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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 Ngaïssona Defence Request for Disclosure of Reports related to Seizure of Digital Materials from P-0889 (ICC-01/14-01/18-1354-Conf)”, 19 April 2022, (ICC-01/14-01/18-1368-Conf)

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I. INTRODUCTION

1. The Office of the Prosecutor (“Prosecution”) hereby responds to the Ngaiisonga Defence’s Request for Disclosure of Reports related to Seizure of Digital Materials from P-0889 (“Request”).¹ The Request proceeds from a fundamentally flawed conception of the Court’s disclosure paradigm and should be rejected.

2. *First*, the Request ignores rule 81(1) of the Rules of Procedure and Evidence (“Rules”) which applies to the *internal* documents sought, namely: forensic extraction reports and an investigative report (“Reports”). As a threshold matter, the Request fails to establish any plausible reason why rule 81(1) should be disregarded or why it would not cover the internal Reports. On this basis alone, the Request should be dismissed.

3. *Second*, even assuming *arguendo* that these internal Reports fall within the scope of rule 77 – which they do not on their face – the Request fails nevertheless. It lacks any *prima facie* relatedness to an identified live issue in the case or to the charges; a well-established test for determining ‘materiality’ in the Court’s jurisprudence. Instead, the Request is predicated on several inaccurate assumptions about the Prosecution’s collection and the processing of materials seized from P-0889. Further, the claimed materiality of the Reports are attenuated by the disclosure of the documents related to [REDACTED] which detail all of the attendant circumstances, as well as the type and volume of material obtained from P-0889. In addition, as it is clear from *inter partes* exchanges, the Defence has not been impeded in any way from examining the forensic images of the seized devices. Although it is unclear why the Defence did not pursue the inspection of this material *inter partes* before filing the Request, this only belies the asserted materiality of the information now sought.

¹ ICC-01/14-01/18-1354-Conf.

4. Last, the Defence's request for the finding of a disclosure violation is groundless, and should not be entertained by the Chamber. The Prosecution has complied with its disclosure obligations pursuant to rule 77 and article 67(2) and, as elaborated below, the Defence has shown no reasons to doubt that this has been done.

II. CONFIDENTIALITY

5. Pursuant to regulation 23*bis*(2) of the Regulations of the Court, this document is filed as "confidential", as it responds to a filing of the same designation.

III. SUBMISSIONS

A. Background

6. As noted above, [REDACTED], in response to a Request for Assistance ("RFA"), [REDACTED] conducted a search and seizure operation [REDACTED]. The operation was fully documented in detail in a [REDACTED] and disclosed to the Defence nearly one and a half years ago, on 3 November 2020.²

7. On [REDACTED] handed over to Prosecution Investigators [REDACTED] containing the seized items. As indicated in the inventory provided by [REDACTED], the seized items included [REDACTED],³ [REDACTED] ("Electronic Devices").⁴

8. On 19 June 2020, Prosecution Investigators provided the Electronic Devices to the Prosecution's Cyber Unit for forensic extraction. Following extraction, the data obtained was assessed for relevance and disclosure, taking into consideration articles 54(1) and 67(2), and rule 77. This necessarily entailed information falling within the

² See CAR-OTP-2129-0100.

³ Images of evidence bags containing [REDACTED] were disclosed to the Defence on 26 October 2020. See CAR-OTP-2127-0708 [REDACTED]; CAR-OTP-2127-0710 [REDACTED]; and CAR-OTP-2127-0712 [REDACTED].

⁴ See CAR-OTP-2127-0652.

scope of the investigation and case, including persons of interest, the Accused, insider and other relevant witnesses, matters in controversy and matters of foreseeable materiality to the Defence.⁵ Items deemed material to the preparation of the defence, including P-0889's [REDACTED] (which underpin the Defence's request for the disclosure of forensic extraction reports⁶) were duly registered and timely disclosed.

9. An extraction report in this case was prepared by the Office of the Prosecutor, and details/documents the recoverable contents of the devices in question (such as data, metadata, and digital events). From the point of view of disclosure, this is in marked contrast to the provision of such reports as prepared by *external* experts or agencies (infrequently utilised by the Prosecution), or law enforcement personnel who are not parties to the proceedings, as is often the case in domestic jurisdictions. Extraction reports, like investigator's reports are normatively utilised in communicating information internally within the broader context of advancing an investigation and trial preparation.

B. The Defence is not entitled to the disclosure of internal documents or reports

10. The material sought by the Defence falls outside the scope of the Prosecution's statutory disclosure obligations. Rule 81(1) excludes the Reports at issue from disclosure. It provides:

“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.”

Neither the fact that the Prosecution is a *Party* to the proceedings, nor that the Reports (as prepared by its Cyber Unit and Investigative staff) in the context of the

⁵ See ICC-1/04-01/06-1433 OA11, para. 36. (noting that the Prosecution's obligation to disclose “must necessarily be based, *inter alia*, on the Prosecutor's understanding of the case as a whole, including what is known or anticipated about possible defence(s)”).

⁶ CAR-OTP-2127-3304.

investigation or preparation of the case, are disputable. The application of rule 81(1) to the Reports could not be clearer. The disclosure of *internal reports and documents* is not mandated under the Court's regulatory framework, nor is it 'waived' either partially or fully on account of any previous act or practise — there is simply no such implied waiver doctrine here, much less one derived from other cases and other circumstances.

11. It is apparent that the Request does not reference rule 81(1). Instead, the Defence argument rests on the erroneous assumption that the Reports sought are *disclosable* in the first place.⁷ In this respect, the Request not only fails to take into account the limitations on disclosure built-in to the Court's statutory framework expressly, but manifestly fails to overcome it.⁸ For this reason alone the Request should be dismissed.

12. To be clear, the Prosecution's documentation of the processes applied regarding the forensic extraction of data in the context of investigations or case preparation does not *per se* create a disclosure obligation of related internal documents. On the contrary, rule 81(1) is clear that such Prosecution-generated (Party-generated) reports are *not* subject to disclosure. The Defence may seek only disclosure of material falling *outside* the scope of rule 81(1) — not within it.

13. The Defence's suggestion that the Prosecution's provision of such material in another case or instance compels the same result here is unavailing. The Request incorrectly asserts a theory of 'implied waiver' with regard to the Prosecution's prior provision of *internal* documents. *First*, no such thing has occurred. *Second*, that forensic extraction reports have been provided in other cases (or even in this one) does not

⁷ See e.g., Request, para. 19.

⁸ See ICC-02/05-03/09-501 OA4, paras. 1, 35 (observing that "Rule 77 of the Rules of Procedure and Evidence has two stages. First, it must be determined whether 'books, documents, photographs and other tangible objects' in question are 'material to the preparation of the defence'. If they are, they must be disclosed to the defence 'subject to the restrictions on disclosure as provided for in the Statute and in rules 81 and 82'" (emphasis added).

render this class of documentation automatically “material” to the preparation of the Defence.⁹ Moreover, how common or not such material is provided at the ICC is completely irrelevant.¹⁰

14. The example cited by the Defence relates to the testimony of an expert witness called in the *Al Hassan* case to provide evidence on the digital extraction of data.¹¹ In that specific instance, the disclosure of forensic reports prepared by the expert was directly related to the subject matter of his testimony. Moreover, as the Prosecution relied on the reports themselves – they were rendered no longer *internal*. This is not the case here, where P-0889 does not dispute the contents of the devices seized from him by the [REDACTED] to any extent.

15. The Defence’s attempt to extend Trial Chamber VII and IX’s findings regarding the disclosure of RFAs to forensic extraction reports¹² is misconceived and unavailing. *First*, RFAs are not *internal* when transmitted to third-parties (*i.e.*, receiving States or entities) despite retaining their confidential status under Part 9.¹³ By contrast, extraction reports generated by the Prosecution are not normatively transmitted outside the Office. *Second*, Trial Chambers VII and IX’s findings concerning RFAs relate to the procedure employed in collecting evidence through States. Again, this is distinguishable from the *internal* process of retrieving information from evidence already collected. In this case, the extraction reports sought do not bear on the procedure used [REDACTED] in collecting evidence from P-0889. And, in any case, as demonstrated below, the Defence is in possession of the necessary information to assess the reliability of that collection process.

⁹ See *e.g.* ICC-01/05-01/13-2275-Red A A2 A3 A4 A5, para.641 (“which objects are ‘material to the preparation of the defence’ will depend upon the specific circumstances of the case”. Thus, while this assessment should be made on a *prima facie* basis, rule 77 of the Rules *does not mandate the automatic disclosure of any particular class of documents in the abstract*”) (emphasis added).

¹⁰ Request, para. 12.

¹¹ Request, para. 27. See also fn. 8 citing *Al Hassan* case, ICC-01/12-01/18-T-028-Red-ENG, p. 8-10, l. 19-25.

¹² Request, para. 35.

¹³ See article 87(3) and (4); see ICC-02/04-01/15-457, 7 June 2016, para. 13 and ICC-01/05-01/13-1234, para. 12.

16. In sum, the Reports fall within the scope of rule 81(1) and are therefore not disclosable. The Defence does not demonstrate otherwise. Moreover, whether and to what extent the Prosecution may decide to make *internal work product* available to the Defence is within its prerogative.

C. The Prosecution has complied with its disclosure obligations in relation to material seized from P-0889

17. Even assuming *arguendo* that the Reports fall under the Prosecution's disclosure obligations – and they do not – the Request fails to establish their 'materiality' sufficient to warrant disclosure. The Defence's position that the Prosecution should have disclosed the digital extraction reports related to P-0889's Electronic Devices and an investigative report on the collection of P-0889's seized material¹⁴ is unfounded.

18. *First*, as noted in its initial response to the Defence's overbroad request seeking the disclosure of *all* extraction reports in the case, the Prosecution responded as follows:

“we do not share your position that all extraction reports in the case need to be disclosed, as it would unreasonably and unnecessarily burden the Parties and Participants with information that is not material.”¹⁵

19. As the Court's jurisprudence establishes, the Prosecution is obliged to assess all material for purposes of disclosure and to determine what must be disclosed on a case by case basis.¹⁶ This normatively encompasses items (i) relevant to the charges, (ii) material to the preparation of the Defence under rule 77, or (iii) evidence containing

¹⁴ Request, paras. 2-3.

¹⁵ Annex A to the Request, p. 1. *See also* Request, para. 18.

¹⁶ *See e.g.* ICC-01/05-01/13-1234, para. 12 (noting with respect to RFAs that the “materiality of such information to the preparation of the defence must be assessed on a *case-by-case basis* (...)”); *see also* , ICC-02/05-03/09-501 OA4, paras. 2, 42 (“[a]ny assessment of whether information is material to the preparation of the defence should be made on a *prima facie* basis”).

potentially exculpatory information under article 67(2). As held by the Appeals Chamber in the *Ntaganda* case, “rule 77 of the Rules leaves to the Prosecutor the assessment of whether objects are ‘material to the preparation of the defence’.”¹⁷

20. The Prosecution’s obligations pursuant to rule 77¹⁸ is not without limit. As noted by the Appeals Chamber in the *Banda & Jerbo* case, “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.”¹⁹ Here, the Prosecution has and will continue to accommodate Defence requests for the disclosure of items as appropriate.

21. The Defence’s arguments concerning the application of the rule 77 ‘materiality’ standard set out in the *Al Hassan* case are incorrect.²⁰ The *Al Hassan* standard, in which Trial Chamber X articulated that a showing of materiality requires a relationship between the items sought and the charges in the case or a live issue,²¹ is no more “narrow” or “restrictive”²² a threshold for disclosure than has been consistently applied at the Court. It does not change the existing low threshold and is moreover established in the Court’s jurisprudence. For instance, Trial Chamber IX in the *Ongwen* case observed:

“[...] it is not sufficient to indicate that the database ‘may potentially’ include information on alleged human rights violations by Ugandan government forces. Even if the database contained such information, without anything further such as a direct connection to the charges or a live issue in the case, this would not in and of itself amount to information ‘material to the preparation of the Defence’ within the meaning

¹⁷ ICC-01/04-02/06-1330 OA3, para. 23; see also ICC-01/05-01/08-632, para. 20.

¹⁸ ICC-01/04-01/06-3017 A5 A6, para. 10; ICC-01/11-01/11-392-Red-Corr, para. 39; ICC-02/05-03/09-501, para. 38.

¹⁹ See ICC-01/05-01/13-2275-Red A A2 A3 A4 A5, para. 55; ICC-02/05-03/09 OA 4, para. 39; See also ICC-01/05-01/08-1594-Conf, para. 21; ICC-02/04-01/15-457, para. 13.

²⁰ See Request, paras. 18-27.

²¹ ICC-01/12-01/18-859-Red, paras. 9-10.

²² Request, para. 4.

and for the purposes of Rule 77 of the Rules. Bearing in mind the above, the Chamber is not satisfied that the Defence has met the low threshold under Rule 77 of the Rules to show that the database would have been ‘material to the preparation of the Defence’ in the sense of undermining the Prosecution case or supporting a line of argument of the Defence.²³

22. The Court’s jurisprudence draws a clear distinction between the disclosability of documents that may be ‘interesting’ or even ‘helpful’ to the Defence versus those which are actually and presently material to its preparation (i.e., “*nécessaires à la préparation de la défense de l’accusé*”²⁴). This ensures that the Court’s disclosure procedure is not unduly burdensome and slow, as opposed to focused, practicable, and effective, especially given the volume of the documentation and evidence involved in ICC cases, as well as their complexity.

23. That said, despite the low threshold, rather than substantiating the materiality of the Reports sought the Defence engages in speculation about the Prosecution’s processing of the evidence collected and the manner in which the Reports may potentially be used.²⁵ Indeed, the arguments advanced by the Defence (although somewhat refined compared to its initial request) amount to the same unsubstantiated general demand for forensic extraction reports that it began with, based on speculation about information of *potential consequence* to an, as yet, unarticulated *live* issue, as was the case in *Ongwen*.

24. The fact that an item may, as suggested by the Defence, “help the Defence understand the limitations of the extracted information or the skill and care take (*sic*) by the technician/expert conducting the examination and/or work”²⁶ is speculative. It is not enough to warrant disclosure absent any demonstration of how this relates to

²³ See ICC-02/04-01/15-1734, para. 22 (emphasis added); see also ICC-02/05-03/09-501 OA4, paras. 38-39, 42.

²⁴ See *Règle 77 du règlement de procédure et de preuve* (emphasis added).

²⁵ See Request, para. 4.

²⁶ Request, para. 32.

an issue in the case, whether that be undermining the Prosecution case or supporting a line of argument. At this point, there remains none.

25. As the Defence concedes, the Prosecution reasonably and specifically noted its intention to reconsider its position concerning the Defence's initial request, upon a showing of a live issue or a line of argument, as stated below:

"if you have a founded basis to question the extraction process, the provenance of the material (e.g., that there is some reason to believe that the information did not come from the Witness or his devices)..."²⁷

Bear in mind that the above was invited despite the Prosecution's well-founded view that the Reports sought fall under rule 81(1).

26. Notably, the Defence has not articulated a line of argument or live issue in the case to which the Reports are material to its preparation, notwithstanding the Prosecution's clear response (even suggesting them). This is because the Defence has no actual basis for such an assertion. On the contrary, as the Request demonstrates, the only assertions advanced by the Defence have been entirely speculative and furthermore, disconnected from any identified live issue or matter in controversy.

27. Again, if the information sought by the Defence is to determine whether the data on which the Prosecution relies comes from the seized material or P-0889's Electronic Devices (among the several non-specific and speculative reasons advanced in the Request²⁸) the fact remains that the forensic images of the Electronic Devices have been and remain available to the Defence for *inspection* pursuant to rule 77. Indeed, any information the Defence claims that it seeks to know about the data at

²⁷ Request, para. 18.

²⁸ See Request, paras. 32-34 (asserting that the Reports are "necessary to understand the evidence", or "assist the Defence to understand the time-line in which events may have occurred", or "may provide information about files that is relevant to the Defence", or "enable[e] the Defence to engage fully with certain materials used within a trial").

issue, resides *in the data itself* – which is not subject to rule 81(1), and which may be inspected. To this extent, it was unnecessary to seize the Chamber with the Request in the first place.

28. This is particularly so, given that [REDACTED] detailing the search and the items obtained, which would have alerted the Defence to the existence of the Electronic Devices,²⁹ has been known since late 2020.³⁰ However, that such *inspection* was not pursued since then and before filing the Request should be considered in terms of the Chamber’s assessment of the claimed materiality of the Reports now put forward.³¹

29. Contrary to the Request, rule 77 demands are not a mechanism for overseeing Prosecution disclosure assessments. This is consistent with Trial Chamber III’s approach in the *Bemba* case in holding that:

“the obligation of the prosecution is to permit inspection of any documents, and other items as listed in Rule 77 of the Rules, which are material to the preparation of the defence. The requirement, therefore, is not for the prosecution to offer everything in its possession on an issue to the defence for inspection, in order for the latter to make its own selection; it is, instead, to provide all the items that are material to the preparation of the defence.”³²

²⁹ See *infra*, para. 34.

³⁰ See e.g., ICC-01/05-01/13-2275-Red A A2 A3 A4 A5, para. 56 (in the *Bemba et al* case, the Appeals Chamber observed that the Accused’s awareness of information for three years was appropriate to consider in assessing the ‘materiality’ of disclosure being sought — “[t]he data the disclosure of which Mr Bemba now seeks are contained within this more comprehensive document disclosed at trial and are therefore already available to him ... the Appeals Chamber considers that the fact that Mr Bemba has already access – and has had it since 20 December 2013 – to the actual information which he now seeks is relevant to the disposal of the present request”).

³¹ See ICC-02/05-03/09-501, para. 40 (noting that the Chamber reasonably “may also take into account whether the defence has already received relevant documents” in determining the materiality of the information sought). By extension, the Prosecution considers that the Defence’s failure to avail itself of such material may be properly considered.

³² ICC-01/05-01/08-632, para. 20 (*emphasis added*).

30. In asserting that the Reports should be disclosed such that “[t]he Defence can also better examine whether undisclosed material *could be relevant*”³³, the Request fundamentally contradicts this basic premise. Indeed, Trial Chamber III decidedly rejected the idea that the Defence should be provided with “seemingly irrelevant information”³⁴ to *decide* if such information is relevant. It determined that the Prosecution does not have:

“an 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 [...]”³⁵

In short, a disclosure obligation does not arise from advancing speculative arguments, but instead must be predicated on concrete and *present* issues which the Prosecution can reasonably identify, or which are reasonably identified to the Prosecution by the requesting Party. Notwithstanding the Prosecution’s entreaty, the Defence has failed to do so in this case.

D. The Defence has all information necessary to assess and understand evidence disclosed in relation to P-0889’s search and seizure

31. The Defence is in possession of the necessary information to assess and understand the circumstances of the collection of items seized from P-0889. The Reports are not material to understand the evidence collected in the context of the

³³ See Request, paras. 15, 39-40, 44.

³⁴ Request, para. 34.

³⁵ ICC-01/05-01/08-632, para. 20 (*emphasis added*).

search and seizure operation. All steps concerning the operation were extensively documented by the [REDACTED] and timely disclosed to the Defence.³⁶

32. In particular, the [REDACTED] provides a clear description of the process. It indicates (i) the date, time, and duration of the search, (ii) the persons present during the search, (iii) the locations where each item was seized, and (iv) a full description of each item, specifying for example the type, date, content, quantity, make, serial number, etc.³⁷ Considering the extent of the records prepared by the [REDACTED], an Investigator Report detailing the process would be unnecessarily duplicative of the information already provided by [REDACTED] and available to the Defence.

33. Further, and contrary to the Defence's claim,³⁸ the Reports are not necessary to identify the dates of the items extracted and disclosed. Each item extracted from P-0889's Electronic Devices includes sufficient metadata to enable the Defence to understand its date, provenance, and characteristics. For each WhatsApp audio the cover page shows: (i) FileName, (ii) FilePath, (iii) Create Date, (iv) Modified Date, (v) File Attributes, (vi) File Size, and (vii) File Type.³⁹ For WhatsApp messages, each cover page shows: (i) the date and time of the extraction, (ii) its duration, (iii) the size of the file, etc.⁴⁰ Again, the forensic images of the extracted devices are available for *inspection*.

34. The features identified in CAR-OTP-2127-3304 as potentially problematic⁴¹ do not impugn P-0889's [REDACTED]. That some of the information in P-0889's [REDACTED] post-dated the charged period has nothing to do with the way the [REDACTED] was extracted. Further, P-0889 testified in the presence of Counsel, and

³⁶ Documents received from the [REDACTED] were disclosed on 3 November 2020 through Pre-Trial INCRIM package 59.

³⁷ CAR-OTP-2129-0100.

³⁸ Request, para. 33.

³⁹ See e.g., CAR-OTP-2127-1335.

⁴⁰ See e.g., CAR-OTP-2127-3042, at 3042.

⁴¹ Request, para. 38.

was subject to cross-examination. During the witness's testimony, he confirmed that [REDACTED] were created *after* the charged period [REDACTED].⁴² There is no mystery to uncover here. Moreover, aware of this well-before P-0889's testimony, the Defence was in a position to examine him on the provenance of the seized material that was put to him.

E. The finding of the disclosure violation is unwarranted

35. *First*, as demonstrated above, rule 81(1) excludes the disclosure of the Reports. The Prosecution has therefore not breached any disclosure obligations.

36. *Second*, even if the Chamber were to find that the Reports do not fall within the scope of rule 81(1) and are subject to rule 77, they are not material.

37. The Reports do not contain information supplementary to what is available to the Defence either through documents already disclosed, *or by way of inspection of the forensic images themselves*. As of October 2020, the Defence started receiving documents related to the search and seizure operation conducted [REDACTED]. The Defence has had ample time to understand and appreciate the circumstances of this search and seizure operation. Moreover, as noted, the Defence had the opportunity to extensively cross-examine P-0889 for about 10 hours and has obtained clarification from the witness as to the circumstances of the seizure [REDACTED] and the content of the extracted [REDACTED].⁴³ In view of the information at the disposal of the Defence both before and after the witness's testimony, the Reports are not material — that is, they would have no “material effect” regarding the Defence's preparation⁴⁴ warranting disclosure.

⁴² P-0889, ICC-01/14-01/18-T-109-CONF-ENG ET, p. 4, l. 14-23.

⁴³ P-0889, ICC-01/14-01/18-T-109-CONF-ENG ET, p. 3, l. 12-p. 4, l. 23.

⁴⁴ See ICC-01/04-01/06-2147, 23-24.

38. *Third*, even if the Chamber were to conclude that the Reports were disclosable under rule 77 – which they are not – the Defence has not suffered any unfair prejudice, taking into consideration the facts described above. As such, there is no further remedy required or justifiable.

IV. CONCLUSION

39. For the above reasons, the Chamber should dismiss the Defence's Request in its entirety.

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

Karim A. A. Khan QC, Prosecutor

Dated this 3rd day of June 2022
At The Hague, The Netherlands