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**International
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Date: **6 June 2022**

TRIAL CHAMBER V

Before:

**Judge Bertrand 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 ROMBHOT YEKATOM
AND PATRICE-EDOUARD NGAÏSSONA***

Public with Confidential Annex A

**Public Redacted Version of the “Ngaïssona Defence Request for Disclosure of Reports
related to Seizure of Digital Materials from [REDACTED]”, ICC-01/14-01/18-1354-
Conf, 8 April 2022**

Source: Defence of Patrice-Edouard Ngaïssona

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

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I. Introduction

1. The Defence requests disclosure of:
 - a. the digital extraction reports of three phones, one computer, three USB keys and one hard disk seized from [REDACTED] and described in [REDACTED] ('Physical Media'); and
 - b. an investigative report that documents what was found in items seized from [REDACTED] and why the Prosecution investigator(s) did or did not select certain objects for forensic examination.
2. The Defence also requests that the Trial Chamber find a disclosure violation with respect to the failure to disclose the digital extraction reports and investigative report that are the subject of this request.
3. The Prosecution applied Rule 77 too narrowly to the Defence *inter partes* request for this material. If consistent with ICC jurisprudence, the Prosecution should have disclosed this material. In the present circumstances, the Prosecution must disclose the above items to the Defence.
4. If the Prosecution continues to apply a narrow standard inconsistent with the Rome Statute, the Prosecution will deny the Defence that should be available to it. This will cause unfairness throughout the proceedings. For this reason, the Defence requests the Trial Chamber to clarify to the Prosecution that the standard the Prosecution applied is too restrictive.
5. The extraction reports are material for the Defence preparation because they are necessary to:
 - a. Understand evidence which has been disclosed or discussed in testimony;
 - b. Instruct experts or engage consultants; and/or
 - c. Scrutinise material that the Prosecution may submit through further witnesses.

6. The investigative report is necessary to ensure a fair trial process that does not deny the Defence material that could be relevant for its preparation or investigations.
7. The Defence did not initially raise this issue during the testimony of [REDACTED] as *inter partes* communications¹ were underway and the Defence did not expect that the Prosecution would deny the Defence request as it did on 15 March 2022. On 16 March 2022, the Defence sought leave to address the Trial Chamber on this issue [REDACTED] and to seek guidance upon how to proceed.² On 16 March 2022, the Chamber instructed the Defence to submit a written request.³

II. Confidentiality

8. Pursuant to Regulation 23bis(1) of the Regulations of the Court, the present submissions are filed as “confidential”, as it refers to confidential information including the names of Prosecution investigators and witnesses. The Defence will file a public redacted version in due course.

III. Submissions

9. The present request for a disclosure order concerns material that the Prosecution should have disclosed. During the examination of [REDACTED], the Prosecution questioned [REDACTED] by presenting the witness with a list of names⁴ and numbers ostensibly drawn from [REDACTED].⁵ Investigations by the Defence into the origin of this document⁶ led to the realization that no information documenting the extraction of material from the devices was available. Other items that the Prosecution derived from this seizure of material also lacked this extraction information.

¹ See Confidential Annex A. The original request was 11 March 2022 14h25 (‘Request for Disclosure - Seizure of [REDACTED]’s Devices’), Annex A, p. 3. The Prosecution responded on 15 March 2022 13h26 (‘RE: Request for Disclosure - Seizure of [REDACTED]’s Devices’), Annex A, p. 2.

² Email, 16 March 2022 14h36, subject ‘Request for leave for Defence to address the Trial Chamber on a procedural matter following the conclusion of testimony of [REDACTED]’.

³ Email, 16 March 2022 15h31, subject ‘Decision on Request for leave for Defence to address the Trial Chamber on a procedural matter following the conclusion of testimony of [REDACTED]’.

⁴ [REDACTED].

⁵ See starting at: [REDACTED].

⁶ See the Request for Assistance to seize the materials: [REDACTED].

A. Background to the request and terminology

10. The Defence uses the term 'Extraction Reports' to refer to two similar types of documentation that may occur within the same reports or apart.
11. The first type of report is documentation that explains and records how Prosecution technicians and/or experts have *preserved* materials stored on digital devices that the Prosecution has collected during an investigation. The technician/expert may create these reports automatically through the software that creates the *forensic disk images*⁷ but the report may include notes from the expert or technician to document difficulties, decisions, and/or errors they experience along the way.
12. The provision of this information to the Defence is common at the ICC⁸ and in national jurisdictions.⁹ Similarly, the European Court of Human Rights has ruled that the requirements of a fair trial "that the prosecution authorities should disclose to the defence all material evidence in their possession for or against the accused"¹⁰ and that

⁷ A disk image file is an exact bit-for-bit copy of an entire hard drive. See, for example, <https://www.exterro.com/forensic-toolkit> and <https://www.exterro.com/ftk-imager>.

⁸ See, for example, *Al Hassan case*, [ICC-01/12-01/18-T-028-Red-ENG](#), p. 8, line 19 to p. 10, line 25. See para. 27 below.

⁹ For example, under French criminal procedure, extracting data from a mobile phone or a computer after a search would qualify as 'a search and seizure (data seizure and extraction)' ([French Criminal Procedure Code](#), Articles [56](#), [57](#), [76](#), [77](#) and [97](#)). The police, including technical and scientific police generally in charge of doing such extractions, must draw reports (*'procès-verbal'*) for each of the procedural acts they are called upon to perform, including search and seizure and in the present case data extraction ([French Criminal Procedure Code](#), Articles [D. 10](#) and [D. 11](#); Articles [56](#), [57](#), [76](#), [77](#) and [97](#)). The *procès-verbal* shall state the date, time and place of the act performed, and its purpose as well as the identity and signature of its author ([Cour de cassation, criminelle, 6 janvier 1993, 92-81.992](#)). In addition, it appears to be common practice to burn out a computerized inventory of the seized files and to annex it to the *procès-verbal* ([Cour de cassation, criminelle, Chambre criminelle, 14 novembre 2013, 12-87.346](#); [Cour de cassation, criminelle, Chambre criminelle, 11 juillet 2017, 16-81.038](#)). All the parties have access to the *procès-verbal* that must be included in the dossier. The Prosecution has disclosed examples *procès-verbal* related to [REDACTED]: CAR-OTP-2129-0021-R01, CAR-OTP-2129-0022-R01, CAR-OTP-2129-0023-R01, CAR-OTP-2129-0025-R01, CAR-OTP-2129-0026-R01, CAR-OTP-2129-0030-R01, CAR-OTP-2129-0079, CAR-OTP-2129-0080, CAR-OTP-2129-0081, CAR-OTP-2129-0082, CAR-OTP-2129-0083, CAR-OTP-2129-0084-R01, CAR-OTP-2129-0096-R01, CAR-OTP-2129-0095, CAR-OTP-2129-0100-R01, CAR-OTP-2129-0102, CAR-OTP-2129-0104, CAR-OTP-2129-0105-R01, CAR-OTP-2129-0019-R01, and CAR-OTP-2129-0103-R01. See also, Article 149(a) section 2 of the [Netherlands Code of Criminal Procedure](#).

¹⁰ [Edwards and Lewis v UK](#), Judgment, Grand Chamber, Applications nos. 39647/98 and 40461/98, para. 46.

not doing so must be “strictly necessary” “to safeguard an important public interest”.¹¹

13. It is inconceivable that this information does not exist in the Prosecution’s possession since the creation of disk images and documentation of this process is part of a basic and reliable forensic process. The Scientific Working Group on Digital Evidence (‘SWGDE’) is an international association of organizations actively engaged in the field of digital and multimedia evidence. It states in its document ‘Minimum Requirements for Quality Assurance in the Processing of Digital and Multimedia Evidence’:

Conducting an examination on the original evidence media should be avoided if possible. Examinations should be conducted on forensic duplicates or forensic image files.¹²

14. The same document notes that:

All examination processes must be fully documented in case notes to allow for repeatability and all examinations **must culminate in a report**. All reports of examination must address **at a minimum**:

1. evidence examined,
2. examinations requested, and
3. results of examination.¹³

¹¹ [Edwards and Lewis v UK](#), para. 46.

¹² ‘Minimum Requirements for Quality Assurance in the Processing of Digital and Multimedia Evidence’, p. 13, available at: https://drive.google.com/file/d/1K7v6rZXYT_1Z8AcaEj2-JtZOWGOhDc7/view.

¹³ ‘Minimum Requirements for Quality Assurance in the Processing of Digital and Multimedia Evidence’, p. 11. See also ‘SWGDE Best Practices for Mobile Phone Forensics’, section ‘5.4 Documentation’, p. 9, available at: <https://drive.google.com/file/d/18dwENONztbEa0G9GLSUEdXZxeDEeUc-3/view>.

15. The Prosecution has already disclosed some material about items that were seized that contains this kind of information.¹⁴ While the Defence reserves its rights to make submissions and objections about the submission of any of these items, the point here is that they provide some basis for understanding and engaging with what the Prosecution did to the digital evidence and how they did it.¹⁵ The Defence can also better examine whether undisclosed material could be relevant.
16. The second type of documentation or report takes a form resembling an expert report or is an expert report. Information stored on digital devices is not always in a human readable format. Because of this, technicians and experts routinely *retrieve* and *process* information contained on devices into a form that a judge and trial participants can understand, use, and scrutinise. SWGDE minimum requirements, described above, mandate the creation of this kind of report. In many cases, the creators of these reports would need to fulfil the criteria to be an expert before the ICC given that what is involved in doing this is “specialised knowledge, skill or training”¹⁶.
17. It is important for the Defence to be able to examine the full process because time pressures during the investigations may lead to errors. For example, extracting the information quickly after seizure may be required to avoid the evidence changing.¹⁷ If done incorrectly, the process of deriving these reports can corrupt information, omit information, or create misleading results. For this reason such reports usually set out the methodology and techniques that the expert or technician used so that the parties can understand what the person did, what the limitations of the process are, and so on.¹⁸ This material also enables the Defence to consult their own experts or consultants

¹⁴ See, for example, CAR-OTP-2098-0246-R01, CAR-OTP-2098-0233-R01, CAR-OTP-2098-0266-R01, CAR-OTP-2005-0137, and CAR-OTP-2059-1308-R01 (which originates from the CARIIA case and lists files extracted). See also, the sub-reports, for example CAR-OTP-2098-0195.

¹⁵ See, for example, CAR-OTP-2098-0246-R01 at 0252 ‘Methodology’ or CAR-OTP-2005-0137 at 0137.

¹⁶ *Ruto* case, [ICC-01/09-01/11-844](https://www.iccnj.org/judgments/ICC-01/09-01/11-844), Decision on the Sang Defence Application to Exclude Expert Report of Mr. Herve Maupeu (7 August 2013), para. 11.

¹⁷ See also ‘SWGDE Best Practices for Mobile Phone Forensics’, section ‘5. Evidence Collection’, p. 6, available at: <https://drive.google.com/file/d/18dwENQNztbEa0G9GLSueDxZxeDEeUc-3/view>.

¹⁸ See footnotes 13 and 15 above.

to verify the process. This ability to consult is an important part of preparation and greatly diminished without the technical documentation.

B. The Prosecution should have disclosed the material and is applying the wrong standard for disclosure

18. The Prosecution responded to the Defence request for the extraction reports with the incorrect statement of the law¹⁹ of disclosure. It stated:

From the items received from the [REDACTED], all those assessed as material were disclosed to the Defence. In respect of extraction reports, 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. However, 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), or you can properly substantiate how the information sought in this particular case is directly connected to the charges or to a live issue (see Al Hassan ICC-01/12-01/18-859-Red, paras. 9-10), we would be happy to further look into the matter²⁰

19. According to the Appeals Chamber, the term 'material to the preparation of the defence' must be construed broadly and refers to all objects relevant for the preparation of the defence.²¹ Trial Chamber IX has understood this phrase to mean

¹⁹ See Confidential Annex A, p. 2. Email, 15 March 2022 13h26 ('RE: Request for Disclosure - Seizure of [REDACTED]'s Devices').

²⁰ Email, sent 15 March 2022 at 17h45, subject 'RE: Request for Disclosure - Seizure of [REDACTED]'s Devices', see Confidential Annex A.

²¹ *Lubanga* case, Appeals Chamber, [ICC-01/04-01/06-3017](#) A5 A6, Decision on Mr. Thomas Lubanga's Request for Disclosure (11 April 2013 – 'Lubanga Appeals Judgment'), para. 10; *Bemba* case, [ICC-01/05-01/08-632](#), Decision on the Defence Application for Additional Disclosure Relating to a Challenge on Admissibility (2 December 2009), para. 24; *Gaddafi* case, [ICC-01/11-01/11-392-Red-Corr](#), Pre-Trial Chamber: Decision on the Defence Request for an Order of Disclosure (1 August 2013), para. 39; *Banda & Jerbo* case, [ICC-02/05-03/09-501](#), Appeals Chamber: Judgment on the appeal of Mr Abdallah Banda Abakaer Nourain and Mr Saleh Mohammed Jerbo Jamus against the decision of Trial Chamber IV of

that ‘material to the preparation of the defence’ “must be interpreted broadly”²². ICC Rule 77 jurisprudence also does not require that the Defence will use an item in court.²³ The Defence must only surpass a “low threshold”²⁴ which Trial Chamber IX understood to involve *inter alia* “undermining the Prosecution case or supporting a line of argument of the Defence”.²⁵ Being able to support a line of argument precedes an issue becoming live in the case. However, the standard is even lower than being able to support a line of argument²⁶ and can encompass material that would be “significantly helpful to an understanding of important inculpatory or exculpatory evidence”.²⁷ The overriding principle is that the Prosecution should make full disclosure and that non-disclosure is the exception to the rule.²⁸

20. Contrary to the Prosecution’s frequent response to the Defence that a request must be ‘directly connected to the charges or to a live issue’, Rule 77 also requires disclosure of objects that **are not directly linked** to incriminating or exonerating evidence but may otherwise be material to the preparation of the Defence.²⁹

1. *The Prosecution misinterprets or misapplies the Al Hassan decision of Trial Chamber X*

21. The Defence confines the present submissions to the request for the Extraction Reports and investigative note, but the Prosecution has referred to an excerpt of a decision from the *Al Hassan* case seven times to deny Defence disclosure requests.³⁰ The

23 January 2013 entitled "Decision on the Defence's Request for Disclosure of Documents in the Possession [...]" (28 August 2013 – Banda & Jerbo OA4), para. 38.

²² [ICC-02/04-01/15-457](#), para. 4 *citing* Appeals Chamber, *Lubanga* Trial, Judgment on the appeal of Mr. Lubanga Dyilo against the Oral Decision of Trial Chamber I of 18 January 2008 (11 July 2008 – ‘Lubanga OA11’), [ICC-01/04-01/06-1433](#) OA11, paras 77-80.

²³ [Banda & Jerbo OA4](#), para. 42.

²⁴ Trial Chamber IX, [ICC-02/04-01/15-1734](#), para. 22 *citing* [Lubanga OA11](#), paras 76-82; [Banda & Jerbo OA4](#), paras 38-39, 42.

²⁵ [ICC-02/04-01/15-1734](#), para. 22.

²⁶ [Lubanga OA11](#), para. 77.

²⁷ [Lubanga OA11](#), para. 81.

²⁸ *Yekatom* case, [ICC-01/14-01/18-169](#), Pre-Trial Chamber: Decision on the Prosecution’s Request to Vary the Decision on Disclosure and Related Matters (10 April 2019) at para. 16.

²⁹ 11 July 2008 Appeals Judgment, para. 77.

³⁰ [REDACTED][REDACTED].

Ngaisonna Defence cannot assess the full merits of the decision *Al Hassan* decision but for the following reasons, the Prosecution was wrong to apply it to the Defence *inter partes* request on 15 March 2022.

22. *Firstly*, the Appeals Chamber jurisprudence that guides the standard of disclosure in the present case requires a broader standard to be applied.³¹ The excerpt from Trial Chamber X relied upon by the Prosecution is not binding upon Trial Chamber V.
23. *Secondly*, the context and subject matter of the *Al Hassan* Trial Chamber X decision is distinguishable from the present one. The present issue concerns routine disclosure for trial preparation and witness questioning. Trial Chamber X took its decision in the specific context of the Defence requesting confidential correspondences between the Prosecution and a State(s).³² The jurisprudence used by Trial Chamber X to discuss confidential correspondences was a Trial Chamber III's decision taking during a procedure for compensation for the wrongful imprisonment of Mr Bemba. The material Mr Bemba was requesting concerned information about freezing of assets. The Defence does not presently take a position on the jurisprudence in those contexts. It is quite clear that the *Al Hassan* decision subject matter is quite different from the issue before Trial Chamber V and it is not applicable to a standard disclosure request.

³¹ See paras. 19-20 *above*. For Trial Chamber jurisprudence, *see also* para. 35 *below*.

³² The *Ngaisonna* Prosecution cites paras 9-10 of ICC-01/12-01/18-859-Red that recall in footnotes 19-24 a decision taken in ICC-01/12-01/18-768-Red. In footnote 10, that decision bases itself upon a Trial Chamber III decision on compensation ICC-01/05-01/08-3660-Red2, para. 16 which states:

The Chamber has carefully considered the request of Mr Bemba to have access to all under seal and/or ex parte filings, orders or decisions in the instant case concerning requests for cooperation to freeze Mr Bemba's assets. The Chamber recalls the integral nature of the cooperation regime under Part 9 of the Statute to the effective functioning of the Court. Central to that regime is the relationship of trust between the Court and States Parties and the need for confidentiality in the communication of requests and responses. While confidentiality is not absolute and can be lifted in particular instances, it must be demonstrated that there is a specific need for that action to be taken. (bold and underline added)

Thirdly, the requirement for specificity to a trial issue, which the Prosecution relied upon to dismiss the Defence request,³³ appears to have arisen out of the particular features of the *Al Hassan* Defence request. It does not appear to be intrinsic to the standard that Trial Chamber X applied. Trial Chamber X understood the *Al Hassan* Defence to be requesting: “disclosure of all records of formal or informal correspondence with national authorities (including but not limited to Requests for Assistance (‘RFAs’), notes verbales, procès-verbaux, letters and emails).”³⁴ Trial Chamber X considered this “too broad and [could not] be considered ‘in bulk’”.³⁵ The decision was informed by Trial Chamber X’s reasoning that:

materiality is not shown by making general allegations referring to the Defence’s interests in having a general picture of the cooperation and assistance between the national authorities and the Prosecution.³⁶

24. *Fourthly*, the CAR IIB Prosecution relies upon the ‘directly connected to the charges or to a live issue’ strand of Trial Chamber X’s reasoning; however, the Prosecution misinterprets Trial Chamber X. The requests that Trial Chamber X rejected in that decision show that the Chamber was still applying a more broad interpretation than suggested by the Prosecution in the present case.

a. Trial Chamber X’s explanation for rejecting one request is redacted from the Defence in the present case. Nevertheless, it appears that the Prosecution in *Al Hassan* provided further information and this formed part of the reasoning. Trial Chamber X states the “Prosecution has in fact confirmed that this RFA [REDACTED] and not relevant to the preparation of the Defence”.³⁷

³³ See para. 18 *above* (“or you can properly substantiate how the information sought in this particular case is directly connected to the charges or to a live issue (see *Al Hassan* ICC-01/12-01/18-859-Red, **paras. 9-10**)” – bold and underlined added).

³⁴ [ICC-01/12-01/18-859-Red](#) recalls in footnotes 19-24 a decision taken in [ICC-01/12-01/18-768-Red](#). See para. 1 of [ICC-01/12-01/18-768-Red](#) (bold underline added).

³⁵ [ICC-01/12-01/18-768-Red](#), para. 8.

³⁶ [ICC-01/12-01/18-768-Red](#), para. 13 (bold underline added).

³⁷ [ICC-01/12-01/18-768-Red](#), para. 17.

- b. Trial Chamber X dismissed one request for being “largely speculative”,³⁸ “grossly hypothetical”,³⁹ and seeking an “admission from the Prosecution as regards investigative steps”.⁴⁰ Another was also “grossly speculative” and was seeking an “admission from the Prosecution as regards investigative steps”.⁴¹
- c. Finally, another request was found to be overly broad given that it “relate[d] to **all and any material** that could have been requested by the Prosecution”.⁴²

25. In sum, given the bases upon which Trial Chamber X rejected requests it appears that the standard being applied by Trial Chamber X’s may in fact have been as broad as the Appeals Chamber standard. It seems that due to the specific aspects of the *Al Hassan* case, the nature of the arguments raised, and the issues, this may have led to a particular articulation of the standard that the Prosecution has now misunderstood as setting out a narrower standard.

26. *Fifthly*, the Trial Chamber X decision did not state that specificity in a Defence request was a pre-condition for an obligation to exist to disclose relevant material or a trigger that created the actual obligation.⁴³

27. *Finally*, in the *Al Hassan* case, the record shows that the Defence had access to at least one forensic extraction reports.⁴⁴ This indicates that the *Al Hassan* Prosecution considered that forensic extraction reports are material to Defence preparation.

2. *The reasons the Prosecution gives for rejecting the Defence request are circular and unfair.*

28. The Prosecution rejected the Defence request noting that the Defence had not provided “a founded basis to question the extraction process, [or] the provenance of

³⁸ [ICC-01/12-01/18-768-Red](#), para. 22.

³⁹ [ICC-01/12-01/18-768-Red](#), para. 23.

⁴⁰ [ICC-01/12-01/18-768-Red](#), para. 23.

⁴¹ [ICC-01/12-01/18-768-Red](#), para. 24.

⁴² [ICC-01/12-01/18-768-Red](#), para. 20 (bold underline added).

⁴³ [ICC-01/12-01/18-768-Red](#), para. 10.

⁴⁴ See citation at footnote 8 *above*.

the material”.⁴⁵ The first two criteria the Prosecution raises involve circular reasoning. An extraction report is a precondition to examining the extraction process. Only the most blatant examples of data-corruption or contradiction of extracted material by other evidence could otherwise satisfy the Prosecution standard.

29. The Prosecution arguments are also in contradiction with judicial instructions provided pre-joinder. The Prosecution states that disclosure “would unreasonably and unnecessarily burden the Parties and Participants with information that is not material”.⁴⁶ However, as noted by the Pre-Trial Chamber in the *Yekatom* case

[b]y claiming that she does not have an obligation to disclose information that has ‘no evidentiary value’ and is ‘irrelevant to the Defence’ the Prosecutor undermines the principle that disclosure is the rule and that non-disclosure is the exception.⁴⁷

30. Moreover, material that would enable examining and/or challenging the reliability of evidence that the Prosecution is submitting is by definition connected to a live issue in the case. The reliability of Prosecution evidence in a case is not a given. Where the Prosecution submits material that it has derived from a particular source, the Defence is entitled to examine the process by which the Prosecution derived the material to check whether the process is itself reliable.
31. Given that the Prosecution should have already disclosed the material, the Defence requests the Trial Chamber to find that the Prosecution has violated its disclosure obligations. The Defence does not request further remedies consequent to this violation at this stage since the Defence cannot assess the prejudice the Prosecution may have caused without the material in hand. However, for this reason, the Defence reserves its rights to make further submissions concerning the submission of the items

⁴⁵ See Confidential Annex A.

⁴⁶ See para. 18 above.

⁴⁷ *Yekatom* case, [ICC-01/14-01/18-169](#), Pre-Trial Chamber: Decision on the Prosecution’s Request to Vary the Decision on Disclosure and Related Matters (10 April 2019), para. 16.

which are connected to the present request for disclosure (i.e. items submitted by the Prosecution that are derived from the Physical Media seized from [REDACTED]). Additionally it reserves its rights to recall witness [REDACTED] should the Chamber grant the present request, and should material that the Prosecution discloses demonstrate the need for this. The Defence does not presently anticipate that it will need to recall [REDACTED].

C. The Extraction Reports are relevant and material to the Defence case

32. Forensic Extraction Reports are necessary to ensure the integrity and reliability of material generated through digital extraction processes. They are also necessary to understand the evidence. The reports assist the Defence to understand the evidence because they help the Defence understand the limitations of the extracted information or the skill and care take by the technician/expert conducting the examination and/or work.⁴⁸ They also enable the Defence to better instruct experts and consultants.
33. In addition to the reasons mentioned above,⁴⁹ the Extraction Reports are material to Defence preparation for further reasons. Because extraction reports commonly include, for example, the dates of the creation and/or modification of files, they assist the Defence to understand the time-line in which events may have occurred and consequently enable the Defence to investigate and/or prepare questions for court.
34. Moreover, while an item may not be relevant in-of-itself, a forensic extraction report may provide information about files that is relevant to the Defence. For example, *seemingly* irrelevant information such as knowing that vacation photos were created at the same date as another item may lead to a re-evaluation of the probative value of an item that is seemingly relevant. In this example, the photos would be evidence that a relevant item may have been received in a context where the recipient's attention

⁴⁸ The publically available information about the investigator involved does not indicate any specialisation with digital evidence. [REDACTED]. Footnotes 62 and 70 indicates why this appears to be the author of the report. If the Prosecution provided the report, this would enable the Defence to examine whether the report was created with the requisite level of skill and care.

⁴⁹ See paras 13-14.

may have been elsewhere. Extraction reports should typically provide this information and are as foundational for enabling the Defence to engage fully with certain materials used within a trial as the chain of custody is necessary to understand other items the Prosecution collected.

35. The jurisprudence on disclosure from Trial Chamber's VII and IX also support the present request. Those Chambers noted "that it is imperative that the Defence be able to test the reliability of the procedure employed in collecting the evidence against them."⁵⁰ This reasoning concerned the disclosure of RFAs that would illustrate the legality of material collected, but the objects of the present request are analogous. If the Prosecution does not disclose this material, then it effectively denies the Defence the opportunity to scrutinise and challenge material derived from the seized items.
36. It is important that the Defence be able to independently scrutinize the evidence. The Prosecution position appears to be that it is asking the Defence to take it on faith that the Prosecution handled and processed all the digital evidence correctly. Proceedings before the ICC have demonstrated that the Defence may identify reliability issues and flaws that impact upon probative value in technical material that the Prosecution has not. The disclosure of technical material has enabled the Defence to put forward arguments that concern substantive matters in final briefs.⁵¹
37. Two examples from the material obtained from [REDACTED] demonstrate the materiality of the extraction reports to Defence preparation.

⁵⁰ Trial Chamber VII, *The Prosecutor v. Jean-Pierre Bemba et al.*, Decision on Arido Defence Request for Disclosure of Documents Related to the Cooperation between the Prosecution and the Cameroonian Authorities, 25 February 2016, [ICC-01/05-01/13-1658](#), para. 6; Trial Chamber VII, *The Prosecutor v. Jean-Pierre Bemba et al.*, Decision on Bemba Defence Request for Disclosure and Lifting of Redactions Related to Collection of Telecommunication Evidence, 17 February 2016, [ICC-01/05-01/13-1632](#), para. 19; Trial Chamber IX, [ICC-02/04-01/15-457](#), Decision on Disclosure Issues Arising Out of First Status Conference (7 June 2016), para. 13.

⁵¹ [ICC-02/04-01/15-1722-Corr-Red](#), paras 250-251, 255-256, 265, 269, and 273. The Defence before Trial Chamber IX makes reference to receiving material about the process, [ICC-02/04-01/15-T-128-ENG](#), p. 59, lines 4-5. This material appears to have been used throughout the questioning. See [ICC-02/04-01/15-T-128-ENG](#), p. 71, lines 17-18.

38. *Firstly*, the list of phone numbers used by [REDACTED]⁵² has many of the features of a technical examination or forensic expert report. However, the Prosecution has provided little information to understand the item. While the Prosecution asserted to [REDACTED] that [REDACTED]⁵³, [REDACTED] was not afforded the time to provide an informed answer and the Defence is not able to conclude that it is all the contacts without more disclosure. The item provides no way to determine whether it was prepared with the necessary skill and care to consider its contents reliable.⁵⁴ Several elements of the item hint at the need for more information. Among them are:
- a. The items contains a peculiar record that hints at data corruption;⁵⁵
 - b. The report itself warns the reader that “Last IMEI digit might be incorrect. Please check manually on the device”;⁵⁶ and
 - c. Other information indicates that at least some of the information in the phone postdates the charged period.⁵⁷
39. The metadata and chain of custody about [REDACTED] when compared to the item make no sense and do not assist the Defence. The Prosecution asserted that [REDACTED] was taken from [REDACTED] on [REDACTED].⁵⁸ The report contains the date of **19 June 2020** on its cover page.⁵⁹ However at the bottom of the item is the date **25 June 2020**. The earliest entry on chain of custody disclosed to the Defence is **5 July 2020**. It shows [REDACTED] provided the report to the Prosecution.⁶⁰ Given [REDACTED]’s reaction to the item, this appears unlikely. The Prosecution has

⁵² [REDACTED].

⁵³ ICC-01/14-01/18-T-108-CONF-ENG, p. 8, lines 23-24.

⁵⁴ The item appears to have been created with a Cellebrite product due to a reference to ‘UFED’ in [REDACTED]. The manufacturer of this device provides information on ‘How to Properly Handle Phones Seized for Investigation’, available at: <https://cellebrite.com/en/how-to-properly-handle-phones-seized-for-investigation/>.

⁵⁵ [REDACTED], entry 176 (name: “F4CAE550DC96”).

⁵⁶ [REDACTED].

⁵⁷ [REDACTED], entry 232 (‘CPI’).

⁵⁸ [REDACTED].

⁵⁹ [REDACTED].

⁶⁰ [REDACTED].

indicated that the code of the investigator⁶¹ in the chain of custody corresponds to the name that is contained within a file path.⁶² Thus, the provenance of the item itself is not wholly clear.

40. The Defence could clarify whether these are issues at all if the Prosecution had disclosed a forensic extraction report.
41. *Secondly*, an extraction report would enable the Defence to identify and substantiate targeted disclosure requests for *Whatsapp* recordings that were ostensibly taken from [REDACTED]'s phone and understand the scope of material seized. The Prosecution used several *Whatsapp* recordings during [REDACTED]'s interviews.⁶³ Others recordings may be relevant to Defence preparation but without an exhaustive picture of what was recorded and when, it is impossible for the Defence to put forward well founded arguments. [REDACTED] is a form of extraction report but provides incomplete information. The Defence received only 10 *WhatsApp* audio conversations in disclosure for [REDACTED].⁶⁴ [REDACTED] refers to seven undisclosed⁶⁵ audio conversations and one disclosed conversation⁶⁶ that have a similar name to the titles of the audio conversations which the Prosecution disclosed.
42. A comprehensive extraction report may also provide more information that is relevant to understanding the context of the recordings. The disclosed report indicates that certain audios were 'Played'⁶⁷ whereas as other audios were 'Delivered'.⁶⁸ This suggests more strongly that the receiver did not hear them.⁶⁹ Clarifying this and

⁶¹ 'A.4 - 0007' query sent to the Prosecution 9 March 2022 at 17h29, subject line 'Request for disclosure pursuant to Rule 77'. Email of 10 March 2022 16h58 to Trial Chamber V, subject 'OTP Lifting A.4 redactions to names of OTP investigator' contains the answer to the Defence query.

⁶² 'C:/Users/[REDACTED]/AppData/Local/Temp/[REDACTED]-extraction-part.zip [REDACTED]' (bold underline added). Compare with [REDACTED] (for example, [REDACTED]).

⁶³ See for example [REDACTED]; [REDACTED].

⁶⁴ [REDACTED].

⁶⁵ [REDACTED].

⁶⁶ [REDACTED].

⁶⁷ [REDACTED], entry 19 "Status: Played".

⁶⁸ [REDACTED], entry 24 "Status: Delivered".

⁶⁹ The fact that an audio was played does not confirm that the receiver heard the message.

having the comprehensive information is material to Defence preparation and the potential formulation of questions for court.

43. Provision of the Extraction Report of the *WhatsApp* communications would also assist in resolving questions about the chain of custody. There are numerous differing dates scattered throughout the seized *WhatsApp* materials. The report title page claims that the “Import started” on **3 July 2020**. The “FilePath” on the cover page suggests that the investigator, [REDACTED], was involved in the extraction.⁷⁰ The actual extracted database file that the technician/expert was working on has a file name that indicates that it dates from **22 June 2020**.⁷¹ The extracted files also are associated with different dates. For example, file [REDACTED] appears to be an audio that is extracted from a device of [REDACTED] that again, according to the chain of custody, was provided by [REDACTED] to [REDACTED] on **5 July 2020**. Yet according to an audio placeholder, someone extracted this item on **29 June 2020**.⁷² The Defence does not have access to all the extraction information for *WhatsApp* messages and audios, but access to this information would enable the Defence to clarify whether all this seeming conflicting information and other concerns can be explained. These issues are material to Defence preparation.

D. The investigation note

44. The Trial Chamber should order the Prosecution to provide or produce the investigator note documenting what the Prosecution found in the seized materials and why the Prosecution did not disclose the contents of certain items seized from [REDACTED] to the Defence. The Prosecution *inter partes* response seems to indicate that the Prosecution did not disclose all digital material that it received from

⁷⁰ “I:\Imported\CAR - PRF [REDACTED]IEU PRF 1 [REDACTED]IEU PRF 1 [REDACTED]\Audios\PTT-20181220-WA0000.opus_Converted.wav” (bold underline added).

⁷¹ See [REDACTED] “Backup 2020-06-22.1.db.crypt12\Chats\Private\33758474303”. Each entry in the table indicates that the “Source file” is “/sdcard/WhatsApp/Databases/msgstore-2020-06-22.1.db.cryp12” (bold underline added).

⁷² [REDACTED].

[REDACTED]. Yet, the Prosecution has refused to confirm whether it selected materials or not despite the Prosecution RFA explaining that as regards the digital devices the Prosecution was requesting [REDACTED]

[REDACTED].⁷³

45. Information obtained from a prosecution witness is presumptively material to the preparation of the Defence unless those items (i) are truly repetitive in the sense that they are duplicates; or (ii) bear no connection to the events relevant to the charges, such as items of a purely personal nature.⁷⁴ The Prosecution has not been explicit about either basis of non-disclosure and has instead seemingly sought to evade the Defence request for information.
46. The Prosecution has already disclosed an investigative report of precisely this nature pursuant to Rule 77.⁷⁵ The disclosed reports describes Prosecution investigators reviewing material seized from an individual by [REDACTED].⁷⁶ This report provides an outline of some of what the [REDACTED] seized and how the Prosecution inspected the material. It also provides some rationale for why the investigators did not retain certain material. In indicating what the Prosecution did not retain, it also assists the Defence in focusing disclosure requests or raising concerns about the investigative process. Though its reasoning could be more articulated, and much more reference could be made to the material that was not retained, this demonstrates that (a) the Prosecution documents such investigative steps, (b) there is no negative results that flow from providing this to the Defence, (c) it has not overburdened the proceedings, and (c) it is of assistance to the Defence to understand what material was seized and not retained as well as how material came to enter the proceedings.

⁷³ [REDACTED].

⁷⁴ *Bemba* case, [ICC-01/05-01/08-1594-Red](#), Decision on the Defence Motion for Disclosure Pursuant to Rule 77 (29 July 2011) at paras. 22-23.

⁷⁵ Trial Rule 77 package 56, 4 August 2021, ICC-01/14-01/18-1084-Conf-Anx, p. 3, line 14.

⁷⁶ [REDACTED].

47. The Prosecution is not privy to the Defence strategy and cannot anticipate in all cases what will be material to Defence preparation. Without basic information concerning the seized items, the Defence cannot substantiate further disclosure requests and the Prosecution may improperly deny information from the Defence. This renders the rights enshrined within the courts rules illusory. Moreover, the responses the Prosecution has been giving to Defence requests for information hinder the resolution of *inter partes* requests and exhaust Defence resources.
48. A fair process requires that the Defence has basic information available so as to provide a basis for the disclosure of material which has a relevance not obvious to the Prosecution. The straightforward provision of information can expedite Defence lines of inquiry. The Prosecution response might *implicitly* suggest that the items had no connection to [REDACTED] but *implicit* communication is not a fair way to conduct such responses. A simple explanation in general terms of what the [REDACTED] actually seized and why the Prosecution did not deem the material relevant to Defence preparation could in some cases suffice to satisfy the Defence query. Conversely, the Defence might see something of importance and be able to bring this to the attention of the Prosecution.
49. In view of the fact that the Prosecution should have disclosed this information, the Defence requests the Trial Chamber to find that it violated its disclosure obligations.

IV. Relief Sought

50. The Defence respectfully requests the Chamber to:

- a. **ORDER** the Prosecution to DISCLOSE the digital extraction reports of three phones, one computer, three USB keys and one hard disk seized from [REDACTED] and described in [REDACTED];
- b. **ORDER** the Prosecution to provide an investigative report that documents what was found on items seized from [REDACTED] and why an investigator(s) did or did not select certain objects for forensic examination;
- c. **FIND** that the Prosecution violated its disclosure obligations with respect to the failure to disclose the digital extraction reports and investigative report.

Respectfully submitted,



Mr Knoops, Lead Counsel for Patrice-Edouard Ngaïssona

Dated this 6 June 2022

At The Hague, the Netherlands.