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Date: **1 November 2024**

TRIAL CHAMBER V

Before: Judge Bertram Schmitt, Presiding Judge
Judge Péter Kovács
Judge Chang-ho Chung
Judge Beti Hohler, Alternate Judge

SITUATION IN THE CENTRAL AFRICAN REPUBLIC II

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

Public

Public Redacted Version of ‘Ngaïssona Defence Request for Reconsideration of the “Decision on the Ngaïssona Defence Motion for Disclosure of Material Related to the Withdrawal of Charges in the Mokom Case (ICC-01/14-01/18-2474-Conf)” dated 2 May 2024’, ICC-01/14-01/18-2721-Conf, 7 October 2024

Source: Defence of Patrice-Edouard Ngaïssona

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

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I. INTRODUCTION

1. The Defence for Mr Ngaïssona (the “Defence”) hereby respectfully requests Trial Chamber V (the “Chamber”) to reconsider its “Decision on the Ngaïssona Defence Motion for Disclosure of Material Related to the Withdrawal of Charges in the Mokom Case” (ICC-01/14-01/18-2474-Conf) (the “Decision”) and order the disclosure of the items and information relating to the “unavailability” of witnesses who were due to testify in the Mokom case, who are also witnesses in the present case, including several insider witnesses (the “Overlapping Witnesses”,¹ the “Sought Material” and altogether the “Request”).²
2. While reconsideration is an exceptional measure, it should be “undertaken when the conditions upon which the decision was grounded have changed”, and it is necessary to prevent an injustice.³ Reconsideration is also warranted when the Decision contains a clear error of reasoning.⁴ In the instant case, the conditions upon which the Decision was grounded have changed and the Decision contains an error of reasoning. New facts and arguments arose since the Decision was rendered which are relevant to the Request, and reconsideration is necessary to prevent an injustice. Indeed, since the Chamber issued the Decision, an Article 85 Chamber whose panel includes Alternate Judge Beti Hohler was constituted to hear Mr Mokom’s claim for compensation. Within the context of those proceedings, five months after the Chamber issued the Decision, the Prosecution provided the Article 85 Chamber with an annex to its

¹ P-1847, P-1521, P-2269, P-0446, P-0884, P-0889, P-2232, P-0475, P-1074, P-2328, P-1339, P-1676, P-2698, P-1577, P-2472, P-1865, P-2625, P-1528, P-2200, P-2462, P-2657, P-2453, P-2049, P-2133, P-2193, P-0966, P-1172, P-1719, P-2027. The Defence does not have access to a definitive witness list in the *Mokom* case; however, it appears there may be several additional overlapping witnesses, such as P-0808, P-2841, P-0954, and P-0876: for P-0808, see *Prosecutor v. Mokom*, Public redacted version of “Prosecution’s Additional Submissions following the Confirmation of Charges Hearing” ([ICC-01/14-01/22-269-Red](#)), 26 September 2023, fn 52; for P-2841, see *Ibid.*, para. 53; CAR-OTP-00001651; for P-0954, see *Prosecutor v. Mokom*, Public Redacted Version of “Defence response to “Prosecution’s Additional Submissions following the Confirmation of Charges Hearing”” ([ICC-01/14-01/22-274-Red](#)), 29 January 2024, fn. 69; for P-0876 see [ICC-01/14-01/22-269-Red](#), fn 91.

² ICC-01/14-01/18-2474-Conf (the “Decision”).

³ ICC-01/14-01/18-206, para 20.

⁴ *The Prosecutor v. Ruto and Sang*, Decision on the Sang Defence's Request for Reconsideration of Page and Time Limits, ICC-01/09-01/11-1813, 10 February 2015, para. 19. See also *The Prosecutor v. Uhuru Muigai Kenyatta*, Decision on the Prosecution's motion for reconsideration of the decision excusing Mr Kenyatta from continuous presence at trial, 26 November 2013, ICC-01/09-02/11-863, para. 11.

“Prosecution’s response to the Chamber’s request for further information”.⁵ Said annex “summarises the most significant information known about the unavailability of certain witnesses in the Mokom case at the time of the Prosecutor’s decision to withdraw the charges” (the “Annex”).⁶ The Annex is therefore a standalone document that contains the Sought Material.

II. CONFIDENTIALITY

3. The Request is classified as confidential as it discusses items of evidence and submissions from the parties that should not yet be made public. The Defence will file a public redacted version of the Request in due time.

III. RELEVANT PROCEDURAL HISTORY

4. On 16 October 2023, the Prosecution filed its “Notice of Withdrawal of the Charges against Mr Maxime Jeoffroy Eli Mokom Gawaka” (“Withdrawal of Charges”) before Pre-Trial Chamber II, indicating that it did “not consider that there is a reasonable prospect of conviction at trial even if the charges were confirmed” in “light of changed circumstances regarding the state of the evidence”.⁷ The changed circumstances relate to the “unavailability” of “several critical witnesses”, including insider witnesses in the present case.⁸
5. On 20 October 2023, the Defence sent an *inter partes* request for disclosure of all documents and information relevant to the “changed circumstances regarding the state of the evidence” in the Mokom case.⁹

⁵ *Prosecutor v. Mokom*, “Prosecution’s response to the Chamber’s request for further information” ([ICC-01/14-01/22-352](#)), 13 September 2024 (the “Prosecution’s Response”).

⁶ [Prosecution’s Response](#), para. 5.

⁷ *Prosecutor v. Mokom*, Notice of Withdrawal of the Charges against Maxime Jeoffroy Eli Mokom Gawaka ([ICC-01/14-01/22-275](#)), 16 October 2023, paras 1-5 (“Mokom Notice of Withdrawal”).

⁸ [Mokom Notice of Withdrawal](#), para. 3.

⁹ Email from the Defence to the Prosecution, 20 October 2023, at 9:27 and re-sent at 12:55.

6. On 2 November 2023, the Prosecution refused to disclose any of the above material to the Defence, indicating *inter alia* that there was no disclosable tangible items or evidence falling under the “materiality” criterion of Article 67(2) of the Rome Statute (the “Statute”), nor any “PEXO” considerations in respect of the decision to withdraw the charges against Mr MOKOM.¹⁰
7. On 9 January 2024, the Defence sent a renewed and narrower request for disclosure to the Prosecution for information relating to the “unavailability” of the Overlapping Witnesses, with reference to the Prosecution’s Notice of Withdrawal.¹¹ The Defence specifically listed the pseudonyms of several witnesses for whom it sought disclosure of information and items.¹²
8. On the same day, the Prosecution reiterated its position that “there are no disclosable tangible items or evidence either in terms of Rule 77 ‘materiality’ or Article 67(2) ‘PEXO’ considerations in respect of the decision to withdraw the charges against Mr MOKOM”.¹³
9. On 9 February 2024, after obtaining authorisation from Pre-Trial Chamber II,¹⁴ the Defence filed a request for disclosure of information relating to the “unavailability” of the Overlapping Witnesses to the Pre-Trial Chamber II (the “First Disclosure Request”).¹⁵
10. On 11 March 2024, the Defence filed its “Request to Compel the Prosecution to Comply with the Contact Protocol”¹⁶ in an attempt to contact some of the Overlapping Witnesses to obtain information on “the reasons and circumstances surrounding the interruption

¹⁰ Email from the Prosecution to the Defence, 2 November 2023, at 16:22.

¹¹ [Mokom Notice of Withdrawal](#), para. 1.

¹² Email from the Defence to the Prosecution, 9 January 2024, at 12:02.

¹³ Email from the Prosecution to the Defence, 9 January 2024, at 17:08.

¹⁴ Email from Pre-Trial Chamber II to Ngaïssona Defence, 9 February 2024, at 11:58.

¹⁵ ICC-01/14-01/22-322-Conf ([ICC-01/14-01/22-322-Red](#)) (the “First Disclosure Request”).

¹⁶ ICC-01/14-01/18-2400-Conf ([ICC-01/14-01/18-2400-Red](#)) (the “Request to Contact the Overlapping Witnesses”).

of their cooperation with the Prosecution in the Mokom case, if applicable” (the “Request to Contact the Overlapping Witnesses”).¹⁷

11. On 2 April 2024, the Pre-Trial Chamber II dismissed the Defence’s First Disclosure Request on the basis that it was not the appropriate forum, without prejudice to Trial Chamber V adjudicating the matter.¹⁸ Specifically, it held that “[REDACTED]” and “[REDACTED].”¹⁹
12. On 15 April 2024, the Defence directed its request to the Chamber, asking it to order the Prosecution to disclose, *inter alia*, all items and information relating the “unavailability” of Overlapping Witnesses, pursuant to Article 67(2) of the Statute and Rule 77 of the Rules of Procedure and Evidence (the “Rules”) (the “Second Disclosure Request”).²⁰
13. On 2 May 2024, the Chamber issued the Decision rejecting the Second Disclosure Request as it saw *inter alia* “no reason to doubt that the Prosecution has complied with its disclosure obligations”.²¹ The Chamber further noted that “[...] the withdrawal of the charges against Mr Mokom, by virtue of its procedural nature, is not directly related to the substance of any allegations that had been brought against Mr Mokom and that may overlap with the allegations brought against Mr Ngaïssona”.²²
14. On 15 May 2024, the Chamber rejected the Request to Contact the Overlapping Witnesses as *inter alia* it would otherwise “[REDACTED]”.²³ The Chamber was further “[REDACTED]” in the proceedings against Mr Ngaïssona.²⁴

¹⁷ Ibid., paras 18, 24 and 25.

¹⁸ ICC-01/14-01/22-328-Conf, paras 7, 10.

¹⁹ ICC-01/14-01/22-328-Conf, para. 8.

²⁰ ICC-01/14-01/18-2448-Conf ([ICC-01/14-01/18-2448-Red](#)) (the “Second Disclosure Request”).

²¹ ICC-01/14-01/18-2474-Conf ([ICC-01/14-01/18-2474-Red](#)), para. 8.

²² Ibid., para. 9.

²³ ICC-01/14-01/18-2493-Conf., para. 9.

²⁴ Ibid., para. 12.

15. On 9 September 2024, the Article 85 Chamber held the hearing regarding Mr Mokom's claim for compensation (the "Compensation Hearing"). On this occasion, the Prosecution argued that "[...] it had become clear that despite having taken all reasonable steps to secure cooperation and availability, several critical witnesses, including insider witnesses, would be unavailable to testify [...]" (*emphasis added*).²⁵
16. On 10 September 2024, after the hearing regarding Mr Mokom's claim for compensation, the Article 85 Chamber questioned the Prosecution about the Withdrawal of Charges. Specifically, it "instructed the Prosecution 'to provide information on which witnesses became unavailable and when, as well as supporting material'".²⁶
17. On 13 September 2024, the Prosecution filed its Prosecution Response to the Article 85 Chamber's request. The Annex appended to the Prosecution's Response consists of "a report prepared by [...] the OTP Senior Trial Lawyer in the Mokom case at the relevant time" that "summarises the most significant information known about the unavailability of certain witnesses in the Mokom case at the time of the Prosecutor's decision to withdraw the charges".²⁷
18. On 20 September 2024, following unfruitful *inter partes* consultations,²⁸ the Defence requested leave to file before the Article 85 Chamber a disclosure request seeking the disclosure of the Sought Material.²⁹

²⁵ [Compensation Hearing](#), page. 58, lines 17-19 (*emphasis added*).

²⁶ [Prosecution's Response](#), para. 1.

²⁷ *Ibid.*, para. 5.

²⁸ Defence email request "D30 Disclosure Request of the Annex to "Prosecution's response to the Chamber's request for further information" (ICC-01/14-01/22-352)", dated 18 September 2024, at 18:23; Prosecution email Response to "D30 Disclosure Request of the Annex to "Prosecution's response to the Chamber's request for further information" (ICC-01/14-01/22-352)", dated 19 September 2024, at 14:02, where the Prosecution baselessly and unequivocally replied: "[REDACTED]."

²⁹ Defence email request "Ngaïssona Defence Request to File Submissions before Article 85 Chamber", dated 20 September 2024, at 12:34, renewed with the parties in copy on 25 September 2024 at 12:09.

19. On 30 September 2024, the Article 85 Chamber rejected the Defence's request for leave given *inter alia* that "[REDACTED]".³⁰
20. On 1 October 2024, the Defence sought reconsideration of the Article 85 Chamber's decision arguing that the Article 85 Chamber is better placed than the Chamber to assess a request seeking the disclosure of the Sought Material. In support, the Defence raised the fact that the Article 85 Chamber is the only chamber in possession of the Annex containing the Sought Material and that Judge Beti Hohler, by virtue of her dual-appointment in both the Chamber and the Article 85 Chamber, is well placed to assess the materiality of the Sought Material against the core issues at trial in the present case.³¹
21. On 7 October 2024, the Article 85 Chamber rejected the Defence's request for reconsideration on the basis that the threshold for reconsideration was not met. The Article 85 Chamber further ruled that [REDACTED].³²

³⁰ Article 85 Chamber email Decision on the "Ngaïssona Defence Request to File Submissions before Article 85 Chamber", dated 30 September 2024, at 17:26.

³¹ Defence email request for reconsideration "Re: Ngaïssona Defence Request to File Submissions before Article 85 Chamber", dated 1 October 2024, at 12:09.

³² Article 85 Chamber email decision on the request for reconsideration "RE: Ngaïssona Defence Request to File Submissions before Article 85 Chamber", dated 7 October 2024, at 09:23.

IV. APPLICABLE LAW

22. Pursuant to Article 64(2) of the Statute, it is the Trial Chamber's duty to ensure the trial is fair and expeditious.
23. The Defence recalls that the Chamber has found that reconsideration "is allowed as an exceptional measure which should only be undertaken when the conditions upon which the decision was grounded have changed, and it is necessary to prevent an injustice".³³ Other trial chambers have found that "[r]econsideration is exceptional, and should only be done if a clear error of reasoning has been demonstrated or if it is necessary to do so to prevent an injustice. New facts and arguments arising since the decision was rendered may be relevant to this assessment."³⁴
24. In addition, the Defence notes that Trial Chamber I in the Lubanga case also established the necessity for a reconsideration procedure of administrative decisions of the Chamber.³⁵ The Chamber recalled that "[t]his approach by the ad hoc Tribunals reflects the position in many common law national legal systems, in the sense that it is well established that a court can depart from earlier decisions that would usually be binding if they are manifestly unsound and their consequences are manifestly unsatisfactory, because, for instance, a decision was made in ignorance of relevant information."³⁶

³³ ICC-01/14-01/18-206, para. 20.

³⁴ *The Prosecutor v. Ruto and Sang*, Decision on the Sang Defence's Request for Reconsideration of Page and Time Limits, [ICC-01/09-01/11-1813](#), 10 February 2015, para. 19. See also *The Prosecutor v. Uhuru Muigai Kenyatta*, Decision on the Prosecution's motion for reconsideration of the decision excusing Mr Kenyatta from continuous presence at trial, 26 November 2013, [ICC-01/09-02/11-863](#), para. 11.

³⁵ *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on the defence request to reconsider the "Order on numbering of evidence" of 12 May 2010, 30 March 2011, [ICC-01/04-01/06-2705](#), para. 13.

³⁶ *Ibid.*, para. 18.

V. SUBMISSIONS

A. The conditions upon which the Chamber issued the Decision have changed warranting reconsideration in order to prevent an injustice

25. The Chamber, without having assessed the materiality of the Sought Material to the preparation of the Defence, took at face value the Prosecution's confirmation that "it has reviewed all material in its possession and not identified any disclosable material" and saw "no reason to doubt that the Prosecution has complied with its disclosure obligations".³⁷ It is "in view of this" only that the Chamber found the Defence's allegations that the Prosecution is withholding disclosable material to be "speculative at best".³⁸
26. Yet, during the Compensation Hearing, the Prosecution openly told the Article 85 Chamber that "[...] it had become clear that despite having taken all reasonable steps to secure cooperation and availability, several critical witnesses, including insider witnesses, would be unavailable to testify [...]".³⁹ In this regard, the Defence recalls the Chamber's own rulings which recognised the materiality of items and information surrounding an insider witness' refusal to cooperate with the Prosecution pursuant to Article 67(2) of the Statute and rule 77 of the Rules.⁴⁰ By admitting in open-court that it has in its possession items and/or information regarding the non-cooperation of insider witnesses, the Prosecution admits to having in its possession disclosable material within the meaning of Article 67(2) of the Statute and Rule 77 of the Rules.
27. Additionally, and upon hearing the Prosecution's above oral submissions, the Article 85 Chamber asked the Prosecution to "provide further information on which witnesses became unavailable, and at what time [...]"⁴¹ and to "put that in writing for

³⁷ The Decision, para. 8.

³⁸ Ibid.

³⁹ [Compensation Hearing](#), page 58, lines 17-19 (emphasis added).

⁴⁰ ICC-01/14-01/18-804-Conf, para. 25; ICC-01/14-01/18-1694-Conf, paras 16-18. The Defence raised referenced these rulings in its Second Disclosure Request at para. 20.

⁴¹ [Compensation Hearing](#), page 58, lines 5-6.

the Chamber's attention".⁴² The Prosecution then compiled the Annex which, as instructed by the Chamber, contains *inter alia* information on the non-cooperation of witnesses and material supporting such information.

28. Given the factual and evidentiary overlap between the cases against Mr Mokom and against Mr Yekatom and Mr Ngaïssona – as acknowledged by the Prosecution itself⁴³ –, witnesses considered as “insider witnesses” in the former case are considered the same in the latter. As previously submitted, the Defence has identified among the 33 Prosecution witnesses cited during the confirmation of charges hearing in the Mokom case at least 29 who testified in the present case (*viz.* the Overlapping Witnesses).⁴⁴ Amongst the Overlapping Witnesses, the Defence has identified the following 14 insider witnesses, according to the Prosecution’s classification : P-2269,⁴⁵ P-1847,⁴⁶ P-2232,⁴⁷ P-0966,⁴⁸ P-1339,⁴⁹ P-0808,⁵⁰ P-1521,⁵¹ P-2841,⁵² P-2027,⁵³ P-0954,⁵⁴ P-0876,⁵⁵ P-0446,⁵⁶ P-0889,⁵⁷ and P-0884.⁵⁸
29. And, given that in the present case, according to the Prosecution’s words, “close to 40 insider witnesses were called in the Prosecution’s case-in-chief” and that “[m]uch of the Prosecution’s case is established by ‘insider’ evidence”,⁵⁹ information regarding

⁴² [Compensation Hearing](#), page 60, lines 8-9.

⁴³ *see e.g.*, ICC-01/14-01/22-T-006-Red-ENG WT, page 22; [ICC-01/14-01/18-1939](#), para. 1; [ICC-01/14-01/22-31](#), para. 4; [ICC-01/14-01/22-24](#), para. 5; [ICC-01/14-01/22-29-Red.](#), para 2; [ICC-01/14-01/22-131-Red](#), para. 6 (“[...] As this Chamber is aware, the prospective case concerning MOKOM involves largely the same facts and circumstances as the Yekatom and Ngaïssona case. Indeed, but for the timing of MOKOM’s arrest the substantive elements of the case against him would have joinable to the now ongoing trial. Given the overlapping nature of the evidence and witnesses regarding the two processes, including linkage evidence [...]” (emphasis added)).

⁴⁴ See fn. 1 where the Defence identified, in addition to the 29 witnesses, 4 witnesses.

⁴⁵ ICC-01/14-01/18-Conf-Red, para. 20.

⁴⁶ ICC-01/14-01/18-2208-Conf-Red, para. 6; ICC-01/14-01/18-757-Conf-Anx-Red, page 2

⁴⁷ ICC-01/14-01/18-2208-Conf-Red, para. 7.

⁴⁸ ICC-01/14-01/18-2208-Conf-Red, para. 10; ICC-01/14-01/18-757-Conf-Anx-Red, page 2.

⁴⁹ ICC-01/14-01/18-2208-Conf-Red, para. 13.

⁵⁰ ICC-01/14-01/18-2208-Conf-Red, para. 16; ICC-01/14-01/18-757-Conf-Anx-Red, page 5.

⁵¹ ICC-01/14-01/18-2208-Conf-Red., para. 21; ICC-01/14-01/18-757-Conf-Anx-Red, page 2.

⁵² ICC-01/14-01/18-757-Conf-Anx-Red, page 2.

⁵³ *Ibid.*, page 4.

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*, page 5.

⁵⁶ *Ibid.*

⁵⁷ *Ibid.*

⁵⁸ *Ibid.*

⁵⁹ ICC-01/14-01/18-2391, para. 19.

the unavailability and/or non-cooperation of either of the above insider witnesses is relevant to the preparation of the Defence. As such, the Prosecution is withholding items and/or information surrounding insider witnesses' refusal to cooperate with its Office that are disclosable to the Defence. Therefore, the Prosecution is withholding information that is relevant and material to the preparation of the Defence.

30. This new statement of the Prosecution shows that the conditions upon which the Decision was grounded have changed. *First*, the Compensation Hearing shows that there is in fact reason to doubt the Prosecution's confirmation that it "has not identified any disclosable material" in its review of disclosable information in relation to the Withdrawal of Charges. *Second*, the Prosecution's submissions during the Compensation Hearing confirms that the Prosecution is indeed withholding disclosable items and/or information surrounding the non-cooperation of insider witnesses. The Prosecution has also produced a concrete Annex detailing information about non-cooperation and "unavailability" of *inter alia* the Overlapping Witnesses. *Third*, the Annex disclosed recently to the Article 85 Chamber is consistent with the Prosecution's history of violating its disclosure obligations.⁶⁰ It demonstrates that the Chamber should exercise caution in evaluating the Prosecution's assertions that it fulfilled its disclosure obligations.

31. While the Chamber may have perceived the Defence's submissions that the Prosecution is withholding disclosable material as speculative at the time of the Decision, this may have been due to the fact that the Prosecution has been very opaque with respect to the "unavailability" of Overlapping Witnesses, despite the Defence's best efforts to obtain even the slightest information. However, new facts have arisen, namely the existence of a concrete report detailing the non-cooperation/unavailability

⁶⁰ ICC-01/14-01/18-315-Conf; ICC-01/14-01/18-342; ICC01/14-01/18-551-Conf; ICC-01/14-01/18-595; ICC-01/14-01/18-740-Conf; Email from the Trial Chamber V to the Parties and Participants on 26 October 2020 at 16:39; ICC-01/14-01/18-783-Anx5; ICC-01/14-01/18-829; ICC-01/14-01/18-1202; ICC-01/14-01/18-1309-Conf; ICC-01/14-01/18-1566-Conf-Corr; ICC-01/14-01/18-1896-Conf; ICC-01/14-01/18-2069; ICC-01/14-01/18-2546-Conf.

of the Overlapping Witnesses, or of the insider witnesses amongst the Overlapping Witnesses. The Prosecution's submissions during the Compensation Hearing clearly show that it is in possession of information that is material to the preparation of the Defence.

32. In light of the above, the Defence's submissions that the Prosecution is withholding disclosable material can no longer be considered speculative. Reconsideration of the Decision is therefore warranted on the sole basis that the conditions upon which the Decision was founded have changed. The Prosecution is clearly in possession of information regarding the non-cooperation of insider witnesses in this case, which is disclosable under the Chamber's own jurisprudence and which is now compiled in the Annex. In view of this, the Decision's consequence (*viz.* the non-disclosure of the Sought Material) has now become manifestly unsatisfactory given that it was made in ignorance of the Prosecution's submissions during the Compensation Hearing and the Annex. The Sought Material should, in consequence, be disclosed to the Defence.

B. The Decision contains a clear error of reasoning, which warrants the Chamber's reconsideration

33. The Chamber held – by way of simple reference to Pre-Trial Chamber II's decision – that “the withdrawal of the charges against Mr Mokom, by virtue of its procedural nature, is not directly related to the substance of any allegations that had been brought against Mr Mokom and that may overlap with the allegations brought against Mr Ngaïssona”.⁶¹

34. By referring to Pre-Trial Chamber II's findings when ruling on the Second Disclosure Request, the Chamber made a clear error of reasoning. The Defence is not requesting the disclosure of the Sought Material on the basis that the substance of the allegations brought against Mr Mokom may be overlapping with those brought against Mr

⁶¹ The Decision, para. 8.

Ngaïssona. The Defence bases its Second Disclosure Request on the Overlapping Witnesses (*viz.* witnesses who were due to testify in the Mokom case and who are also witnesses in the present case, including several insider witnesses) who testified on the substance of the allegations brought against Mr Ngaïssona. Conflating the two is the Chamber's clear error of reasoning, which warrants reconsideration of the Decision.

35. Pre-Trial Chamber II's finding, quoted by the Chamber, is only sound in so far as the case against Mr Mokom never went to trial and no witnesses testified against Mr Mokom in support of the allegations brought against him. In the Mokom case, there were no witnesses to cross-examine, no testimony to impugn, no credibility issues to challenge or witness testimony to assess. But the case against Mr Ngaïssona is undeniably different wherein more than one hundred witnesses, in the course of a three-and-half year long trial, have provided testimonies – whether orally or pursuant to Rule 68(2) of the Rules – on the substance of the allegations brought against Mr Ngaïssona. Amongst those witnesses are the Overlapping Witnesses, whose credibility the Defence must be allowed to challenge in accordance with the principle of adversarial proceedings. To this end, the Defence recalls that information that undermines or supports the evidence, or the credibility, of witnesses falls within the scope of Rule 77 of the Rules.⁶² As such, the Chamber's reliance on Pre-Trial Chamber II's findings negates the legal reality that any information that goes to the credibility of witnesses is relevant to assess their testimony on the substance of the allegations in this case.

36. By referring to Pre-Trial Chamber II's findings, the Decision also dismisses the issue of unavailability of Prosecution witnesses which has been and remains a largely disputed issue in the present case.⁶³ Indeed, the distinction between “unwillingness”

⁶² *The Prosecutor v. Thomas Lubanga Dyilo*, Trial Chamber I, “Decision on the scope of the prosecution's disclosure obligations as regards defence witnesses” ([ICC-01/04-01/06-2624](#)), 12 November 2010, para. 18.

⁶³ ICC-01/14-01/18-1957-Conf; ICC-01/14-01/18-1958-Conf; ICC-01/14-01/18-1965-Conf; ICC-01/14-01/18-1967-Conf; ICC-01/14-01/18-1986-Conf; ICC-01/14-01/18-1987-Conf; ICC-01/14-01/18-1988-Conf; ICC-01/14-01/18-2013-Conf; ICC-01/14-01/18-2025-Conf.

and “unavailability” to testify within the meaning of Rule 68(2)(c) of the Rules has been the subject of extensive litigation by the Defence, such that the Appeals Chamber had to intervene.⁶⁴ Specifically, the core of the Defence’s submissions was based on the very chronology of the evidence and the “sequence of events” of how a witness’ ‘unwillingness’ to cooperate with the Prosecution has contributed to his or her ‘unavailability’ to testify.⁶⁵ In other words, should the Prosecution not be able to locate a witness after the witness expressed his/her unwillingness to testify, he or she would not be considered as “unavailable” within the meaning of Rule 68(2) of the Rules.⁶⁶ As such, any item and/or information that goes to the unavailability of Overlapping Witnesses (viz. the Sought Material), including when they have allegedly become unavailable, are necessarily relevant, in a general sense,⁶⁷ to the preparation of the Defence.

37. In this regard, the Defence recalls that the Withdrawal of Charges was filed because *inter alia* it “has become clear that several critical witnesses are unavailable to testify”.⁶⁸ Then, the Prosecution, during the Compensation Hearing, further explained that “[...] it had become clear that despite having taken all reasonable steps to secure cooperation and availability, several critical witnesses, including insider witnesses, would be unavailable to testify [...]”.⁶⁹ Following the hearing, the Article 85 Chamber “instructed the Prosecution ‘to provide information on which witnesses became unavailable and when, as well as supporting material’”.⁷⁰ The Prosecution then filed the Annex that contains *inter alia* information, and supporting material, on which Overlapping Witnesses became unavailable and when.

⁶⁴ ICC-01/14-01/18-2146-Conf; ICC-01/14-01/18-2207-Conf-Corr; ICC-01/14-01/18-2502-Conf.

⁶⁵ ICC-01/14-01/18-2207-Conf-Corr ([ICC-01/14-01/18-2207-Corr-Red](#)), para. 31.

⁶⁶ *Ibid.*

⁶⁷ *The Prosecutor v. Thomas Lubanga Dyilo*, Trial Chamber I, “Decision on the scope of the prosecution’s disclosure obligations as regards defence witnesses” ([ICC-01/04-01/06-2624](#)), 12 November 2010, paras 15, referring to Judgment on the appeal of Mr. Lubanga Dyilo against the Oral Decision of Trial Chamber I of 18 January 2008 (Judge Pikis and Judge Song dissenting) ([ICC-01/04-01/06-1433](#)), 11 July 2008, paras 76 - 82.

⁶⁸ [Mokom Notice of Withdrawal](#), para. 3.

⁶⁹ [The Compensation Hearing](#), page. 58, lines 17-19 (emphasis added).

⁷⁰ [Prosecution’s Response](#), para. 1 (emphasis added).

38. Therefore, the Sought Material (*viz.* information on which Overlapping Witnesses became unavailable and when, as well as supporting material), now contained in the Annex, is highly relevant to the preparation of the Defence. Indeed, the Sought Material may, for instance, lay grounds for requests for reconsideration of decisions allowing the introduction of P-2602's or P-2269's prior recorded testimonies pursuant to Rule 68(2)(c) of the Rules, or have an impact on the credibility of the Overlapping Witnesses, and affect the evidentiary weight the Chamber will give to their statements in its Article 74 judgment.⁷¹

39. All the above demonstrates that the Chamber made a clear error in reasoning when it relied on Pre-Trial Chamber II's reasoning to reject the Second Disclosure Request. While by virtue of its procedural nature, the Withdrawal of the Charges may not be directly related to the substance of any allegations that had been brought against Mr Mokom, the reasons behind the non-cooperation and unavailability of the Overlapping Witnesses that led to the Withdrawal of Charges are related to the substance of the allegations brought against Mr Ngaïssona.

40. For the reasons above, the Decision should be reconsidered and the Sought Material should be disclosed to the Defence, whether by way of disclosure of a separate document or of the Annex.

C. The Disclosure of the Sought Material in the Annex is not restricted under Rule 81(1) of the Rules

41. The Annex, which came into existence after the Decision, now contains the Sought Material. By its *raison d'être* of being responsive to the Article 85 Chamber's query, the Annex perfectly delineates the scope of the Sought Material to "which [Overlapping Witnesses] became unavailable and when, as well as the supporting material".⁷² By its very purpose of having been created for its submission before Article 85 Chamber, the

⁷¹ ICC-01/14-01/18-2127-Conf ([ICC-01/14-01/18-2127-Red](#)).

⁷² [Prosecution's Response](#), para. 1.

Annex provides concrete evidence on the sequence of events that led to the alleged unavailability of *inter alia* the Overlapping Witnesses. Finally, by its very nature as a standalone document, the Annex contains all the Sought Material, and the Chamber is now aware of its specific location.

42. Rule 81(1) of the Rules provide that:

“Reports, memoranda or other internal documents prepared by a party, its assistants or representatives in connection with the investigation or preparation of the case are not subject to disclosure”.

43. Trial Chamber I and Trial Chamber III’s previous rulings imply that the documents referred to in Rule 81(1) of the Rules are limited to documents that are “purely internal, preparatory documents”.⁷³ In fact, when Trial Chamber I listed examples as to the meaning of “internal work product”, it appears that it only referred to documents which are created at the Prosecution’s own initiative and whose foreseeable purpose is to be used internally only i.e. the targeted recipients and/or addressees of the documents are members of the Office of the Prosecutor (the “OTP”):⁷⁴

⁷³ *The Prosecutor v. Jean-Pierre Bemba Gombo*, Trial Chamber III, Public redacted version of "Decision on the Defence Request for disclosure of pre-interview assessments and the Consequences of non-disclosure" ([ICC-01/05-01/08-750-Red](#)), 9 April 2010, para. 35 (“35. Addressing the suggestion that these records come within Rule 81(1) of the Rules (**viz, they are purely internal, preparatory documents**), this will depend critically on the content of the record and the matters that are addressed during the screening process [...]”) (emphasis added).

⁷⁴ *The Prosecutor v. Thomas Lubanga Dyilo*, Trial Chamber I, “Redacted Decision on the prosecution's disclosure obligations arising out of an issue concerning witness DRC-OTP-WWW-0031” ([ICC-01/04-01/06-2656-Red](#)), 20 January 2011, para. 17.

Court. In particular, the examples provided as to the meaning of “internal work product” appear to conform with his obligations:

- i) all preliminary examination reports;
- ii) information related to the preparation of a case, such as internal memoranda, legal research, case hypotheses, and investigation or trial strategies;
- iii) information related to the prosecution’s objectives and techniques of investigation;
- iv) analyses and conclusions derived from evidence collected by the OTP;
- v) investigator’s interview notes that are reflected in the witness statements or audio-video recording of the statement;
- vi) investigator’s subjective opinions or conclusions that are recorded in the investigator’s interview notes; and
- vii) internal correspondence.⁷⁵

44. Similarly, Trial Chamber I further held that the material covered by the provision “includes, inter alia, the 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 investigation”.⁷⁵ This interpretation further indicates that the application of Rule 81(1) is limited to documents whose nature, purpose and use are intended to strictly remain internal to the OTP.

45. The Sought Material does not qualify as “internal work product” given it was created for the purpose of being submitted in the record of the Mokom compensation proceedings. Indeed, the Sought Material contained in the Annex was not compiled at the Prosecution’s own initiative but in accordance with the Article 85 Chamber’s instructions. Similarly, the intended recipient of the Sought Material compiled in the Annex is not a member of the OTP, but rather the Article 85 Chamber. Therefore, the disclosure of the Sought Material cannot be restricted pursuant to Rule 81(1) of the Rules.

⁷⁵ *The Prosecutor v. Thomas Lubanga Dyilo*, Trial Chamber I, Decision on the "Prosecution's Request for Non-Disclosure of the Identity of Twenty-Five Individuals providing Tu Quoque Information" of 5 December 2008, ([ICC-01/04-01/06-1924-Anx2](#)), 9 April 2009, para. 31.

46. Even if the Annex would be considered by the Chamber as an “internal work product”, it still contains disclosable information that is the Sought Material. Indeed, Trial Chamber I held that “[...] if information in this category [i.e. “internal work product”] contains disclosable information, it will be provided to the defence (in a suitably usable and intelligible form, either by way of disclosure of redacted documents or in a separate document)”.⁷⁶ In other words, Rule 81(1) restricts only the disclosure of documents and information that are purely internal to the OTP. The mere presence of internal analysis or information in a document is no excuse, under the legal framework of the Court, to refuse disclosure of disclosable information contained in that same document.

47. As such, should the Chamber consider the disclosure of the Annex to be restricted pursuant to Rule 81(1) of the Rules, the Sought Material should be disclosed pursuant to Article 67(2) of the Statute or Rule 77 of the Rules, either by way of disclosure of a redacted version of the Annex or in a separate document containing the Sought Material.

D. Alternative Request to order the Prosecution to disclose the Annex to the Chamber *ex parte*

48. The Defence acknowledges that the “Prosecution does not have an obligation of ‘handing the defence the keys to the warehouse’”, such that the Defence can determine for itself what material is exculpatory or material to the Defence.⁷⁷ However, in this instance, the Defence has demonstrated that there are *prima facie* indications that the Prosecution has failed to discharge its disclosure obligations. For this reason, the Defence requests the Chamber to intervene. Were the Chamber to find that it has not been presented with sufficient information to make a determination as to the

⁷⁶ *The Prosecutor v. Thomas Lubanga Dyilo*, Trial Chamber I, “Redacted Decision on the prosecution’s disclosure obligations arising out of an issue concerning witness DRC-OTP-WWWW-0031” ([ICC-01/04-01/06-2656-Red](#)), 20 January 2011, para. 18.

⁷⁷ ICC-01/05-01/08-632, para. 26.

materiality of the Annex, the Defence requests that the Chamber order the Prosecution to disclose the Annex *ex parte* only to the Chamber.

49. This alternative relief would not only permit the Chamber to easily assess the Request but it would also provide an equal footing for the Honourable Judges of the Chamber. Honourable Judge Beti Hohler, Alternate Judge of the Chamber, has knowledge of the Annex as part of her functions as permanent Judge of the Article 85 Chamber. As such, making the annex available to the Chamber would address this disparity of knowledge on the Overlapping Witnesses before Judge Beti Hohler “[...] is required to replace a member of the [Chamber] if that member is unable to continue attending” the hearings or deliberations in the present case.⁷⁸

50. Granting Alternative Request would therefore better assist the Chamber in making a determination as to whether the information falls within the Prosecution’s disclosure obligations, and alleviate any disparities of knowledge between the Honourable Judges of the Chamber. Assessing the Annex will allow the Chamber to properly adjudicate the present reconsideration request.

51. Finally, in accordance with Regulation 35(2) of the Regulations of the Court, which allows the Chamber to “extend or reduce a time limit if good cause is shown and, where appropriate, after having given the participants an opportunity to be heard”, the Defence requests for the deadline allocated to the parties and participants to respond to Request to be reduced to five days. The Defence is currently drafting its Final Trial Brief, which is due in roughly six weeks, and the Sought Material may extensively impact the Defence’s assessment and final submissions on the credibility

⁷⁸ Rule 39 of the Rules of Procedure and Evidence (“Where an alternate judge has been assigned by the Presidency to a Trial Chamber pursuant to article 74, paragraph 1, he or she shall sit through all proceedings and deliberations of the case, but may not take any part therein and shall not exercise any of the functions of the members of the Trial Chamber hearing the case, unless and until he or she is required to replace a member of the Trial Chamber if that member is unable to continue attending. Alternate judges shall be designated in accordance with a procedure pre-established by the Court.”).

of the Overlapping Witnesses. As such, the Defence has good cause to request a reduction of time limit.

VI.RELIEF SOUGHT

52. Considering the above, the Defence respectfully requests the Chamber to

GRANT the Request and **RECONSIDER** its Decision;

ORDER the Prosecution to disclose the Sought Material to the Defence in a suitably usable and intelligible form, either by way of disclosure of the Annex or in a separate document; and

SHORTEN the deadline for the parties and participants to respond to the Request to five days.

Alternatively,

ORDER the Prosecution to disclose the Annex *ex parte* to the Chamber to assess whether it contains information falling within the Prosecution's disclosure obligations under Rule 77, and subsequently to rule on the Request.

Respectfully submitted,



Mr Knoop, Lead Counsel for Patrice-Edouard Ngaïssona

Dated this 1 November 2024

At The Hague, the Netherlands.