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PRE-TRIAL CHAMBER II

Before: Judge Rosario Salvatore Aitala, Presiding Judge
Judge Antoine Kesia-Mbe Mindua
Judge Sergio Gerardo Ugalde Godínez

SITUATION IN THE CENTRAL AFRICAN REPUBLIC II

THE PROSECUTOR V. MAXIME JEOFFROY ELI MOKOM GAWAKA

Public

With Confidential Annexes A, B & C

Public Redacted Version of Mokom Defence Request for Disclosure, ICC-01/14-01/22-198-Conf, 4 May 2023

Source: Philippe Larochelle, Counsel for Mr. Mokom

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

The Office of the Prosecutor
Karim A. A. Khan KC
Mame Mandiaye Niang
Kweku Vanderpuye

Counsel for the Defence
Philippe Larochelle

Legal Representatives of the Victims

Legal Representatives of the Applicant

Unrepresented Victims

**Unrepresented
(Participation/Reparation)**

Applicants

The Office of Public Counsel for Victims
Paolina Massidda

**The Office of Public Counsel for the
Defence**

States' Representatives

Amicus Curiae

REGISTRY

Registrar
Ozvaldo Zavala Giler

Counsel Support Section

Deputy Registrar

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations Other
Section**

A. INTRODUCTION

1. The Prosecution has been investigating in the Central African Republic since May 2007. In doing so, the Prosecution was bound by its statutory obligation “to investigate incriminating and exonerating circumstances equally”.¹

2. A corollary of investigating exonerating circumstances is the obligation to then disclose any exculpatory information to the Defence. At the ICTY and ICTR, the Prosecution’s obligation to disclose exculpatory material was considered “as important as the obligation to prosecute”.² This is also an equality of arms issue. The Prosecution has been on the ground for 16 years, with teams of investigators, lawyers, and analysts assessing the information collected. Lead Counsel for Mr Mokom was appointed in January 2023. The Court’s caselaw regularly makes the link between prompt and full disclosure and “ensuring the fairness of the proceedings and that the rights of the defence are respected, in particular the principle of equality of arms.”³

3. In addition, because of its importance, exculpatory disclosure cannot be partial, nor can this material be buried somewhere in the case record.⁴ The practice of the Court is that exculpatory aspects of evidence must be indicated,⁵ with the relevant sections highlighted.⁶

¹ Rome Statute, Article 54.

² ICTY, *Prosecutor v. Kordić and Čerkez*, Appeals Chamber: Decision on Motions to Extend for Filing Appellants’ Briefs, IT-95-14/2-A, 11 May 2001, para. 14: “Rule 68 performs an important function [...] It forms part of the Prosecution’s duty as “ministers of justice assisting in the administration of justice”. [...] The Prosecution’s obligation under Rule 68 is not a secondary one, [...] it is as important as the obligation to prosecute.” See also ICTY, *Prosecutor v. Blaškić*, Appeals Chamber: Judgment, IT-95-14-A, 29 July 2004, para. 264; ICTY, *Prosecutor v. Kordić & Čerkez*, Appeals Chamber: Judgment, IT-95-14/2-A, 17 December 2004, para. 242; ICTR, *Ndindabahizi v. Prosecutor*, Appeals Chamber: Judgment, ICTR-01-71-A, 16 January 2007, para. 72.

³ *Prosecutor v. Banda & Jerbo*, Appeals Chamber: Judgment on the appeal of Mr Abdallah Banda Abakaer Nourain and Mr Saleh Mohammed Jerbo Jamus against the decision of Trial Chamber IV of 23 January 2013 entitled “Decision on the Defence’s Request for Disclosure of Documents in the Possession of the Office of the Prosecutor”, ICC-02/05-03/09-501, 28 August 2013, para. 34; *Prosecutor v. Ongwen*, Appeals Chamber: Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber II entitled “Decision Setting the Regime for Evidence Disclosure and Other Related Matters”, ICC-02/04-01/15-251, 17 June 2015, para. 40.

⁴ *Prosecutor v. Yekatom & Ngaïssona*, Single Judge: Decision on Disclosure and Related Matters, ICC-01/14-01/18-64-Red, 23 January 2019, para. 18.

⁵ *Prosecutor v. Gbagbo & Blé Goudé*, Single Judge: Decision Establishing a Disclosure System and a Calendar for Disclosure, ICC-02/11-01/11-30, 24 January 2012, para. 25; *Prosecutor v. Gicheru*, Single Judge: Decision Setting the Regime for Evidence Disclosure and Other Related Matters, ICC-01/09-01/20-67, 1 December 2020, para. 31.

⁶ *Prosecutor v. Abd-Al-Rahman*, Pre-Trial Chamber: Second Order on Disclosure and Related Matters, ICC-02/05-01/20-169, 2 October 2020, para. 24.

4. In the present proceedings, the amount of material disclosed to the Defence is objectively large: a migration of over 28,000 documents and tens of thousands of pages of transcripts and interviews.⁷ Despite its volume, the Prosecution has repeatedly failed to identify and disclose documents and information material to the preparation of the Defence, and has failed to consistently disclose and identify the exculpatory aspects therein.

5. Aware of the Chamber's stated preference for *inter partes* consultation, and its instruction that "parties may only seize the Chamber where an agreement cannot be found with regard to a specific matter after all *inter partes* consultations",⁸ the Defence has raised the issues referenced in the present filing with the Prosecution, consistently seeking further information and disclosure. These exchanges are annexed,⁹ and show that the parties are unable to reach agreement. The Prosecution cites the Defence's alleged confusion about disclosure, its misunderstanding of the nature of the case, and the fact that the Pre-Trial Chamber has apparently "exceeded" the requirements of the e-Court Protocol, which the Prosecution interprets as limiting the need to comply fully with its orders. The Defence does not agree with any of these starting propositions, and seeks the Chamber's assistance in accessing the three (3) categories of information set out below.

B. PROCEDURAL HISTORY

6. On 3 February 2023, the Chamber issued its *Second order on the conduct of the confirmation of charges proceedings*,¹⁰ in which it set time limits to facilitate the parties' preparations for the confirmation of charges hearing and the orderly conduct of the proceedings. One of the time limits set by the Chamber was that: "any and all motions on matters relating to the disclosure process shall be submitted by no later than 4 May 2023".¹¹

7. The Defence understands "the disclosure process" to refer to the ***procedure*** through which the Prosecution will disclose or migrate materials to the Defence in the present case,

⁷ See further, Defence Request for Review of the Registrar's Decision on Legal Assistance and for a Stay of Proceedings, ICC-01/14-01/22-178-Conf-Exp, 24 March 2023, paras. 36, 37.

⁸ Pre-Trial Chamber II: Second order on the conduct of the confirmation of charges proceedings, ICC-01/14-01/22-157, 13 February 2023 ("Second Conduct Order"), para. 31.

⁹ Annex A: Exchanges relating to disclosure of exculpatory materials; Annex B: Exchanges relating to disclosure of CDRs, CSTs and RFAs; Annex C: Exchanges relating to disclosure of materials from *Yekatom and Ngaïssona* trial proceedings.

¹⁰ Pre-Trial Chamber II: Second order on disclosure and related matters, ICC-01/14-01/22-116, 30 November 2022 ("Second Disclosure Order").

¹¹ Second Conduct Order, para. 16(i).

and not as encompassing all possible disclosure issues that will continue to arise throughout the pre-trial and trial proceedings.

8. Regardless, and to contribute to the important aims of facilitating the confirmation hearing and the orderly conduct of proceedings, the Defence has endeavoured to assemble the disclosure issues currently hampering its preparations in the present motion, which is filed without prejudice to the Defence's ability to raise future disclosure issues with the Chamber.

C. LEVEL OF CONFIDENTIALITY

9. Pursuant to Regulation 23*bis*(1) of the Regulations of the Court, the Defence files this request as confidential since it refers to confidential documents and information. A public redacted version will be filed as soon as practicable.

D. SUBMISSIONS

(i) Disclosed Exculpatory Material

10. On 7 November 2022, the Chamber ordered the Prosecution "to 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".¹² This instruction was repeated in a second order on 30 November 2022, in the following terms:¹³

[...] The 7 November 2022 Order unambiguously and specifically instructed the Prosecution 'to 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**' (emphasis added).

11. After 16 years of investigations, during which it was required to investigate exonerating and incriminating circumstances equally, the Prosecution has identified 116 documents in its possession which it accepts as being exculpatory in this case. Of the tens of thousands of items collected, the Prosecution considers 116 documents show or tend to show Mr Mokom's innocence, or mitigate his guilt, or may affect the credibility of Prosecution

¹² Pre-Trial Chamber II: Order on disclosure and related matters, ICC-01/14-01/22-104, 7 November 2022 ("Disclosure Order"), para. 8 (emphasis added).

¹³ Second Disclosure Order, paras. 13-14.

evidence. Of these 116, the Prosecution has disclosed 96 as being entirely exculpatory, and has pointed to exculpatory sections in 20 others.

12. On their face, these figures suggest the Prosecution has adopted an erroneously narrow approach to exculpatory material, at odds with the broad approach which has been consistently advocated by Chambers.¹⁴ This impression is reinforced by the fact that, outside this list of 116 documents, no other evidential items in the case record have any indication of any exculpatory sections or information contained therein. Accordingly, the Prosecution's position is that all other evidential items are entirely supportive of the Prosecution case. This position is unsustainable, for the following reasons.

13. Firstly, the Prosecution claims that Defence concerns about the identification of exculpatory material are underpinned by its confusion about the different categories of materials in this case. Importantly, the Prosecution unilaterally claims that "to the extent that the Chamber's Orders exceed the requirements of the e-Court Protocol" they apply to "'disclosed' and/or 'disclosable' material", which the Prosecution distinguishes from "migrated" or "access" material.¹⁵ As such, the Prosecution appears to exempt itself from identifying exculpatory sections in the migrated and access material. This is incompatible with the plain language of the Chamber's order, which extends the Prosecution's obligation to evidential items "**migrated**" from the *Yekatom and Ngaïssona* case record to the *Mokom* case record.¹⁶

14. Secondly, the Defence pointed to sections of the prior testimony of Prosecution witnesses, on whom the Prosecution seeks to rely for the confirmation hearing, which contain unequivocally exculpatory material, and which has not been indicated as such.¹⁷ The Prosecution's response demonstrates its mistaken approach. The Prosecution firstly claims that the Defence misunderstands the case, or characterises the evidence in a way that is "selective and out of context". The Prosecution then points to other parts of P-1521 and P-2232's evidence which, according to the Prosecution, contradict or somehow override the

¹⁴ See, e.g., *Prosecutor v. Katanga*, Single Judge: 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, paras. 23-24 ("*Katanga* Disclosure Decision").

¹⁵ Annex A, Email Prosecution to Defence on 23 April 2023, 21:38, p. 3.

¹⁶ Disclosure Order, para. 8; Second Disclosure Order, paras. 13-14.

¹⁷ Mokom Defence Further Observations on the Conduct of the Proceedings Related to the Confirmation of Charges Hearing, ICC-01/14-01/22-192-Conf, 17 April 2023, paras. 18-23.

sections indicated as being exculpatory by the Defence.¹⁸ In doing so, the Prosecution reinforces the Defence position.

15. The Defence has never suggested that the exculpatory sections deprive the entire testimony of its incriminating character. However, the fact that a witness provides both incriminating and exonerating evidence in the same testimony, does not mean the obligation to disclose the exculpatory parts simply evaporates.¹⁹ Nor does the Defence deny that P-1521 and P-2232 are considered by the Prosecution to be “key INCRIM witnesses”.²⁰ The point being made is a different one; even within the evidence of “key INCRIM witnesses” there can be sections which are exculpatory, which undermine and contradict the witness’ remaining evidence. The Prosecution was required to accept this reality and point these sections out. It cannot circumvent this obligation by simply hiding behind its characterisation of the witness as incriminating, or even as a “key INCRIM witness”.

16. In practical terms, the Prosecution seems to have decided that the burden should be on the Defence to read through all evidentiary items, figure out what is exculpatory and what is incriminating, and work from there. The problem being, this is the Prosecution’s case. The Prosecution has asked for Mr Mokom to be arrested, detained, and accused of international crimes, while opposing all requests for interim release. The Prosecution is expected to know its case, and complete disclosure in a way that allows for meaningful preparation. The designation of 116 documents as exculpatory, with no other sections being indicated anywhere else in the case record, goes no way towards putting the Chamber or the Defence in a position to be able to do so. The Prosecution should be ordered to comply with the terms of the Chamber’s orders, and the practice of the Court,²¹ and indicate the sections of evidential items in the case record that are exculpatory.

17. The second problem with the list of 116 exculpatory documents is that 96 have been designated as entirely exculpatory, and the Prosecution has given no indication as to why. The 116 documents include interviews which are 320 pages, 230 pages, and 258 pages in length, with no indication as to which sections are considered exculpatory, and on what basis.

¹⁸ Annex A Email Prosecution to Defence on 23 April 2023, 21:38, pp.3-4. *See also*: Prosecution’s response to “Mokom Defence Further Observations on the Conduct of the Proceedings Related to the Confirmation of Charges Hearing”, ICC-01/14-01/22-196-Conf, 24 April 2023 (“ICC-01/14-01/22-196-Conf”), paras. 5-14.

¹⁹ *Prosecutor v. Lubanga*, Trial Chamber I: Decision on Disclosure Issues, Responsibility for Protective Measures and other Procedural Matters, ICC-01/04-01/06-1311-Anx2, 24 April 2008, para. 94.

²⁰ ICC-01/14-01/22-196-Conf, para. 6.

²¹ *See* authorities cited in footnotes 5 and 6 above.

As set out in the letter of 26 April 2023,²² the same problem exists for purportedly exculpatory witness statements, and screening notes. In response, the Prosecution advised the Defence to read these statements “as a whole, *i.e.* holistically”, and explained that “marking an entire document in fact denotes an assessment of the relevant pages in context”.²³ Although this is good advice, the Defence remains in the dark. The Defence has read, for example, the 320-page Prosecution interview in good faith, holistically, and cannot discern why it is said to undermine the Prosecution’s case. The fact that the Prosecution does not wish to say more is now hampering Defence preparation.

18. Moreover, the 116 documents include [REDACTED],²⁴ tweets,²⁵ part of an internal report,²⁶ and [REDACTED],²⁷ with no indication of how these materials suggest Mr Mokom’s innocence or undermine the Prosecution case. As such, in addition to asking for the sections of interviews, statements, and screening notes which are exculpatory,²⁸ the Defence has asked the Prosecution to indicate “what criteria were used by the Prosecution in designating items as exculpatory”.²⁹ The Prosecution has responded that this information is internal work product and not disclosable under Rule 81(1), and that the Defence should feel “free to determine whether and to what extent to take the Prosecution’s characterisation of any disclosed evidence into account in its preparation”.³⁰ This statement is useful in illustrating the Prosecution’s entire approach to exculpatory disclosure: the Defence should feel free to figure it out by itself. The Prosecution is required to organise its disclosure in a manner that will ensure full compliance with its obligations, and which will put the Defence in a position where it can genuinely exercise its rights. Without even a basic indication of why these documents are exculpatory, the Defence’s preparations become immeasurably and unnecessarily harder, in a manner incompatible with the full exercise of its rights.

²² Annex A, Letter Defence to Prosecution on 26 April 2023, pp. 8-12.

²³ Annex A, Email Prosecution to Defence of 3 May 2023, 17:08, p. 13.

²⁴ CAR-OTP-2063-0491; CAR-OTP-2063-0492.

²⁵ CAR-OTP-2109-0407; CAR-OTP-2109-0408.

²⁶ CAR-OTP-2100-0742.

²⁷ CAR-OTP-0072-0436.

²⁸ In Annex A, Letter Defence to Prosecution of 26 April, pp. 9-12, the Defence asked the Prosecution to identify the exculpatory sections of: **Interviews:** Items 32 to 41; Items 6-8; Items 49-52; Items 54-58; Items 60 to 70); Items 71 to 78; Items 79-88); Items 95-107; **Witness Statements:** all; **Screening Notes:** Item 20; Item 19; Item 24; Item 25; Item 29 and Item 31.

²⁹ Annex A, Letter Defence to Prosecution of 26 April, p. 11.

³⁰ Annex A, Email Prosecution to Defence of 3 May 2023, 17:08, pp. 13-14.

19. The Defence agrees with the Prosecution³¹ that the characterisation of particular evidence may indeed change over time. In other cases, the Prosecution has re-defined its search criteria for exculpatory evidence, resulting in a decrease or increase of exculpatory material, as the case and the charges evolve.³² The fact that characterisations are not static does not preclude the Prosecution from indicating, even in general terms, why a particular piece of evidence is considered exculpatory at this stage of the proceedings, particularly when that is manifestly unclear on its face.

(ii) CDRs, CSTs AND RFAs

20. The Prosecution case relies on its analysis of **Call Data Records (“CDRs”)**, being metadata that provides information about the alleged source and destination phone numbers, and the date, time and duration of phone calls, but with no information as to content, and **Call Sequence Tables (“CSTs”)**, being database tables that are supposed to organise and present information from CDRs into an intelligible and readable format, without altering their content.

21. The disclosed CDRs and CSTs have been used to create the Prosecution’s “Analysis of Call Data Records” (“Analysis”),³³ which is an annex to the Document Containing the Charges. The Prosecution relies on this Analysis to purportedly show, *inter alia*, [REDACTED].³⁴ The problem is that, in doing so, the Prosecution has presented a curated and partial picture of the communication matrix it has been compiling since at least November 2014.³⁵

22. In total, the Prosecution has disclosed a list of attributions for 107 phone numbers, which are purportedly linked to 65 named users.³⁶ The Prosecution has also disclosed, to the knowledge of the Defence, 27 CSTs which purport to show contact between Mr Mokom and other individuals within set time periods in 2013 and 2014. None of this information is indicated as being exculpatory.

³¹ Annex A, Email Prosecution to Defence of 3 May 2023, 17:08, p. 13.

³² *Katanga* Disclosure Decision, paras. 26-27.

³³ ICC-01/14-01/22-174-Conf-AnxC2.

³⁴ ICC-01/14-01/22-174-Conf-AnxC2, para. 1.

³⁵ CAR-OTP-2107-9098.

³⁶ CAR-OTP-00001197.

23. However, the disclosed CDRs that feature in the Analysis represent only a small slice of the communication information obtained by the Prosecution in this case. The disclosed **Requests for Assistance (“RFAs”)** indicate that there are many other numbers for which CDRs were sought and obtained by the Prosecution, which are not in the curated list eventually prepared and disclosed to the Defence and the Chamber.³⁷

24. In order to assess the assertions being made by the Prosecution on the basis of its Analysis, the Defence would like to perform its own review of the relevant communications, test the reliability of the underlying material, and be in a position to understand the Prosecution’s methodology, process and results. This would put the Defence on the same footing as the Prosecution. Namely, the Defence would be able to assist the Chamber by being able to replicate, confirm, deny, or provide nuance to the Prosecution’s own conclusions. In this way, all CDRs obtained by the Prosecution are material to the preparation of the Defence.

25. Moreover, the Defence and the Chamber are entitled to see what the Prosecution chose **not** to include in its Analysis. For example, the Prosecution has presented the alleged communication between Mr Mokom and two alleged [REDACTED] on 5 December 2013.³⁸ But who else were these two [REDACTED] speaking with on 5 December? And for how long? Who did they call before or after Mr Mokom? And for how long? The CDRs would also show this kind of information, which is undoubtedly material to the preparation of the Defence, and puts the communication with Mr Mokom in its necessary context. The curated snapshot of communications provided by the Prosecution is ultimately unhelpful, potentially misleading, and does not comply with the Prosecution’s disclosure obligations.

26. On this basis, the Defence asked the Prosecution to provide it with “an inventory of all CDRs in the Prosecutor’s custody or possession, including those that post-date 2012 and 2013”.³⁹ Not all the CDRs, but simply an inventory. The Prosecution refused on the basis that this request was “overly broad”, recalling the Chamber’s direction that “the scope of the confirmation of charges is limited” and “only evidence of true relevance to the charges in this

³⁷ See, e.g., [REDACTED].

³⁸ Analysis, para. 16.

³⁹ Annex B, Email Defence to Prosecution of 19 April, 18:06, p. 1.

specific case is to be disclosed”.⁴⁰ The Chamber’s reasonable admonition concerning relevance does not act as a *carte blanche* for the Prosecution to provide selective and partial disclosure of the communications it has put at the centre of its case. The CDRs are disclosable. The Prosecution is required to provide the entirety of the CDRs made available to it,⁴¹ and cannot pick and choose the ones it wishes the Chamber or Defence to see.

27. In addition, the Defence’s review of the case records has begun to reveal the startling extent to which [REDACTED]. [REDACTED].⁴² [REDACTED].⁴³ [REDACTED].⁴⁴ There are many other examples. On this basis, the Defence also seeks disclosure of an inventory of the CDRs obtained by the Prosecution in relation to its own witnesses at any time before, during and after the period covered by the DCC allegations, in order to confirm (or otherwise) the disclosed statements made by the Prosecution witnesses about their contact, and to have an accurate picture of the [REDACTED].

28. As noted above, the Prosecution has disclosed 27 CSTs, which purport to detail communication between Mr Mokom and other individuals. Again, the Prosecution has curated the CSTs provided to only include certain numbers attributed to Mr Mokom, which are in contact with others. However, also material to Defence preparations are those CSTs which demonstrate communication patterns that do not line up directly with the Prosecution case. As such, the Defence asked the Prosecution to disclose “any other CSTs created by the Prosecution” in this case.⁴⁵ The Prosecution refused on the basis that “CSTs are internal analytical memoranda/reports created in preparation of the case. Consequently, they squarely fall under rule 81(1) and are not subject to disclosure”.⁴⁶

29. This is incorrect. Internal work product is material that reveals the internal strategies or approach to litigation or investigation by a party. It has been interpreted as including material such as “legal research undertaken by a party and its development of legal theories, the possible case strategies considered by a party, and its development of potential avenues of

⁴⁰ Annex B, Email Prosecution to Defence of 23 April, 21:38, p. 4.

⁴¹ See, e.g., IRMCT, *Prosecutor v. Turinabo et al.*, Single Judge: Decision on Jean de Dieu Ndagijimana’s Urgent Motion for Disclosure of Harmonised Call Data Records, MICT-18-116-PT, 2 September 2019, para. 2.

⁴² Interview of 10 January 2018, track 3, pp. 31-35.

⁴³ CAR-OTP-2067-1438, p.4; CAR-OTP-2090-0002, para.97.

⁴⁴ CAR-OTP-2067-1438, p.4.

⁴⁵ Annex B, Email Defence to Prosecution of 19 April, 18:06, p. 1.

⁴⁶ Annex B, Email Prosecution to Defence of 23 April, 21:38, p. 4.

investigation,”⁴⁷ or “names and locations of protected witnesses and victims, internal assessments on various individuals and work processes”.⁴⁸ CSTs do not fall into these categories. Rather, CSTs by their very nature are databases which organise and present data, without any Prosecution input or spin. Relevantly, in the *Turinabo* case at the IRMCT, the Single Judge drew a distinction between CSTs which were considered disclosable, and the Prosecution’s internal notes and mission reports concerning CDRs, which were not considered to be subject to disclosure where the Defence had not demonstrated that the information sought was *prima facie* exculpatory.⁴⁹ The Prosecution should be ordered to disclose all CSTs produced.

30. Finally, the RFAs sent by the Prosecution to obtain the CDRs in question are also material to the Defence. Many of these RFAs have already been disclosed. The disclosed RFAs refer to others that have not been. On this basis, the Defence sought disclosure of “all outstanding RFAs and any other documents associated with the CDRs”.⁵⁰ Again, this was refused, with the Prosecution continuing to present a partial picture of the communication data sought in this case. It makes no logical sense that some RFAs would be disclosable, and others would not. In *Turinabo*, when considering a similar request regarding CDRs obtained from Rwanda, **all** RFAs sent and responses received in relation to the communication material were considered disclosable.⁵¹ The same should be ordered in the present case.

(iii) **Transcripts and Exhibits from the *Yekatom and Ngaïssona* Proceedings**

31. The Defence seeks disclosure of three categories of material from the *Yekatom and Ngaïssona* trial proceedings, all related to the testimony of witnesses who are being relied upon by the Prosecution for the confirmation hearing in these proceedings. The materials sought include:

- a. All exhibits shown to, or otherwise used with, the relevant witnesses during their testimony;

⁴⁷ *Prosecutor v. Lubanga*, Trial Chamber I: Decision issuing corrected and redacted versions of "Decision on the Prosecution's Request for Non-Disclosure of the Identity of Twenty-Five Individuals providing Tu Quoque Informadon" of 5 December 2008, ICC-01/04-01/06-1924, 2 June 2009, para. 31.

⁴⁸ *Prosecutor v. Lubanga*, Trial Chamber I: Decision on the defence request for disclosure of screening notes, ICC-01/04-01/06-2585, 13 October 2010, para. 21.

⁴⁹ *Prosecutor v. Turinabo et al.*, Single Judge: Decision on Requests for Disclosure of Information Arising from Interviews with Investigator Tomasz Blaszczyk, MICT-18-116-PT, 7 May 2020 (“*Turinabo* Disclosure Decision”), p. 6.

⁵⁰ Annex B, Email Defence to Prosecution of 19 April, 18:06, p. 1.

⁵¹ *Turinabo* Disclosure Decision, pp. 4, 5, 7.

- b. 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 (even if they were not actually used) (“Defence Lists”); and
- c. Unredacted versions of the transcripts of testimony for which the Defence have only been disclosed redacted versions.

32. The Defence seeks these documents on the basis that they are material for its preparation for the confirmation hearing, pursuant to Rule 77. What is material for the preparation of the defence must be interpreted broadly, and “should be understood as referring to all objects that are relevant for the preparation of the defence”.⁵² Information and witness testimony that tends to incriminate a suspect or accused have been found to be material to the preparation of the defence in the relevant case, including by having a direct impact on defence strategy. Consequently, the witness’ entire transcripts, without redactions, may therefore be disclosable.⁵³

33. There is no dispute that the requested items are within the possession of the Prosecution. The materiality and relevance of items from the *Yekatom and Ngaïssona* proceedings also should not be in question: there are significant geographical, temporal and material overlaps with the charges, crime sites and witnesses in *Yekatom and Ngaïssona*, which has previously been considered sufficient to indicate the relevance of the material to the defence.⁵⁴

(a) Materials used during, or relevant to, witness testimony

34. The Defence has requested disclosure of materials associated with the testimony of witnesses on three occasions from the Prosecution: the Defence initially requested disclosure of the exhibits associated with the testimony of five specific witnesses;⁵⁵ then expanded this request to the exhibits associated with the testimony of all witnesses listed in the Prosecution Witness Table;⁵⁶ before then also requesting disclosure of all the documents that the Yekatom

⁵² *Prosecutor v. Lubanga*, Appeals Chamber: Judgment on the appeal of Mr. Lubanga Dyilo against the Oral Decision of Trial Chamber I of 18 January 2008, ICC-01/04-01/06-1433 OA11, 11 July 2008, paras. 77-80.

⁵³ *Prosecutor v. Lubanga*, Trial Chamber I: Decision on the request from the defence in the Katanga and Ngudjolo case for disclosure of transcripts in the Lubanga case, ICC-01/04-01/06-2471, 11 June 2010, para. 27.

⁵⁴ *Prosecutor v. Ntaganda*, Trial Chamber IV: Order on Defence access to confidential material in the Lubanga case, ICC-01/04-02/06-806, 1 September 2015, paras. 10-11.

⁵⁵ Annex C, Letter Defence to Prosecution of 17 February 2023, p. 1.

⁵⁶ Annex C, Letter Defence to Prosecution of 7 March 2023, p. 6.

and Ngaïssona defence teams used, or advised that they intended to use, during the cross-examination of relevant Prosecution witnesses.⁵⁷ The Prosecution has refused these requests, on the basis that the information requested was not relevant or material to the preparation of the Defence, or the requests were ‘overbroad’.⁵⁸ The Prosecution advised the Defence to identify any specific exhibits for which it sought disclosure, then the Prosecution would “reassess its position upon a showing of materiality”.⁵⁹

35. All items used during the testimonies of witnesses, on whom the Prosecution intends to rely for these proceedings, are patently material to the Defence preparation. Such material is also necessary for the Defence to fully understand the transcripts of the relevant witnesses. In fact, it is impossible to meaningfully review important sections of the trial transcripts without access to the underlying documents. The Defence is missing key elements of the witness’ evidence, so the transcripts are devoid of context and incomprehensible in the relevant portions.

36. The Defence endorses the approach previously advocated by the Yekatom defence, and submits the material referred to in these transcripts is analogous to material referenced in a statement that is routinely admitted as an associated exhibit pursuant to Rule 68: “[i]f such material is admissible as an integral part of the witness’ statement or testimony, it follows that it must also be disclosable as such”.⁶⁰ The Pre-Trial Chamber in *Yekatom and Ngaïssona* ultimately determined that materials which were shown to, or provided by witnesses, and for which they provided additional information, were disclosable prior to the confirmation hearing. In fact, such materials were “necessary in order for the Defence to understand the line of questioning surrounding them”.⁶¹

37. In addition, the Defence submits that all items in the Defence Lists for the relevant witnesses are material to its preparation. These are documents that the Yekatom and Ngaïssona defence teams deemed to be relevant to challenging the credibility, reliability and

⁵⁷ Annex C, Email Defence to Prosecution of 11 April 2023, 19:15, pp. 12-13.

⁵⁸ See: Annex C, Email Prosecution to Defence of 14 March 2023, 18:46, p. 9; Annex C, Email Prosecution to Defence of 13 April 2023, 17:24, pp. 14-15.

⁵⁹ Annex C, Email Prosecution to Defence of 14 March 2023, 18:46, p. 9.

⁶⁰ *Prosecutor v. Yekatom & Ngaïssona*, Yekatom: Public Redacted Version of Second Motion for Disclosure of Rule 76 Material, ICC-01/14-01/18-331-Red, 11 September 2019, para. 21.

⁶¹ *Prosecutor v. Yekatom & Ngaïssona*, Pre-Trial Chamber II: Decision on the Yekatom Defence Second Motion for Disclosure of Rule 76 Material, ICC-01/14-01/18-341-Red, 13 September 2019, para. 24.

authenticity of a witness' account – for witnesses that the Prosecution now also seeks to rely on for the purposes of these proceedings against Mr Mokom. Further, even if the documents are not specifically referred to within the transcript, the Defence remains unable to understand the propositions being put to the witnesses, which are based on evidentiary foundations being drawn through documents which are not available to the Defence.

38. The Defence is seeking materials that are directly relevant to witnesses that are being used against Mr Mokom, and are therefore material to its preparation. In these circumstances, it cannot be the Defence's responsibility to trawl through hundreds of pages of transcripts for each witness to specify each and every item for which it requires disclosure. These materials should be provided to the Defence.

(b) Unredacted Trial Transcripts

39. The Prosecution has disclosed transcripts of witness testimony in the *Yekatom and Ngaïssona* trial proceedings which are partially redacted.⁶² It is the Defence's understanding that these redactions were made following Trial Chamber V's invitation to the Defence teams to suggest redactions they deemed necessary.⁶³ However, no explanation has been provided justifying these redactions, leaving the Defence with no information as to why the redactions have been implemented and what material is sought to be protected.

40. The starting point is that, in principle, the Defence is entitled to be provided with the unredacted statements of any witness that the Prosecution intends to rely on at the confirmation hearing.⁶⁴ As is evident from the list of redactions cited, the number and extent of the affected transcripts is significant. Such redactions impede the Defence's preparations, particularly since they have been applied to evidence given by witnesses that are being relied

⁶² T-037-CONF-Red-ENG: page 3, lines 3-23; T-039-CONF-Red-ENG: page 58, lines 10-11; T-046-CONF-Red-ENG: page 3, lines 15-25; page 4, fully redacted; page 5, lines 1-7; T-058-CONF-Red-ENG: page 42, lines 15-22; page 82, lines 4-9; page 83, lines 9-16; T-065-CONF-Red-ENG: page 19, lines 12-25; T-076-CONF-Red-ENG: page 70, lines 22-25; page 71, fully redacted; page 72, fully redacted; page 73, line 1; T-092-CONF-Red-ENG: page 7, lines 3-14; T-108-CONF-Red-ENG: page 12, lines 12-17; page 22, lines 7-10; page 42, line 25; page 43, lines 1, 4 and 8; T-111-CONF-Red-ENG: page 55, lines 10, 19-25; page 56 lines 1, 6, 7, 14, 17; page 57, lines 7, 13- 25; page 58, lines 3-15; T-141-CONF-Red-ENG: page 50, lines 14-16; T-169-CONF-Red-ENG: page 79, lines 21-25; page 80, fully redacted; page 81, lines 1-23; page 83, lines 3-19; and T-184-CONF-Red-ENG: page 18, line 25; page 19, lines 1-2.

⁶³*Prosecutor v. Yekatom & Ngaïssona*, Trial Chamber V: Decision on the Prosecution Request to Grant Maxime Mokom Access to the Record of the Yekatom and Ngaïssona Case, ICC-01/14-01/18-1552, 23 August 2022, p. 7.

⁶⁴ *Prosecutor v. Lubanga*, Single Judge: Decision on the Final System of Disclosure and the Establishment of a Timetable, ICC-01/04-01/06-102, 15 May 2006, Annex I para. 98.

upon by the Prosecution against Mr Mokom at the confirmation of charges hearing. The Defence therefore seeks disclosure of the unredacted materials, in the interests of fairness and the exercise of his rights.

E. CONCLUSION & RELIEF REQUESTED

41. The Chamber's orders in this case have been repeated, and clear. Its stated concern was that the Prosecution organise its disclosure in a way that fully realises 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.⁶⁵ Throughout the pre-trial proceedings, the Chamber has been alive to the reality that "[t]he 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."⁶⁶

42. The Prosecution has not indicated sections of exculpatory material within the evidential items in the case record. Its selection of 116 documents, underpinned by its erroneously narrow conception of exculpatory material, is an incomplete and unhelpful exercise in the absence of any indication as to why these items were considered exculpatory. Its disclosure of CDRs, CSTs and RFAs has been partial and incomplete, and its justification for the curation of this evidence is insufficient, and inconsistent with past practice. The Prosecution has also failed to disclose all relevant parts of a witness' testimony in the *Yekatom and Ngaïssona* proceedings, including any materials that were used with the witness, or identified by either defence team as materials they were intending to use with the witness. On this basis, the Defence asks that the Chamber:

ORDER the Prosecution to fulfil its disclosure obligations and:

- (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;

⁶⁵ Second Disclosure Order, paras. 13-14.

⁶⁶ *Ibid*, para. 14.

- (ii) **INDICATE** the criteria used in designating evidential items as exculpatory;
- (iii) **DISCLOSE** an inventory of all CDRs received, CSTs produced, and all outstanding RFAs and any other documents associated with the CDRs;
- (iv) **DISCLOSE** all materials shown to, or otherwise used with, the relevant witnesses during their testimony in the *Yekatom and Ngaïssona* trial proceedings;
- (v) **DISCLOSE** all materials in the Defence Lists, as well as the lists themselves; and
- (vi) **DISCLOSE** unredacted versions of the transcripts of testimony for which the Defence has only been disclosed redacted versions.



Philippe Larochelle,
Counsel for Maxime Mokom

The Hague, The Netherlands
Wednesday, June 28, 2023