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**No. ICC-01/14-01/18
Date: 1 November 2021**

TRIAL CHAMBER V

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

SITUATION IN THE CENTRAL AFRICAN REPUBLIC II

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

Public redacted version of

**Decision on the Ngaißsona Defence Request pursuant to Article 57(3)(b)
of the Statute**

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
James Stewart
Kweku Vanderpuye

Counsel for Alfred Yekatom

Mylène Dimitri
Thomas Hannis
Anta Guissé

Counsel for Patrice-Edouard Ngaïssona

Geert-Jan Alexander Knoops
Richard Omissé-Namkeamaï
Marie-Hélène Proulx

Legal Representatives of Victims

Abdou Dangabo Moussa
Elisabeth Rabesandratana
Yaré Fall
Marie-Edith Douzima-Lawson
Paolina Massidda
Dmytro Suprun

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparations**

The Office of Public Counsel for Victims

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

States Representatives

Amicus Curiae

REGISTRY

Registrar

Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Nigel Verrill

Detention Section

**Victims Participation and Reparations
Section**

Other

TRIAL CHAMBER V of the International Criminal Court, in the case of *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*, having regard to Articles 57(3)(b), 61(11), 64(2), (6)(a) and (b), 86, 87, 93(1)(i), 96(2), 99(1) and (2) of the Rome Statute (the ‘Statute’), and Rules 116 and 176(2) of the Rules of Procedure and Evidence (the ‘Rules’), issues this ‘Decision on the Ngaïssona Defence Request pursuant to Article 57(3)(b) of the Statute’.

I. Procedural history and submissions

1. On 11 October 2021, the Ngaïssona Defence (the ‘Defence’) requested the Chamber to (i) seek, under Article 57(3)(b) of the Statute, the cooperation of the Central African Republic (the ‘CAR’), pursuant to its obligations under Articles 86, 87 and 93 of the Statute, for the transmission of ‘a complete copy of Mr Ngaïssona’s [REDACTED]’ (the ‘Requested Material’); and (ii) order the Registry to prepare and transmit to the CAR the cooperation request, emphasising ‘the importance of its prompt execution’ (the ‘Request’).¹
2. The Defence argues that the Requested Material is material to ‘the proper determination of certain key factual issues being discussed in this trial’ – related to Mr Ngaïssona’s [REDACTED] – and ‘the proper preparation of Mr Ngaïssona’s defence’. Further, it submits that the Request meets the requirements of specificity, relevance and necessity.²
3. The Defence argues that the Chamber’s intervention, pursuant to Article 57(3)(b) of the Statute, is necessary after having exhausted all other alternatives.³ In this regard, it submits that it visited on several occasions [REDACTED], to no avail.⁴ On 13 April 2021, noting that a copy of the first page of the Requested Material had been previously disclosed by the Office of the Prosecutor (the ‘Prosecution’) under the ERN CAR-OTP-2103-0038, the Defence contacted it to request

¹ Defence Application pursuant to Article 57(3)(b) of the Statute to Seek the Cooperation of the Central African Republic, ICC-01/14-01/18-1133-Conf (the ‘Defence Application’), paras 1, 18, pp. 8-9 (with confidential redacted Annex A, ICC-01/14-01/18-1133-Conf-AnxA-Red; confidential Annexes B and C, ICC-01/14-01/18-1133-Conf-AnxB and ICC-01/14-01/18-1133-Conf-AnxC, respectively).

² Defence Application, ICC-01/14-01/18-1133-Conf, para. 2. *See also* paras 16-17.

³ Defence Application, ICC-01/14-01/18-1133-Conf, para. 15.

⁴ Defence Application, ICC-01/14-01/18-1133-Conf, paras 10-11; Annex A to the Defence Application, ICC-01/14-01/18-1133-Conf-AnxA-Red.

disclosure of a complete copy pursuant to Rule 77 of the Rules. However, the Prosecution responded that it is not in possession of the Requested Material.⁵ Moreover, on 21 April 2021, it sent a letter to the [REDACTED] seeking assistance to obtain the Requested Material (the ‘Letter’), the response for which is pending and, according to the Defence, ‘should no longer be reasonably expected at this stage’.⁶

4. On 20 October 2021, the Prosecution responded to the Request.⁷ While deferring to the Chamber’s discretion,⁸ it nonetheless notes that the Defence (i) does not specify how the information contained in the Requested Material ‘may be material to the proper determination of the issues being adjudicated, or to the proper preparation of the person’s defence’, as required by Rule 116(1)(a) of the Rules; (ii) has not filed or indicated its intention to file an alibi notification under Rule 79 of the Rules, as required if it intends to assert that Mr Ngaïssona was present at a place other than where the Prosecution’s evidence indicates; and (iii) may have not ‘exhausted all reasonable avenues for collecting the material sought, or [...] sufficiently demonstrated that it cannot be obtained without the Chamber’s intervention’ as it does not appear that it sought the Registry’s assistance to send the Letter.⁹

II. Analysis

5. The Chamber recalls that pursuant to Article 57(3)(b) of the Statute and Rule 116(1) of the Rules, it may ‘seek such cooperation pursuant to Part 9 as may be necessary to assist [a] person [who has been arrested] in the preparation of his or her defence’, where it is satisfied that (i) this would ‘facilitate the collection of evidence that may be material to the proper determination of the issues being adjudicated, or to the proper preparation of the person’s defence’,¹⁰ and (ii)

⁵ Defence Application, ICC-01/14-01/18-1133-Conf, para. 12; Annex B to the Defence Application, ICC-01/14-01/18-1133-Conf-AnxB.

⁶ Defence Application, ICC-01/14-01/18-1133-Conf, paras 13-15; Annex C to the Defence Application, ICC-01/14-01/18-1133-Conf-AnxC.

⁷ Prosecution’s Response to Defence Application pursuant to article 57(3)(b) of the Statute to seek the cooperation of the Central African Republic, ICC-01/14-01/18-1141-Conf (the ‘Prosecution Response’).

⁸ Prosecution Response, ICC-01/14-01/18-1141-Conf, paras 1, 6.

⁹ Prosecution Response, ICC-01/14-01/18-1141-Conf, paras 3-5.

¹⁰ See Decision on the Yekatom Defence Request for Cooperation from the African Union, 17 September 2020, ICC-01/14-01/18-658, para. 7.

‘sufficient information to comply with article 96, paragraph 2, has been provided’.

6. It further recalls that any cooperation request under Article 57(3)(b) and Part 9 of the Statute must satisfy three cumulative requirements, namely (i) relevance, (ii) specificity, and (iii) necessity.¹¹
7. For the reasons that follow, and noting that the Prosecution defers to the Chamber’s discretion in this regard, the Chamber finds that the tripartite requirements of relevance, specificity and necessity are satisfied. It further finds that the Defence has provided sufficient information to comply with Article 96(2) of the Statute.
8. First, the Chamber notes the Defence’s submissions that the Requested Material would assist the Chamber in determining Mr Ngaïssona’s [REDACTED] during the period relevant to the charges – and, specifically, during [REDACTED] –, and further assist the Defence in challenging the accounts of events presented by certain Prosecution witnesses in this regard.¹² In the Chamber’s view, this kind of information is material to the preparation of the defence under Rule 77 of the Rules and is thus relevant.¹³
9. Second, the Chamber considers that the Request is specific in that it relates to a document clearly identified by the Defence, which provides detailed information about, *inter alia*, [REDACTED] and specific place in the CAR where, according to the Defence’s sources, it would be currently located.¹⁴ It further notes that the Defence provides the ERN of a copy of the first page of the Requested Material.¹⁵
10. Third, the Chamber notes the Defence’s unsuccessful attempts to obtain the Requested Material by contacting the Prosecution as well as the relevant

¹¹ See Decision on the Prosecution Request to Summon a Witness, 8 January 2021, ICC-01/14-01/18-804-Conf, para. 15. See also Trial Chamber VII, *The Prosecutor v. Jean Pierre Bemba Gombo et al.*, Decision on Second Mangenda Request for Cooperation, 5 April 2016, ICC-01/05-01/13-1768, para. 8.

¹² Defence Application, ICC-01/14-01/18-1133-Conf, para. 16.

¹³ See Appeals Chamber, *The Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the appeal of Mr. Lubanga Dyilo against the Oral Decision of Trial Chamber I of 18 January 2008, 11 July 2008, ICC-01/04-01/06-1433 (OA 11), paras 77-78 regarding the broad interpretation of ‘material to the preparation of the defence’.

¹⁴ See Annex A to the Defence Application, ICC-01/14-01/18-1133-Conf-AnxA-Red.

¹⁵ CAR-OTP-2103-0038.

authorities in the CAR. With regard to the latter, it notes that the Letter has remained unanswered for more than six months. In these circumstances, the Chamber finds that a cooperation request is necessary to obtain the Requested Material.

11. Lastly, and with regard to the Prosecution's observation that the Defence should have filed or indicated its intention to file an alibi notification under Rule 79 of the Rules, the Chamber considers it speculative at this stage and trusts that the Defence has taken note of its previous findings regarding the timing of notifications pursuant to Rule 79(2) of the Rules.¹⁶
12. In order to facilitate the execution of the cooperation request, the Chamber considers that the Defence's filing and its Annexes A and C, as well as a copy of CAR-OTP-2103-0038, should also be transmitted to the CAR authorities. The Registry is instructed to proceed accordingly, in consultation with the Defence.
13. The Registry is further instructed to emphasise in the cooperation request the importance of its prompt execution and to indicate to the CAR authorities that, in the event they identify problems which may impede or prevent its execution, they shall consult with the Chamber without delay to resolve the matter, in accordance with Article 97 of the Statute.

FOR THESE REASONS, THE CHAMBER HEREBY

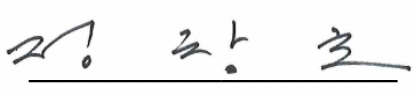
GRANTS the Request;

DIRECTS the Registry to prepare and transmit forthwith, in consultation with the Defence, the necessary cooperation request to the relevant authorities of the CAR, as set out in paragraphs 12 and 13 above; and

¹⁶ Decision on the Prosecution Requests related to the Yekatom Defence Notification under Rule 79 of the Rules, 12 March 2021, ICC-01/14-01/18-911, paras 8-12.

DIRECTS the Defence and the Prosecution to file public redacted versions of filings ICC-01/14-01/18-1133-Conf and ICC-01/14-01/18-1141-Conf, respectively, within one week of notification of the present decision.

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

 _____ Judge Péter Kovács	 _____ Judge Bertram Schmitt Presiding Judge	 _____ Judge Chang-ho Chung
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Dated 1 November 2021

At The Hague, The Netherlands