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

Public

**Public redacted version of “Prosecution's Response to the “Defence Request for Disclosure of Materials pursuant to Rule 77 of the Rules of Procedure and Evidence” (ICC-01/14-01/18-1998-Conf-Red)”,
ICC-01/14-01/18-2014-Conf, 2 August 2023**

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I. INTRODUCTION

1. Trial Chamber V (“Chamber”) should reject the NGAISSONA “Defence Request for Disclosure of Materials pursuant to Rule 77 of the Rules of Procedure and Evidence.”¹ The Prosecution has discharged its disclosure obligations. The grounds provided by the Defence for the information sought are speculative and overbroad. Thus, the Request fails and should be dismissed.

2. Nevertheless, for the sake of judicial economy and to avoid unnecessarily protracted litigation, the Prosecution agrees to disclose an overview of its communications with P-2200, annexed to the present response.²

II. CONFIDENTIALITY

3. Pursuant to regulation 23*bis*(2) of the RoC, this document is classified as “*Confidential*” as it responds to a filing of the same designation. A public redacted version will be submitted as soon as practicable.

III. SUBMISSIONS

A. The Prosecution has discharged its disclosure obligations fully

4. On 23 June 2023, the Prosecution disclosed (i) a 10-page detailed investigation report documenting its extensive efforts to verify and confirm P-2200’s reported death (“Investigation Report”);³ (ii) a signed medical certificate specifying the manner of death;⁴ and (iii) the witness’s health booklet.⁵

¹ ICC-01/14-01/18-1998-Conf-Red (“Request”).

² See CAR-OTP-000017.

³ CAR-OTP-00001606.

⁴ CAR-OTP-00001616.

⁵ See CAR-OTP-00001607, CAR-OTP-00001608, CAR-OTP-00001609, CAR-OTP-00001610, CAR-OTP-00001611, CAR-OTP-00001612, CAR-OTP-00001613, CAR-OTP-00001614, and CAR-OTP-00001615.

5. P-2200 and his family were evacuated from BOSSANGO to a Refugee Camp in [REDACTED]⁶ in 2014, [REDACTED]. Thus, obtaining the necessary documentation regarding the witness's reported death within the Refugee Camp proved logistically challenging. Several steps had to be undertaken in doing so, as described in the Investigation Report.

6. As explained below, the material disclosed to date, is directly and sufficiently responsive to the issues before the Chamber, specifically whether: P-2200's is *presently* unavailable to testify in these proceedings; whether reasonable diligence has been exercised to secure his attendance; and whether the application of article 56 could have averted the witness's unavailability,⁷ pursuant to rule 68(2)(c) of the Rules of Procedure and Evidence ("Rules").

7. The Investigation Report compiles and summarises in detail the Prosecution's communications with P-2200's [REDACTED] P-2201, whose identity has been disclosed to the Defence.⁸ It sets out every step taken to obtain P-2200's medical death certificate and health booklet, including detailing the logistical difficulties involved; the authorities from whom P-2201 tried to obtain the documentation; the different locations from where the documentation could be retrieved; the time-lines involved; the particular reasons why certain of the Prosecution's requests were challenging; and the impediments related to the rites and traditions surrounding P-2200's reported death and burial.

8. In addition, after several lengthy exchanges reflected in the Investigation Report,⁹ the Prosecution agreed to provide P-2201 with funds necessary to obtain the documentation. These comprised 75,000 XAF¹⁰ (*i.e.*, approximately 115 EUR) to cover

⁶ See P-2200's statement, CAR-OTP-2088-2146, at 2148, paras. 12-13, 68, 81.

⁷ See ICC-01/05-01/13-1481-Red-Corr, para. 19 (noting that where "[a]rticle 56 measures would have been incapable of ameliorating the situation" the requirement under rule 68(2) is satisfied).

⁸ See e-mail from the Prosecution to the Defence dated 5 July 2023 at 09:17 (available at ICC-01/14-01/18-1998-Conf-AnxA, p. 5).

⁹ See CAR-OTP-00001606, at 000001, 000002, 000005, 000006, and 000007.

¹⁰ See CAR-OTP-00001606, at 000007, para. 20.

expenses for P-2201's: (a) travel from the Refugee Camp to the [REDACTED] to communicate with the Prosecution; (b) phone credit necessary for such communication; and (c) obtaining the relevant documentation from the [REDACTED].

9. The Investigation Report further details the parameters used to assess and verify the amounts requested by P-2201, including through external sources, such as P-0840.¹¹ All information related to the amount provided to P-2201 to acquire documentation regarding [REDACTED] death, was duly disclosed to the Defence.

B. The additional information sought is not material to the preparation of the Defence

10. Despite the Prosecution's disclosure of comprehensive information concerning the circumstances in which it obtained P-2200's medical certificate and health booklet, the Defence argues that the disclosure of additional information is necessary in order for it to (i) provide a meaningful response to the Prosecution's Rule 68(2)(c) application concerning P-2200¹² (Items 1-6, and 8); and/or (ii) to undermine the Prosecution's case or support a line of argument of the Defence (Item 7).¹³ The Prosecution will address these two grounds separately.

11. At the outset, the Prosecution has already indicated in a 5 July 2023 e-mail to the Defence¹⁴ that it does not have any un-disclosed information responsive to Item 2.¹⁵ In respect of Item 8,¹⁶ as noted above, the Prosecution agrees to exceptionally disclose an

¹¹ See CAR-OTP-00001606, at 000005, para. 12 (evaluating the cost of the death-related documentation at 30.000 XAF (approximately 45 euros)).

¹² ICC-01/14-01/18-1967-Conf ("Rule 68(2)(c) Request").

¹³ ICC-01/14-01/18-1998-Conf-Red, para. 26.

¹⁴ See e-mail from the Prosecution to the Defence dated 5 July 2023 at 09:17 (available at ICC-01/14-01/18-1998-Conf-AnxA, p. 5).

¹⁵ ICC-01/14-01/18-1998-Conf-Red, para. 2 ("all materials the Prosecution possesses or is in control of that corroborate and/or contradict P-2201's account of [REDACTED]").

¹⁶ See ICC-01/14-01/18-1998-Conf-Red, para. 2 (*i.e.*, 'all communication and attempted exchanges between the Prosecution and P-2200, as mentioned in paragraphs 12 and 13 of the Rule 68(2)(c) Request').

overview of its communications with P-2200 prior to his death.¹⁷ Accordingly, these Items are not addressed.

i. The information disclosed already sufficiently allows the Defence to meaningfully respond to the pending request

12. The Defence asserts that the information listed below is material to ‘assess the credibility, reliability and authenticity of the information and materials communicated — not by the witness — but, by [REDACTED] P-2201’.¹⁸

- ‘all the exchanges between the Prosecution and P-2201, including all voice-messages sent and received by the Prosecution from P-2201, both prior and after the production of the Report (“Item 1”);
- ‘P-2201’s refugee card he has provided to the Prosecution (“Item3”);
- ‘P-0840’s identity, as he is the sole source for the Prosecution’s estimate of the required funds to obtain the Death Certificate and Certificate of Cause of Death (“Item 4”);
- the ‘receipts and the breakdown of P-2201’s estimated costs (what funds were to cover official costs and what funds were intended for bribery) that may have been provided to the Prosecution that justify the 75.000 XAF (“Item 5”); and
- ‘all transfer of funds the Prosecution made to P-2201 and the reasons that prompted the Prosecution to agree to amount of 75.000XFA while its estimated costs to obtain the Death Certificate and Certificate of Cause of Death originally amounted to 30,000 XFA (“Item 6”).

¹⁷ See ICC-01/14-01/18-1967-Conf, paras. 10-16 (the frequency of these communications confirm and illustrate the Prosecution’s position that it had maintained regular contact with P-2200 for testimony scheduling purposes, despite substantial logistical difficulties in reaching the witness, and that the Prosecution could thus not have reasonably anticipated the need for Article 56 measures).

¹⁸ ICC-01/14-01/18-1998-Conf-Red, paras. 2, 27.

13. As recently reiterated,¹⁹ there is a fundamental difference between information which is *relevant* to the Defence's preparation, and that which is *necessary*.²⁰ The 'materiality' requirement of rule 77 of the Rules of Procedure and Evidence ("Rules") and the Court's interpretive jurisprudence tends towards the latter.²¹ Thus, as the Appeals Chamber has explained, "the right to disclosure is not unlimited and which objects are 'material to the preparation of the defence' will depend upon the *specific circumstances* of the case."²² Accordingly, as Trial Chamber III has noted, there is no Prosecution obligation "to provide the defence with all the material relating to an issue that is in its possession, to enable the accused to analyse it and to assess for himself whether or not it is relevant to the submissions he wishes to advance. The prosecution does not have the obligation of 'handing the defence the keys to the warehouse' in this way."²³ The notion of 'materiality' is neither abstract nor automatic, and the Defence's contest of the Court's interpretive jurisprudence does not make its position so.

14. Moreover, where information is not assessed as 'material' by the Prosecution in the exercise of its responsibility,²⁴ the Defence bears the burden to demonstrate the *prima facie* materiality of the information sought.²⁵ Several cases speak to this issue, including *Ongwen*, *Al Hassan*, and *Lubanga*.²⁶

15. The Request fails to establish the materiality of any of the additional information sought, over and above the information already at the Defence's disposal. The

¹⁹ In response to a request of the YEKATOM Defence – see ICC-01/14-01/18-2000-Conf, para. 5.

²⁰ See *e.g.*, Règle 77 du Règlement de procédure et de preuve (providing for the disclosure of items « *qui sont nécessaires à la préparation de la défense de l'accusé* ») (emphasis added).

²¹ See ICC-02/04-01/15-1734, para. 22; ICC-01/12-01/18-859-Red, paras. 9-10; ICC-01/04-01/06-2147, paras. 23-24; see also for example, ICC-01/14-01/18-64-Red, para. 18, ICC-02/05-01/20-169, para. 21. ICC-01/12-01/18-31-tENG, para. 25; ICC-02/04-01/15-203, para. 20 (describing the notion of "true relevance").

²² ICC-01/05-01/13-2275-Red, para. 55 (internal citations omitted) (emphasis added).

²³ See ICC-01/05-01/08-632, para. 26.

²⁴ See ICC-01/05-01/08-3336, para. 34 ("[...] Generally, the Prosecution holds responsibility for making such determinations."). Similarly, see ICC-01/05-01/08-632, paras. 20-22.

²⁵ See ICC-01/11-01/11-392-Red-Corr, para. 40 (requiring disclosure requests to be "specific enough both in terms of what is sought by the Defence and the reasons why disclosure of the [...] material appears necessary").

²⁶ See ICC-02/04-01/15-1734; ICC-01/12-01/18-859-Red; ICC-01/04-01/06-2147; see also ICC-01/05-01/13-2275-Red, para. 55; see ICC-02/05-03/09-501, paras. 39, 42.

Defence's blanket demand for "*all*" transfers, receipts, or exchanges do not suffice to meet its low burden to substantiate its demand.²⁷

16. *First*, the Prosecution has discharged its disclosure obligations fully. As noted, the Investigation Report details the Prosecution's several conversations with P-2201. The Investigation Report further specifies how P-2200's medical certificate and health booklet were obtained, allowing the Defence to fully address the sufficiency of the pending rule 68(2)(c) Request, and the specific issues attendant to it.

17. *Second*, P-2201's actions have no bearing upon the credibility of P-2200 — the witness whose statement is the subject of the rule 68(2)(c) Request. Significantly, P-2201 is not a Prosecution witness. He does not provide any substantive evidence on which the Prosecution relies concerning any factual aspect of the charges or case. The Defence's request for his refugee card and 'all exchanges' with P-2201, including 'all voice-messages sent and received', both 'prior and after the production of the Report' is therefore unnecessary, overly broad and unwarranted, as the Court's jurisprudential framework confirms.²⁸

18. To the extent that the Defence can rely on the content of the Investigation Report to argue that P-2201 actions affect the merits of the Prosecution's assertions regarding P-2200's present unavailability, the additional information sought would have no

²⁷ See e.g. ICC-01/12-01/18-768-Red, paras. 8, 13 (noting for instance that, "materiality is not shown by making general allegations referring to the Defence's interests in having a general picture of the cooperation and assistance between the national authorities and the Prosecution"); see ICC-01/04-02/06-2336, para. 3 (rejecting a disclosure requests in relevant part, because "on an apparent view, the requests amount to an exercise in a form of fishing expedition") citing *Kordić & Čerkez*, Case No.: IT-95-14/2-A, Order on Paško Ljubičić's Motion for Access to Confidential Supporting Materials, Transcripts and Exhibits in the Kordić and Čerkez Case, 19 July 2002; *Prosecutor v. Karemera et al*, ICTR-98-44-T Decision on Defence Motion for Full Disclosure of Payments to Witnesses and to Exclude Testimony from Paid Witnesses, 23 August 2005, para. 8; and, *Prosecutor v. Ayyash*, STL-11-01/T/TC, Decision on Prosecution Witness Expenses, 9 May 2014, para. 11.

²⁸ See ICC-01/05-01/13-1172, 24 August 2015, para. 20 (noting that "not every contact the Prosecution makes with these fourteen Defence witnesses is relevant to the [surrounding] circumstances, and the Application is overbroad in this respect"); see also ICC-01/05-01/13-1658, para. 5 (finding a Defence request for the disclosure of "any other documents relating to the involvement, presence, and participation in the investigation on the Cameroonian territory ... too vague to substantiate materiality in the sense of Rule 77 of the Rules").

“material effect.”²⁹ In any case, it is worth noting that it does not appear from the Request that the Defence disputes P-2200’s is dead.³⁰

19. Further, if the documentation reflecting P-2200’s proof of death is inaccurate, this would not affect the rule 68(2)(c) Request insofar as the witness remains unavailable, whether because he is in fact deceased, he may be presumed so, or despite the Prosecution’s exercise of reasonable diligence, as the Investigation Report and the accompanying documentation demonstrate. Even assuming *arguendo* that P-2200 would have staged his own death — which the Prosecution does not believe to be the case — this only underscores his unavailability despite the reasonable diligence reflected in the numerous attempts to contact the witness and/or [REDACTED] over the last two years.³¹ Moreover, any documentary inaccuracies would not affect the veracity of P-2200’s prior recorded testimony since, if anything, this arises well after the making of the statement and the substantive events reflected therein.

20. *Third*, the 75,000 XAF expended in order to obtain the documentation of P-2200’s death are not exceptional in the circumstances.³² As the Defence is aware, the Court’s jurisprudence holds that only documents concerning *extraordinary* payments or assistance to witnesses are liable to disclosure.³³ No such payments or assistance exist in this case. The amount is not ‘extraordinary’, nor is P-2201 a Prosecution ‘witness’. Nevertheless, the discussions had with P-2201 about the expenses and the amounts involved in obtaining the relevant documentation are detailed comprehensively in the

²⁹ See ICC-01/04-01/06-2147, para. 24.

³⁰ ICC-01/14-01/18-1998-Conf-Red, para. 46 (referring to P-2201 [REDACTED] of P-2200).

³¹ See ICC-01/14-01/18-1967-Conf, paras. 10-16; the Investigation Report; and the Annex detailing such conversations.

³² See ICC-01/04-02/06-840-Red, para. 60 (noting that “merely ‘stat[ing], without further detail, that [expense] documents are disclosable because ‘they evidently contain information material to the preparation of the Defence and/or which may affect the credibility of the Prosecution evidence’” does not sufficiently substantiate that a record that expenses incurred by the Prosecution are material to the Defence’s preparation).

³³ See *e.g.*, ICC-01/05-01/08-3167-Conf, para. 33, referring to ICC-01/05-01-08-1857-Conf, paras. 10-12; see also ICC-01/04-01/06-T-294-ENG CT, 25 May 2010, p. 28, lns. 1-10; *Prosecutor v. Karemera et al.*, ICTR-98-44/T, Decision on the Defence Motion for Disclosure of Exculpatory Evidence, 7 October 2003, para. 16.

Investigation Report. As such, the Defence fails to show the *prima facie* materiality of the *additional* information sought.

21. The Request should thus be dismissed in respect of Items 1, and 3-6.

ii. The Prosecution has discharged its disclosure obligations in respect of P-2049

22. The Defence seeks disclosure and/or inspection of ‘all communication that may had [*sic*] occurred between the Prosecution and P-2049 since his testimony before the Court (Item 7)’,³⁴ asserting that it goes to ‘undermine the Prosecution case on the BOSSANGOA-related charges and to support a line of argument of the Defence that P-2049 is involved in the Production and collection of evidence’.³⁵ More specifically, the Defence asserts that a comparison of the time-line of the exchanges between the Prosecution and P-2201 against its post-testimony exchanges with P-2049, would allow the Defence to establish that the two produced/fabricated the medical certificate and health booklet of P-2200.³⁶ The Prosecution fails to see how its communications with either P-2201 or P-2049 could, even if perfectly aligned, establish such production or fabrication.

23. The Defence’s arguments are obscure and their underlying basis is at best speculative. Whatever the case, as mentioned above, while P-2049 is a Prosecution witness (as opposed to P-2201), the request for ‘all communication’ between the Prosecution and P-2049 ‘since his testimony’ is overly broad and should be dismissed.³⁷

24. The Court’s case law requires neither that the Prosecution put at the disposal all material in its possession for the Defence’s perusal, nor that it accommodate with

³⁴ ICC-01/14-01/18-1998-Conf-Red, para. 2.

³⁵ ICC-01/14-01/18-1998-Conf-Red, para. 45.

³⁶ ICC-01/14-01/18-1998-Conf-Red, paras. 45-47.

³⁷ ICC-01/05-01/13-1172, para. 20.

disclosure every conclusory idea the Defence asserts. This principle is well established at the Court, and is consistent with several other international tribunals applying the same or similar rules, such as the STL,³⁸ SCSL,³⁹ and the ICTY.⁴⁰

25. Accordingly, similar to the Court's application of rule 77, the STL Appeals Chamber (endorsing the *Banda & Jerbo* case's jurisprudence among other) has held the following in terms of its equivalent rule of disclosure⁴¹:

"Rule 110(B) does not invite a fishing expedition. Accordingly, we accept (with deletion of the word 'necessarily') a recent ICC Trial Chamber clarification that 'Rule 77 [...] does not [...] provide for an unfettered 'right to inspection', *triggered by any unsubstantiated claim of relevance made by the defence*'.⁴² Rather, Rule 110(B) demands a context-specific application by the chambers of first-instance, which is uniquely situated to determine whether the defence has sufficiently demonstrated materiality by making the requisite showing that items sought are relevant to the preparation of the defence case⁴³ ... [which] is also supported by relevant domestic case-law."⁴⁴

³⁸ See *Prosecutor v. Ayyash et al*, STL-11-01/PT/TC, Decision on Call Data Records and Disclosure to Defence (On Remand from Appeals Chamber), 4 December 2013, para. 18 ([“the Defence] may not rely on unspecific and unsubstantiated allegations or a general description of the information”).

³⁹ See *Prosecutor v. Sesay et al*, SCSL-04-15-T, Decision on Sesay – Motion Seeking Disclosure of the Relationship between Governmental Agencies of the United States of America and the Office of the Prosecutor, 2 May 2005, paras. 51-65 (“it is not enough to premise its application either on presumptions, on speculations, or on probabilities”).

⁴⁰ See e.g., *Prosecutor v. Delalić et al*, IT-96-21-T, Decision on the Motion by the Accused Zejnil Delalić for the Disclosure of Evidence, 26 September 1996, para. 9 (“[t]he Defence, however, may not rely on conclusory allegations or a general description of the information, but must make a prima facie showing of materiality”).

⁴¹ STL Rule 110(B) (requiring inspection of objects “in the Prosecutor’s custody or control, which are material to the preparation of the defence, or are intended for use by the Prosecutor as evidence at trial or were obtained from or belonged to the accused”).

⁴² See ICC-02/05-03/09-443, para. 15 (emphasis added); see also *Prosecutor v. Karadžić*, IT-95-5/18-PT, Decision on Accused’s Second Motion for Inspection and Disclosure: Immunity Issue, 17 December 2008, paras. 23, 26.

⁴³ *Prosecutor v. Bagosora et al*, ICTR-98-41-AR73, Decision on Interlocutory Appeal Relating to Disclosure under Rule 66 (B) of the Tribunal’s Rules of Procedure and Evidence, 25 September 2006 (“Bagosora Decision”), para. 9.

⁴⁴ *Prosecutor v. Ayyash et al*, STL-11-01/PT/AC/AR126.4, Decision on Appeal by Counsel for Mr Oneissi against Pre-Trial Judge’s ‘Decision on Issues Related to the Inspection Room and Call Data Records’, 2 October 2013, para. 22 (citing, *inter alia*, *United States v. Jordan*, 316 F.3d 1215, 1250 (11th Cir. 2003) “[a] general description of the item will not suffice; neither will a conclusory argument that the requested item is material to the defense”; *UK, R. v. H* [2004] 2 AC 134, para. 35 (“[t]he trial process is not well served if the defence are permitted to make

26. A disclosure demand must present at least a plausible showing of *prima facie* materiality.⁴⁵ The Defence's reliance on mere conjecture, as opposed to presenting a substantiated basis for its demand for additional information, is fatal to the Request. Absent any substantiated indication that P-2049 and P-2201 have (a) colluded, and (b) that such collusion bears on a material fact or issue in the case, the requested information is not disclosable.

27. The Request should thus be dismissed in respect of Item 7.

IV. CONCLUSION

28. For the reasons above, the Chamber should reject the Request in all respects.



Karim A. A. Khan KC, Prosecutor

Dated this 10th day of October 2023

At The Hague, The Netherlands

general and unspecified allegations and then seek far-reaching disclosure in the hope that material may turn up to make them good”).

⁴⁵ See ICC-01/05-01/08-3336, para. 54.