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**International
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Court**



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No.: **ICC-01/14-01/18**

Date: **2 September 2019**

PRE-TRIAL CHAMBER II

Before: Judge Antoine Kesia-Mbe Mindua, Presiding Judge
Judge Tomoko Akane
Judge Rosario Salvatore Aitala

**SITUATION IN THE CENTRAL AFRICAN REPUBLIC II
IN THE CASE OF *PROSECUTOR v. ALFRED YEKATOM AND PATRICE-
EDOUARD NGAÏSSONA***

Confidential

**Prosecution's Response to the Yekatom Defence's Motion for Inspection of
Information on the Organisation of the Seleka, ICC-01/14-01/18-297**

Source: Office of the Prosecutor

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

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I. INTRODUCTION

1. The Office of the Prosecutor (“Prosecution”) requests Pre-Trial Chamber II (“Chamber”) to dismiss the Yekatom Defence’s Motion for Inspection of Information on the Organisation of the Seleka¹ (“Motion”). The disclosure sought is not material to the preparation of the Defence, particularly given the limited scope of the Confirmation Hearing and the information regarding the Seleka’s organisation and structure already available in the material disclosed.

II. CONFIDENTIALITY

2. This Response is filed as “Confidential” as it addresses matters erroneously made public by the Defence. A public redacted version of the filing will be filed as soon as practicable.

III. SUBMISSIONS

A. The information sought is not material to the preparation of the Defence under rule 77

3. The Prosecution has reviewed the list of 31 “insiders”² for whom the Defence seeks inspection of any material they have provided about the organisation of the Seleka or ex-Seleka. To the extent that the Prosecution has obtained such material from any of these individuals,³ it does not consider this information to fall within the scope of rule 77. In conducting this assessment, the Prosecution is guided by the Chamber’s direction not to “disclose the greatest volume of evidence”,⁴ but rather ensure that “only such evidence is disclosed which is of *true relevance* to the case and

¹ ICC-01/14-01/18-297.

² ICC-01/14-01/18-297, Annex A.

³ Certain entries in the list may be misspelled or adopt one of several name/spelling variants for a given individual. Other entries, including some references to Generals or Colonels with highly common names, could apply to any number of individuals. Nonetheless, the Prosecution has applied its best efforts to discern who the names likely refer to and conducted its review accordingly.

⁴ ICC-01/14-01/18-64-Red, para. 18, *citing* ICC-01/12-01/18-31-tNG-Corr, para. 25; ICC-02/04-01/15-203, para. 20; ICC-01/05-01/08-55, para. 67.

apt to support a particular factual allegation underlying the requisite legal elements.”⁵

4. Consistent with the Chamber’s guidance, the assessment of whether information is considered *material* to the preparation of the Defence under rule 77 cannot be conducted in isolation, but rather, must be based on the specific circumstances of the case as charged and in light of the information already available to the Defence on a particular issue. For instance, in isolation, a piece of evidence could be considered *relevant* to the case in a general sense, but if the Defence is already in possession of several sources of evidence which disclose substantially the same information to which the piece of evidence is largely duplicative or cumulative, that piece of evidence is not *material* (i.e., “*nécessaire*”) ⁶ to the Defence’s preparation. As discussed below, this is particularly so at the present stage of the proceedings. Notably, none of the cases cited by the Defence in their Motion⁷ address the point of disclosure of cumulative materials at the pre-confirmation stage specifically. Moreover, while the Appeal Chamber in the *Banda & Jerbo* case⁸ expressed the need for a degree of caution in denying inspection of materials on the basis that other material on the same issue was already provided to the Defence, it nonetheless held that “[w]here appropriate, in deciding whether the information sought continues to be material to the preparation of the defence, *the Chamber may also take into account whether the defence has already received relevant documents from the Prosecutor.*”⁹ This observation is particularly apposite in the present circumstances, given the stage of the proceedings and the Chamber’s previous admonishment regarding the limitation of disclosure to truly relevant evidence.

⁵ ICC-01/14-01/18-64-Red, para. 18 (emphasis added).

⁶ See *règle 77 de Règlement de procédure et de preuve* (which provides uses the term “*nécessaires*” as distinguished from merely “relevant” or “pertinent”; see also, e.g. article 69(3) which uses the term “pertinent” in the official French text denoting the term ‘relevant’, as used in the English text).

⁷ Motion, para. 16-18.

⁸ ICC-02/05-03/09-501, para. 40.

⁹ ICC-02/05-03/09-501, para. 40 (emphasis added).

5. In this instance, the Defence has already received disclosure of a number of comprehensive United Nations and other reports containing information on the organisation of the Seleka, which is well documented in open source publications. Beyond these open source reports, the Defence is also in receipt of a number of statements from Anti-Balaka “insiders” and other witnesses who themselves provide direct evidence about armed engagement with the Seleka, including information regarding the Seleka’s military capacity.

6. In determining whether the information sought by the Defence falls within the scope of rule 77, the Prosecution also notes that the temporal period of the charged crimes in the present proceedings commences in December 2013. At this point, despite its official “dissolution”, the Seleka was for all intents and purposes running the Government of the Central African Republic (“CAR”), having co-opted the resources, structures and military apparatus of the State, rendering the issue of “organisation” for the purposes of establishing a Non-International Armed Conflict (“NIAC”) effectively moot. To the extent that the Defence seeks information on the structure of the ex-Seleka factions *after* the resignation of President DJOTODIA and the collapse of the Seleka regime in January 2014, the Prosecution confirms that such information is generally not contained in the evidence obtained from Seleka “insiders”, and information the Prosecution considers material in this respect has already been disclosed to the Defence.

B. The stage of the proceedings have a bearing on disclosure

7. Notwithstanding that the Prosecution’s obligations remain constant throughout the proceedings, the stage of the case necessarily bears on disclosure. As well as the rights of the Defence, the disclosure process affects the competing interests of judicial economy, efficiency and expedition, which also must be fairly balanced. For this reason, this Chamber has been clear in its directive that the Prosecution disclose only material of true relevance.

8. At this early stage, the Prosecution's disclosure assessments of materiality must consider factors which differ between the confirmation of charges stage and that of trial given their divergent scopes and purposes, for instance the standards of proof. The confirmation of charges process does not envisage a full contestation of all factual and legal issues to the beyond reasonable doubt standard. Thus, the Prosecution should not be expected to disclose everything in its possession that could conceivably be relevant to a future trial proceeding — the scope of which is still to be fully determined pending the outcome of the confirmation process — but rather, information focussed on what is material to the preparation of the Defence for the confirmation of charges proceedings specifically. Despite this, the Prosecution has nonetheless disclosed a substantial volume of material in the pre-confirmation phase of proceedings; substantially more than has been disclosed in other ICC cases during this phase, including information and statements relating to around 150 witnesses, which is unprecedented at the Court.

9. In this respect, as noted in separate filings, the Prosecution is guided by the *Lubanga* "Bulk Rule", which provides that "prior to the confirmation hearing, the Prosecution's obligation was solely to disclose to the Defence *the bulk* of potentially exculpatory evidence or evidence which could be material to the preparation of the Defence."¹⁰ The Bulk Rule has also been followed by other Pre-Trial Chambers. For instance, the Pre-Trial Chamber in the *Katanga & Ngudjolo* proceedings noted that it had "held on several occasions that the specific features and limited scope and purpose of the confirmation hearing allow for the Prosecution to fulfil its article 67(2) and rule 77 disclosure obligations for the purposes of that hearing by disclosing, sufficiently prior to the start of the hearing, the bulk of the materials identified as potentially exculpatory or otherwise material to the Defence's preparation for the confirmation hearing ("the bulk rule")."¹¹ While the Bulk Rule has not been applied

¹⁰ ICC-01/04/01/06-803-tEN, para. 154 (emphasis added), citing ICC-01/04-01/06-102 or ICC-01/04-01/06-581-Conf-tEN ("Bulk Rule").

¹¹ ICC-01/04-01/07-621, para. 8.

consistently across all Pre-Trial Chambers, the Prosecution avers that, particularly in the context and circumstances of this case, it remains the most fair and pragmatic approach. It is fully in line with the fundamental rights of the Suspects and the statutory framework, which envisages a limited scope and purpose of the confirmation of charges proceedings.

C. Unwarranted disclosure of information related to the Seleka Investigation will negatively affect judicial economy

10. As the Chamber is aware, the Prosecution advanced its investigations into alleged crimes committed by the Anti-Balaka and by the Seleka ("Seleka Investigation") in parallel. In discharging its disclosure obligations in these proceedings, the Prosecution has sought to review all of the information in its possession, including information obtained primarily in connection with the Seleka Investigation, to determine whether it is subject to disclosure under article 67(2) or rule 77. Contrary to the Defence suggestion,¹² the Prosecution has not used the fact of its on-going investigation into Seleka crimes to deny inspection of material under rule 77.

11. As such, the Prosecution has already disclosed to the Defence a substantial amount of information relating to the Seleka Investigation, including witness testimony from individuals with knowledge of the Seleka organisation or structures, where the Prosecution has assessed this evidence as falling within the scope of article 67(2) or rule 77. Pursuant to the Chamber's instructions, this evidence has been disclosed without any non-standard redactions applied to information regarding the Seleka's general organisation and structure.

12. As the Chamber is also aware, disclosure of potentially sensitive information relating to the Seleka Investigation in these proceedings also carries a substantial

¹² Motion, para. 20.

administrative and logistical burden in terms of putting in place witness protection measures and filing detailed motions for non-standard redactions to protect the integrity of the ongoing Seleka Investigation. While the Prosecution accepts that it bears the responsibility for taking such measures in a timely manner in line with its disclosure obligations, it re-emphasises the resource intensive nature of this exercise. To the extent that the Prosecution could be compelled, at this early stage of the proceedings, to disclose witness related materials from Seleka insiders with only speculative or tangential relevance to the Defence case — much less a Prosecution case, the contours of which the Chamber has yet to determine — this would likely result in substantial delays while witness protection measures are assessed, implemented, and further motions for redactions are filed. The impact this would have on judicial expedience further supports the necessity for disclosure under rule 77 to be limited to what is genuinely *material* to the preparation of the Defence, particularly at the pre-confirmation stage.

IV. RELIEF SOUGHT

13. For the above reasons, the Prosecution requests the Chamber to dismiss the Motion.



Fatou Bensouda, Prosecutor

Dated this 2nd day of September 2019

At The Hague, The Netherlands