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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

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

Confidential

**Defence proposals for redactions of the “Decision on the confirmation of charges against
Alfred Yekatom and Patrice-Edouard Ngaïssona” (ICC-01/14-01/18-403)**

Source: Defence of Patrice-Edouard Ngaïssona

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

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I. Introduction

1. The Defence of Patrice-Edouard Ngaïssona (the “Defence”) hereby respectfully submits its proposals for redactions to be applied to the Pre-Trial Chamber II’s (“Chamber”) “Decision on the confirmation of charges against Alfred Yekatom and Patrice-Edouard Ngaïssona” (“Confirmation Decision”) pursuant to the Chamber’s order.¹
2. The Defence submits that, in light of the fundamental principle of publicity of proceedings, which warrants that minimal redactions be applied to the Confirmation Decision (A), the Prosecution’s blanket request to redact all pseudonyms from the Confirmation Decision, in particular in the absence of any substantiation for its request (B) and the specific redaction proposals made by the the Prosecution, as identified below (C), should be rejected.

II. Confidentiality

3. The present submissions are filed on a confidential basis under Regulation 23bis(2) as they refer to documents of the same classification, which contain confidential information.

III. Submissions

A. The general principle of publicity warrants minimal redactions of the Confirmation Decision

¹ ICC-01/14-01/18-403-Conf, p. 104.

4. Articles 64(7) and 67(1) of the Rome Statute establish a presumption in favour of public proceedings.² The principle of publicity is a fundamental component of fair trial rights.³ It is a guarantee that is also owed to the general public.⁴
5. Exceptions to the general rule of publicity must be supported by compelling arguments. As held by the Trial Chamber in *Bemba*:

“While certain matters may be addressed confidentially to protect, *inter alia*, "confidential or sensitive information" or the safety and well-being of witnesses, requests for confidential treatment must be appropriately justified.”⁵

6. In its submissions dated 16 December 2019,⁶ the Prosecution failed to provide such justification in support of its redaction proposals. Its general reference to Article 68(1) and Rules 81(2) and (4) of Procedure and Evidence (“Rules”) in its cover filing⁷ falls short of providing appropriate justification for its proposed redactions.
7. More specifically, the Prosecution failed to show how any potential risk of prejudice to the Prosecutor’s ongoing investigations or the protection of witnesses outweigh the rights and interests of the Defence.

² Prosecutor v. Lubanga, Order on numbering of evidence, ICC-01/04-01/06-2432, para 1: “all evidence will be public unless there is an order specifying otherwise”; Prosecutor v. Bemba, Public Redacted Version of the Chamber’s 11 November 2011 Decision regarding the prosecution’s witness schedule, ICC-01/05-01/08-1904-Red, para. 18. In 1996, the Preparatory Committee indicated: “With regard to paragraph 4, the view was expressed that the principle of public trials should be clearly stated as the strong preference in the Statute and that any exceptions should be very limited, Preparatory Committee 1996, Report (Report of the Preparatory Committee on the Establishment of an International Criminal Court), Vol. I (Proceedings of the Preparatory Committee during March-April and August 1996), para. 267.

³ Prosecutor v. Mbarushimana, Decision on issues relating to the publicity of proceedings in the case, ICC-01/04-01/10-7, para. 7; Prosecutor v. Lubanga, ICC-01/04-01/07-T-147-CONF-ENG ET, 26 May 2010, p. 42.

⁴ See, for instance, Article 6(1) European Convention on Human Rights; Article 14(1), International Covenant for Civil and Political Rights; ECHR, *Werner v. Austria*, Judgement of November 24, 1997, para. 45, A. Cassese et al., *The Rome Statute of the International Criminal Court: a commentary*, Oxford (2002), p. 1281: “The same principle also guarantees freedom of information for the public on the functioning of a public and international institution”.

⁵ Prosecutor v. Bemba, Public Redacted Version of the Chamber’s 11 November 2011 Decision regarding the prosecution’s witness schedule, ICC-01/05-01/08-1904-Red, para. 18 [footnotes omitted], emphasis added.

⁶ ICC-01/14-01/18-405.

⁷ ICC-01/14-01/18-405, para. 2.

B. The Prosecution's blanket request to redact all witness pseudonyms should be rejected

8. The Prosecution requests, in addition to specific requests for redactions of the Confirmation Decision as provided in Annex A to its submissions,⁸ that *all* pseudonyms be redacted in the Confirmation Decision, including footnotes.
9. Such a broad exception to the general rule of publicity not only infringes on Mr Ngaïssona's fundamental right to a public hearing⁹ but is also unwarranted. *First*, the Prosecution fails to substantiate its request that all pseudonyms should be redacted.¹⁰ Such a blanket request should be rejected by the Chamber, particularly in the absence of justification for its request. *Second*, the Chamber's consistent use of pseudonyms in the Confirmation Decision already serves the purpose of preserving the anonymity of witnesses vis-à-vis the general public and to protect their identities. This protective measure applied by the Chamber is, moreover, sufficient to preserve the integrity of ongoing investigations and the Prosecution has failed to provide any indication to the contrary. Even if the Chamber were to conclude that the redaction of certain identifying information relating to particular witnesses was warranted, the redaction of the information itself would sufficiently serve the purpose of preserving the witnesses' identities, without the need to redact the witness' pseudonyms as well.
10. The Defence therefore respectfully requests the Chamber to reject the Prosecution's blanket request to redact all pseudonyms, in particular in the absence of any substantiation by the Prosecution for requesting such a far-reaching measure.

⁸ ICC-01/14-01/18-405-Conf-AnxA.

⁹ Articles 67(1) and 64(7), Rome Statute.

¹⁰ As mentioned above, this runs contrary to the Prosecution's obligations, See Prosecutor v. Bemba, Public Redacted Version of the Chamber's 11 November 2011 Decision regarding the prosecution's witness schedule, ICC-01/05-01/08-1904-Red, para. 18.

C. Specific redaction proposals made by the Prosecution are entirely unfounded

11. In addition to the arguments raised above, the Defence challenges the following specific redactions proposed by the Prosecution.

12. *First*, at paragraph 59, the Defence objects to the Prosecution's proposal to redact the following passage:

59. (...) Considering the breadth and complexity of the situation in the CAR, where the Prosecutor's investigation is still ongoing, it indeed cannot be excluded that this or another Chamber of the Court will be called in the future to adjudicate the facts or some of the facts underlying the charges in this case in respect of other suspects.

13. The "breadth and complexity of the situation in the CAR", the fact that the Prosecution's investigation is still ongoing, and the speculative scenario that other suspects may potentially be brought one day before the Court, are all of a general nature and part of the public domain. The redaction of this broad and general information is entirely unfounded and should therefore be rejected.

14. *Second*, the Defence opposes the Prosecution's proposed redaction of the near-entirety of paragraph 77, which once more, contains information of a general nature. For instance, the fact that Steve Yambété led the COAC and that Lévy Yakitité led the COCORA are both well-known facts which are in the public domain.¹¹ The Prosecution's allegation that Mr Ngaïssona would have been

¹¹ See for instance: https://www.acap.cf/Mike-Steve-Yambete-decide-a-soutenir-les-actions-politiques-du-President-Francois-Bozize_a5124.html; <http://beafrikanews.centerblog.net/66-centrafrique-coac-remplace-cocora-pour-la-securite>; <http://www.rfi.fr/afrique/20130303-rca-cocora-action-demission-centrafrique-gouvernement-centrafrique-bozize-zuma>.

involved with COCORA is also publicly known.¹² Moreover, the Chamber's conclusions contained in paragraph 77 are based on several sources, including witness testimonies, whose identities are protected through the use of pseudonyms. This further diminishes the potential identifying nature of the information provided therein.

15. *Third*, the proposed redaction of the following last sentence of paragraph 127 of the Confirmation Decision is unwarranted: "The Chamber further observes that these crimes took place in the aftermath of 5 December 2013 Attack and that they were also perpetrated against Muslims or persons perceived to be affiliated with or supportive of the Seleka". This Chamber finding, which refers broadly to "these crimes", is general in nature and its proposed redaction by the Prosecution bears no connection with any of the limited grounds for exceptions to the principle of publicity provided under article 68(1) and Rules 81(2) and (4) of the Rules.

16. *Fourth*, the Defence opposes the Prosecution's proposed redaction of the entirety of paragraph 187, which goes well beyond any aim of protecting witnesses or ongoing Prosecution investigations. Should the Chamber find that the information contained in this paragraph is potentially identifying in nature, the Defence proposes the following lesser redactions, which strikes a more appropriate balance between the principle of publicity and the protection of witness identities:

187. Third, the Chamber notes that the evidence related to Sébastien Wenezoui having been considered a traitor for seeking to open access to the cemetery, makes no mention of Ngaïssona. Rather, it states in general that '[Wenezoui] a été considéré comme un traître' and '[h]e was called a traitor for this by those in [Boeing]'.⁴¹⁶ The Prosecutor

¹² See ICC-01/14-01/18-T-008-Red-ENG, p. 79, lns 10-15.

further presents a decision signed by Ngaïssona suspending ~~Sébastien Wenezoui~~ from his functions for ~~high treason and insubordination, among others~~.⁴¹⁷ However, this decision is dated 18 August 2014 and, according to Witness P-1193, ~~Sébastien Wenezoui sought to open access to the cemetery sometime before mid-May 2014~~.⁴¹⁸ Given the time span between the two events, the Chamber finds it difficult to link his suspension with his efforts to ~~open access to the cemetery~~.

17. *Fifth*, the Prosecution's proposed redactions of the Chamber's references to Facebook entries and Facebook accounts at paragraphs 199, 202, 209 and 211 of the Confirmation Decision are unwarranted. *First*, the Prosecution's reliance on digital communication evidence is in the public domain,¹³ and Facebook accounts are, by their very nature, of a public nature. *Second*, the mere fact that the Prosecution relied on Facebook accounts and the Chamber's assessment of this evidence, bear no relation to the potential exceptions to the principle of publicity as provided under the Court's statutory framework. *Third*, from a broader perspective, the parties' and Chambers' reliance on digital and social media evidence at the Court is becoming increasingly common¹⁴ and the Chamber's assessment of this type of evidence should not be held from public scrutiny and debate.

18. Should the Chamber conclude that the Prosecution's redaction proposals in relation to the referenced Facebook account finds any merit, the Defence proposes that simply the name of the Facebook account in question may be redacted as such:

¹³ See for instance, ICC-01/14-01/18-282-AnxB1-Red, para. 144.

¹⁴ See for instance, Prosecutor v. Al Werfalli, Warrant of Arrest, ICC-01/11-01/17-2, 15 August 2017, para. 11; Prosecutor v. Ntaganda, Trial Judgment, ICC-01/04-02/06-2359, 8 July 2019, para. 226, fn. 553; Prosecutor v. Al Senussi, Decision on the admissibility of the case against Abdullah Al-Senussi, ICC-01/11-01/11-466-Red, para. 274.

199. (...) (iv) an ~~Anti-Balaka National Coordination~~ Facebook account refers to the events in Yaloké; and (v) the situation in Yaloké was extensively covered in the media.

(...)

202. Lastly, the Chamber considers that Facebook entries must be assigned limited weight in the absence of evidence led as to the identity of the person using the account entitled '~~coordination des Anti-balaka~~'. The Chamber also recalls that it has found that media reporting about the alleged crimes are of limited relevance.

(...)

209. (...) (v) an ~~Anti-Balaka National Coordination~~ Facebook account refers to the events in Bossemptélé; and (vi) Ngaïssona himself claimed to be in contact with the Anti-Balaka leaders in every municipality.

(...)

211. (...) In this regard, the Chamber finds that the issuance of badges is per se neutral vis-à-vis the intent and purpose of Ngaïssona as to the charged incidents. Furthermore, Facebook entries must be assigned limited weight in the absence of evidence as to the identity of the person using the account entitled '~~coordination des Anti-Balakas~~'. (...)

19. This approach would strike a more appropriate balance between the rights of Mr Ngaïssona to fair and public pre-trial proceedings and the public's right to be informed of the nature of the Chamber's findings on the one hand, and any concern the Prosecution may have in relation to the protection of its ongoing investigations, on the other.

20. *Sixth*, the Defence opposes the Prosecution's proposed redaction of the last sentence of paragraph 205 of words spoken by Mr Ngaïssona at a meeting. The Chamber concluded that several attendees were present at this meeting,¹⁵ and that Mr Ngaïssona "told the participants 'to lay down [their] weapons and to reconcile with the Muslims who were born in CAR since they are our brothers" and "not kill the Muslims, to bring back peace, and to wait for the DDR'".¹⁶ The fact that there were several attendees present at the meeting, combined with the Chamber's use of pseudonyms, eliminates any potential risk of identification of the witness relied upon by the Chamber in relation to this finding. In the alternative, were the Chamber to accept that the information contained in this passage would meet one of the exceptions to the principle of publicity found in Article 82 or Rules 81(2) or (4), the Defence submits that only the pseudonym could be redacted, and not the entire passage:

205. (...) Witness P-1962 specifically indicates that, at a meeting in June 2014, Ngaïssona told the participants 'to lay down [their] weapons and to reconcile with the Muslims who were born in CAR since they are our brothers. He told [them] to not kill the Muslims, to bring back peace, and to wait for the DDR'.

21. *Seventh*, the Prosecution's proposed redaction of the Chamber's findings in paragraph 211 of the Confirmation Decision in relation to the issuance of badges should be rejected, as it again fails to meet any of the potential exceptions to the principle of publicity and disproportionality infringes on both Mr Ngaïssona's rights and the public's right to be informed of the Chamber's findings. *First*, the question of the issuance of badges was already discussed at length by the Prosecution during the confirmation of charges

¹⁵ The Chamber indicates at paragraph 205 that Mr Ngaïssona addressed the "participants".

¹⁶ Confirmation Decision, para. 205.

hearings, in open session, and is therefore in the public domain.¹⁷ *Second*, the information provided by the witness in this passage, whose identity is already protected by the Chamber through the use of a pseudonym, is general in nature, eliminating any risk that it could lead to the witnesses' identification.

22. *Eighth*, the Prosecution's proposal to redact the Chamber's general findings in relation to the evidence of ties between the National Coordination and the Coordination in Boda, as embodied in the first sentence of paragraph 217, is again, unwarranted. This passage does not refer to any witnesses or individuals, or to any identifying information; it simply provides a general conclusion in relation to the Chamber's findings pertaining to its observations directly above this paragraph. As such, this redaction proposal should be rejected.

23. *Ninth*, based on a similar logic, the Defence opposes the Prosecution's proposed redaction in paragraph 218. Should the Chamber find that the passage proposed by the Prosecution contains identifying information which would warrant the limiting of the principle of publicity, the Defence proposes the following, lesser redacted formulation:

218. Similarly, the Chamber finds that the evidence does not establish that the meetings in Bangui between Ngaïssona and Anti-Balaka representatives from Boda were related to the alleged crimes. The Chamber notes in particular the evidence of Witness P-1962, who states that Ngaïssona did not provide ~~Habib Soussou and the Witness~~ with weapons or money, and that during these visits, Ngaïssona would ask them to bring peace to Boda.

¹⁷ See for instance, ICC-01/14-01/18-T-007-Red-ENG, p. 16, lns 1-6, p. 20, lns. 2-5, p. 24, lns. 5-7, p. 33, lns 11-13.

24. *Tenth*, the Prosecution proposes excessive, unnecessary and unwarranted redactions at paragraphs 234-237 with respect to the Chamber's general findings with respect to Call Data Records ("CDR"), as well as conversations had between Maxime Mokom and Anti-Balaka members in Guen. The Defence strongly opposes the redactions in relation to the Prosecution's reliance on CDR evidence, as this is not only part of the public domain,¹⁸ but it also bears no connection whatsoever with the preservation of the Prosecution's investigation or the protection of witnesses. In order to strike an appropriate balance, the Defence proposes the following lesser redactions, which removes the names of individuals named as members the National Coordination:

234. As regards Guen, the Prosecutor submits that (i) ~~'MOKOM~~ was in contact with persons in GUEN alleged to be elements of the GUEN Group or closely linked to it' (collectively referred to as 'the Guen Anti-Balaka leadership') from at least 1 February 2014 to at least 23 February 2014; (ii) the National Coordination 'endorsed and/or rewarded the Guen group'; and (iii) the GUEN Group 'received instructions and directions from the National Coordination ~~(MOKOM)~~'.

235. In support of these allegations, the Prosecutor relies on (i) CDRs of telephone contacts between ~~Mokom~~ and 'an anti-Balaka member or conduit in Guen concerning Anti-Balaka operations'; (ii) media reports; and (iii) the fact that 'members of the Anti-Balaka National Coordination, including ~~NDOGUIA~~, as well as an official delegation from the Coordination, visited the village in the days following the 4 February 2014 executions'. An additional inference is drawn from the fact that the National Coordination 'rewarded the GUEN Group after it

¹⁸ See for instance, ICC-01/14-01/18-T-011-Red-ENG WT, p. 21, ln. 9, p. 79, ln. 10, p. 82, ln. 18.

had departed from GUEN by endorsing the continued Anti-Balaka membership of its members through issuing them with Anti-Balaka identification badges’.

236. The Chamber recalls its findings on the inadequacy of CDRs alone, in the absence of indicia as to the content and purpose of the conversation, to support a conclusive finding, albeit at the lower evidentiary threshold applicable at this stage, as well as on the very limited relevance of media and open source reporting for the same purpose. The Prosecutor submits that assuming that the phone calls emerging from the CDRs ‘were made to or from ~~MOKOM~~ directly and indirectly concerning Anti- Balaka operations taking place there’ is ‘the only reasonable inference arising from the timing of the contacts, the stature of the persons involved, their respective locations, and the circumstances on the ground at the time’. Even if the Chamber were to agree with this assumption, concluding that instructions to commit crimes were imparted during and by means of those contacts would be taking this inference several steps too far. Furthermore, the Chamber notes that many of the contacts between the local Anti-Balaka leadership and ~~Mokom~~ were not to the latter but to his deputy.

237. As to the ‘official delegation’ visiting the village in the aftermath of the events, and even leaving aside the ‘sensibilisation’ nature of its mission (as acknowledged by Witness P-1598), the Chamber does not find that the circumstances of this visit, as resulting from the available evidence, allow to reach any conclusion as to its official nature and hence as to its link to Ngaïssona. (...)

IV. Conclusion

25. In light of the above, the Defence respectfully requests the Chamber to:

- a.* Reject the Prosecution's request for a blanket redaction of all witness pseudonyms;
- b.* Reject all the Prosecution's proposed redactions as identified in paragraphs 11-24, above;
- c.* In the alternative, apply minimal redactions to the Confirmation Decision, as submitted in paragraphs 11-25 above and as the Chamber may deem appropriate, in order to strike an appropriate balance between Mr Ngaïssona's fundamental right to publicity and the public's right to be informed on the one hand, and any concern the Prosecution may have in relation to the protection of its ongoing investigations and witness protection, on the other.

Respectfully submitted on 19 December 2019,



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