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

Public

**Public redacted version of “Prosecution’s Response to the “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-01/14-01/18-2721-Conf)”,
ICC-01/14-01/18-2725-Conf, 14 October 2024**

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I. INTRODUCTION

1. Trial Chamber V should reject the “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” (“Request”).¹ The Request, which seeks reconsideration of the 26 September 2024 Decision denying NGAISSONA’s prior disclosure motion in its entirety,² fails to demonstrate – even cursorily – a ‘new fact or circumstance’ or that the Chamber committed any clear error of reasoning warranting reconsideration. Nor, does the Request otherwise meet any other legal requisite for such relief.

2. The Defence’s further alternative request for the Chamber to direct the Prosecution to provide [REDACTED],³ [REDACTED]. The basis for the alternative request is – like the previous disclosure request - wholly unsubstantiated and speculative.

II. CONFIDENTIALITY

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

¹ ICC-01/14-01/18-2721-Conf.

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

³ [REDACTED].

III. SUBMISSIONS

A. There is no basis for the Chamber's reconsideration of the Decision

a. There is no 'new fact' or 'changed circumstance' requiring reconsideration

4. Like NGAISSONA's several prior requests brought before this Chamber regarding disclosure related to the withdrawal of the *Mokom* case, the Request fails. Notably, in the Decision the Chamber observed:

"the Prosecution confirmed on *several occasions* that it has reviewed all material in its possession and not identified any disclosable material in relation to the Withdrawal. In view of this, the Chamber finds the Defence's allegations that the Prosecution is withholding disclosable material speculative at best and sees no reason to doubt that the Prosecution has complied with its disclosure obligations."⁴

5. These circumstances have not changed. The facts have not changed. Nor, has the Ngaissona Defence's persistent prior attempts to circumvent this Chamber in determining matters of disclosure in this case changed them.

6. As the Request recites, the Ngaissona Defence has, [REDACTED] in a misguided attempt to obtain information to which it is not entitled regarding the withdrawal of the *Mokom* case, particularly concerning unavailable prospective Prosecution witnesses.⁵

7. The Defence's disclosure demands have properly failed on each such occasion.⁶ That it refuses to accept (a) that it is not entitled to the information that it seeks; and (b) that its request for such information must be founded, does not constitute a "new fact" or mean that the Decision is erroneously reasoned or results in any injustice.

⁴ ICC-01/14-01/18-2474-Conf, para. 8 (emphasis added).

⁵ [REDACTED].

⁶ [REDACTED].

8. The Request exhibits the same deficiencies that permeate the Ngaissona's Defence's strategy to obtain disclosure concerning the withdrawal of the *Mokom* case. The argument that the Prosecution's representations [REDACTED]⁷ [REDACTED].

9. In the compensation proceedings, the Prosecution stated [REDACTED]⁸ This is not a revelation, and it is not new. Indeed, the Notice of Withdrawal of the Charges made public on 19 October 2023, provides exactly that:

“It has become clear that several critical witnesses are *unavailable to testify* ... Among the *unavailable witnesses* are *insider witnesses* [...] The Prosecution has taken all reasonable steps to secure their *cooperation and/or availability*.⁹

10. Although the Request cites to this very provision,¹⁰ the Defence fails to explain how the above is substantively distinct from the prevailing facts and circumstances known to it at the time the Decision was rendered. In the Decision, the Chamber acknowledged that the Prosecution had repeatedly informed the Parties and Participants that it had reviewed the information concerning the circumstances of the withdrawal of the *Mokom* case and determined that there was no further disclosable information within it. Nothing in the Request refutes this.

b. The Report does not amount to a changed circumstance

11. The Request's suggestion that the Report prepared by the Senior Trial Lawyer assigned in the *Mokom* case amounts to a new circumstance or fact, is unavailing. It is predicated on unsubstantiated inferences and speculation.

12. Despite the fact that the Report came into existence after the Decision was rendered,¹¹ it was clearly produced for the Article 85 Compensation Chamber based on *internal information* previously assessed by the Prosecution in respect of the

⁷ ICC-01/14-01/18-2721-Conf, para. 26.

⁸ ICC-01/14-01/18-2721-Conf, para. 26 (citing ICC-01/14-01/22-T-009-Red-ENG WT, page 58, ln. 17-19).

⁹ ICC-01/14-01/22-275, para. 3 (emphasis added).

¹⁰ ICC-01/14-01/18-2721-Conf, para. 37.

¹¹ See ICC-01/14-01/22-352, paras. 4-5.

Defence's prior disclosure requests. The relevant Prosecution Article 85 filing, provides that:

"[A] report prepared ... is attached in the *under seal, ex parte* Annex [which] 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.*"¹²

13. Thus, the information summarised in the Report comprises nothing new. To the contrary – it was acquired before the Defence's disclosure requests were made and the Prosecution's several responses submitted. The Defence fails to establish any plausible basis to suggest that the Report contains different or other information which was not considered by the Prosecution when addressing its previous requests. The arguments to the contrary are transparently speculative.

14. The Defence's further charge that "the Prosecution is withholding information that is relevant and material to the preparation of the Defence",¹³ is an argument made previously and flatly rejected in the Decision¹⁴ — a fact which the Defence must concede.¹⁵ The assumption that insider witnesses are necessarily the ones who are non-cooperative — as opposed to any other basis for their unavailability — is at best totally speculation. Even if that were the case, the Defence's assumption that it further bears on their prospective or prior evidence, is pure conjecture. The Request thus fails in this regard.

c. There is no clear error of reasoning

15. The Defence's contention that the Decision reflects an error of reasoning by the Chamber simply misunderstands it, and is in any case, incorrect.

¹² ICC-01/14-01/22-352, para. 5 (emphasis added).

¹³ ICC-01/14-01/18-2721-Conf, para. 30; *see also* ICC-01/14-01/18-2448-Conf, paras 21, 25.

¹⁴ ICC-01/14-01/18-2474-Conf, para. 8.

¹⁵ ICC-01/14-01/18-2721-Conf, para. 31.

16. The Decision does not rely on Pre-Trial Chamber II's prior rejection of the Defence's First Disclosure request.¹⁶ Rather, it correctly observes that the Pre-Trial Chamber found that the withdrawal [REDACTED]¹⁷ in assuring that, beyond the Defence's speculation, there was no objective basis on which the disclosure sought might otherwise be required. The Chamber's reference to the Pre-Trial Chamber's findings thus reflects its diligence in disposing of the Defence's disclosure request – rather than simply dismissing it out of hand, which it could easily have done.

17. Contrary to the Request, the Decision reflects the *prima facie* insufficiency of the Defence's disclosure demand. It moreover, correctly recalled and applied the settled law – in particular, that “the determination of whether an object is material to the preparation of the defence depends upon the specific circumstances of the case and is performed by the Prosecution.”¹⁸ Having done so, the Chamber properly satisfied itself that the Prosecution had discharged its statutory obligations. Taken at its highest, the Defence's suggestion that the Decision demonstrates a ‘clear error of reasoning’ is unpersuasive.

B. Rule 81(1) Applies to the information sought

18. The Defence incorrectly contends that the Report, which it acknowledges “was not compiled at the Prosecution's own initiative but in accordance with the Article 85 Chamber's instructions”¹⁹ summarising *internal information* requested by that Chamber, nullifies the non-disclosable status which the regulatory framework otherwise accords it. The argument is untenable.

19. There is no ‘waiver doctrine’ at the Court which applies in such circumstances, particularly when the internal character of the underlying information is expressly made known to the Chamber and the document (in this case, the Report) is filed “*under*

¹⁶ ICC-01/14-01/22-328-Conf; see ICC-01/14-01/18-2721-Conf, para. 33.

¹⁷ ICC-01/14-01/18-2474-Conf, para. 8.

¹⁸ ICC-01/14-01/18-2474-Conf, para. 7 (internal citations omitted); see also ICC-01/05-01/13-2275-Red, para. 55.

¹⁹ ICC-01/14-01/18-2474-Conf, para. 45.

seal, ex parte pursuant to regulation 23bis(2).”²⁰ Moreover, providing such information to the Chamber in this manner does not amount to its ‘disclosure’ *externally*, which might otherwise suggest a ‘waiver’, if ever the notion applies.

20. To suggest that where the Prosecution provides a Chamber with information bearing on the “OTP’s internal investigative and prosecution strategies and analysis ... to best assist the Chamber” in respect of a directive to “provide information” of such character, the Prosecution thereby waives the non-disclosure *inter partes* of such material under Rule 81(1), is incongruent and inconsistent with the Court’s regulatory framework. The Defence’s posture ignores the policy interests underpinning the provision. Moreover, such an understanding would erode, if not altogether eviscerate, the express exemption afforded parties involved in adversarial litigation as concerns *internal information* bearing on their respective case preparation.

21. Despite the Request’s lengthy discourse on the applicability of Rule 81(1) in this situation, the Defence neither persuasively argues nor demonstrates that the information on which the Report is based and/or the views of the Senior Trial Lawyer who authored it concerning a decision firmly within the discretion of the Prosecutor, is *not* internal within the meaning of the provision. The Report’s very creation to assist the Article 85 Compensation Chamber to understand the *internal information* that it instructed the Prosecution to provide it, cannot conceivably transform the *internal nature* and origin of the underlying information.²¹ Absent any demonstration that the Prosecution waived the right afforded under Rule 81(1) — that *internal* information prepared in preparation of the case is “not subject to disclosure”²² — the Request necessarily fails.

²⁰ ICC-01/14-01/22-352, paras. 2 and 5 (identifying “a report prepared by ... the OTP Senior Trial Lawyer in the Mokom case at the relevant time—is attached in the *under seal, ex parte Annex*”) (emphasis added).

²¹ *Contra* ICC-01/14-01/18-2721-Conf, para. 46.

²² Rule 81(1) of the Rules.

C. The Alternative Request should be rejected

22. It is thoroughly unclear on what legal basis the Ngaissona Defence's alternative request to order the Prosecution to [REDACTED] rests.

23. As the Defence concedes, and as recognised with regard to statutory disclosure, the "Prosecution does not have an obligation of 'handing the defence the keys to the warehouse'."²³ This reflects the burden on the Defence (albeit low) to identify and substantiate the *materiality* of the information sought.

24. As noted, the Decision correctly recognises that the determination of whether an object is 'material' is borne by the Prosecution.²⁴ Moreover, it is well-settled that where information is not assessed as 'material' by the Prosecution in the exercise of its responsibility²⁵ the Defence *must* demonstrate the *prima facie* materiality of the information sought.²⁶ Several cases confirm this, including *Ongwen*, *Al Hassan*, and *Lubanga*.²⁷

25. However, once again, the Defence is unable to substantiate its request for disclosure. Instead, it rehashes the same speculative grounds for the information sought. Further, nothing in the Request contradicts or impugns the Prosecution's confirmation on several previous occasions that it has reviewed the information in its possession and has determined that there is no information material to the Defence's preparation²⁸ or otherwise disclosable regarding the withdrawal of the *Mokom* case.²⁹

²³ ICC-01/05-01/08-632, para. 26.

²⁴ ICC-01/14-01/18-2474-Conf, para. 7.

²⁵ 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.

²⁶ 5 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").

²⁷ 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.

²⁸ 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 e.g., 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").

²⁹ See ICC-01/14-01/18-2465-Conf, para. 2; ICC-01/14-01/22-326-Conf, para. 9; and *inter partes* emails from the Prosecution to the Defence of 2 November 2023, at 16:22 and 9 January 2024, at 17:08.

26. Insofar as the Decision found the Defence's previous disclosure request to be "speculative at best,"³⁰ the present Request adds nothing. As such, there is no founded basis for the alternative relief sought.

IV. CONCLUSION

27. For the reasons above, the Prosecution requests that the Chamber reject the Request in its entirety, along with the alternative relief sought.

A handwritten signature in blue ink, consisting of a stylized 'K' followed by a horizontal line and a dot.

Karim A. A. Khan KC, Prosecutor

Dated this 1st of November 2024
At The Hague, The Netherlands

³⁰ ICC-01/14-01/18-2474-Conf, para. 8.