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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***

Confidential Redacted

**Confidential redacted version of "Prosecution's Response to Yekatom Defence
Motion to Lift Non-Standard Redactions: Seleka Investigation
(ICC-01/14-01/18-626-Conf)" 27 August 2020**

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

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I. INTRODUCTION

1. Trial Chamber V (“Chamber”) should reject the “Yekatom Defence Motion to Lift Non-Standard Redactions: Seleka Investigation” (“Defence Motion”)¹. The Motion fails to establish that the Defence is unduly prejudiced by the non-standard redactions applied to the statements of Witnesses P-0291, P-0627, and P-0567 at this stage of the proceedings. The redactions do not affect the disclosure of information under article 67(2) or rule 77 as the information described therein does not pertain to the charged incidents.² Although the proceedings against the YEKATOM and NGAISSONA (“Accused”) are moving towards trial, the redactions authorised under rule 81(2) by Pre-Trial Chamber II for the three witnesses continue to be justified. While the redactions remain under ongoing review by the Prosecution, they should not be lifted until such time as the investigation into certain crimes allegedly committed during 2013 by members of the Seleka coalition (“Seleka Investigation”) is finalised, made public or the redactions otherwise become disproportionate.

II. CONFIDENTIALITY

2. This Response is filed “confidential, *ex parte*, only available to the Prosecution” pursuant to regulation 23*bis*(2) of the Regulations of the Court as it concerns filings of the same classification and otherwise sensitive information pertaining to the Prosecution’s ongoing Seleka Investigation. A confidential redacted version will be filed together with this Response.

¹ ICC-01/14-01/18-626-Conf.

² See below at paras. 18-25.

III. SUBMISSIONS

A. Relevant Procedural History

3. On 29 March 2019, the Prosecution requested the Pre-Trial Chamber to withhold the identities and portions of statements of six witnesses, and to apply non-standard redactions to the statements of another four witnesses under rule 81(2) due to its ongoing Seleka Investigation.³ The Prosecution also indicated its intention to rely on the evidence of Witnesses P-0291 and P-0567 for the purposes of the confirmation of the charges.⁴

4. On 18 April 2019, the Prosecution submitted the request seeking authorisation to withhold certain witness identities and apply non-standard redactions to the statements and transcripts of interviews of other witnesses.⁵ Among this group was P-0627, who was assessed as providing incriminatory evidence upon which the Prosecution intended to rely for the purposes of the confirmation of the charges.⁶

5. On 15 May 2019, the Pre-Trial Chamber ordered the Prosecution to provide additional justification for the non-disclosure of information to the Defence for all of the witness statements and transcripts of interviews concerned.⁷ On 31 May 2019, the Prosecution submitted its response in which it provided this additional information and modified aspects of its first request.⁸ On 26 June 2019, the Defence filed a joint response opposing the requests.⁹

³ ICC-01/14-01/18-162-Conf-Exp.

⁴ Ibid., paras. 2 and 14, ICC-01/14-01/18-162-Conf-Exp-AnxA at Nr. 6 and ICC-01/14-01/18-162-Conf-Exp-AnxE for P-0567; ICC-01/14-01/18-162-Conf-Exp-AnxA at Nr. 9 and ICC-01/14-01/18-162-Conf-Exp-AnxF for P-0291.

⁵ ICC-01/14-01/18-179-Conf.

⁶ Ibid., para. 12 and ICC-01/14-01/18-179-Conf-Exp-AnxB for P-0627.

⁷ ICC-01/14-01/18-201-Conf, para. 16.

⁸ ICC-01/14-01/18-217-Conf-Exp, *see* paras. 15-41 for P-0627.

⁹ ICC-01/14-01/18-230-Conf.

6. In its first decision dated 28 June 2019, the Pre-Trial Chamber granted the requested redactions to the statements of P-0291 and P-0567.¹⁰ In its Second Decision of 17 July 2019, it granted the requested redactions to the transcript of the interview of P-0627 as well as accompanying materials, such as translations and audio-recordings.¹¹ All three witnesses were identified as holding incriminatory evidence the Prosecution sought to rely on for the purposes of the confirmation of the charges.

7. In its decision on the confirmation of the charges on 11 December 2019, the Pre-Trial Chamber reaffirmed that its decision regarding these redactions does not prejudice the Defence.¹²

8. On 15 June 2020, the Prosecution filed its preliminary witness list, which included Witnesses P-0627, P-0567 and P-0291.¹³

9. The Prosecution and the Defence engaged in *inter partes* discussions during the week of 10 August 2020. The Defence requested the lifting of all redactions applied to the materials of the three witnesses arguing that, their inclusion in the Prosecution's preliminary witness list warranted a review from the Trial Chamber. The Prosecution opposed this general argument, but conveyed that it would consider the request if the Defence demonstrates the materiality of the information sought. The Defence responded that, beyond the general issue of credibility, information on Seleka locations and activity in places like Boeing and Cattin regarding the 5 December 2013 attack; Muslim traders in Boeing and their relationship to the Seleka; and the Seleka's presence in the PK5 area, parts of the PK9-Mbaiki axis and wider Lobaye region during February 2014, would be of relevance. The Prosecution has incorporated these aspects into its review.

¹⁰ ICC-01/14-01/18-232-Conf, paras. 16, 68.

¹¹ ICC-01/14-01/18-249-Conf-Exp, para. 38.

¹² ICC-01/14-01/18-403, para. 48.

¹³ ICC-01/14-01/18-553-AnxA.

10. On 17 August 2020, the Defence requested the Chamber to lift the redactions in the statements and transcripts of Witnesses P-0291, P-0567 and P-0627 in their entirety.

B. The redactions concerning the Seleka Investigation remain necessary

a. Approach taken by Pre-Trial Chamber II

11. The Pre-Trial Chamber previously determined that, while mindful of the disclosure requirements provided under article 67(2) and rule 77, rule 81(2) and (4) expressly provide for the possibility that the Prosecution may withhold information from the Defence, subject to the Chamber's authorisation. This extends to material that is potentially exculpatory or material to the preparation of the Defence. A balance must be struck on a case-by-case basis for each request for non-disclosure between the need to protect witnesses and victims, and the Prosecution's further or ongoing investigations on the one hand, while also remaining mindful of the rights of the Defence and the Prosecution's disclosure obligations.¹⁴

12. Accordingly, although redactions *can* be applied to information that is potentially exculpatory or material to the preparation of the Defence, the Prosecution has been vigilant not to extend them to such information. This was also the case for the materials of Witnesses P-0291, P-0627, and P-0567.¹⁵ If such information was or could be affected, special care was taken when balancing the interests at stake. Also, in accordance with the Pre-Trial Chamber's decision, information of a general nature about the Seleka coalition and its organisation, as well as information otherwise publicly available has been disclosed to the Defence.¹⁶ The information that remains redacted continues to be necessary and proportionate for the reasons explained below.

¹⁴ ICC-01/14-01/18-249-Conf, para. 26.

¹⁵ See below at paras. 20-26.

¹⁶ ICC-01/14-01/18-232-Conf-Exp, para. 67.

b. The Seleka Investigation is ongoing

13. Contrary to the Defence Motion, the redacted portions of the statements or transcripts of Witnesses P-0291, P-0567, and P-0627 contain information that would reveal the direction and targets of the Seleka Investigation. [REDACTED].¹⁷ [REDACTED].¹⁸

14. [REDACTED].

15. [REDACTED].

c. The risk underlying the redactions remains unchanged

16. As the investigation into the incidents [REDACTED] is still ongoing [REDACTED], any disclosure of information – including to the Defence in this case – has the potential to prejudice the Seleka Investigation through the risk of leaks or inadvertent disclosure through channels outside the Prosecution's control. [REDACTED].¹⁹ [REDACTED].

17. The Prosecution maintains that the redactions granted by the Pre-Trial Chamber to protect the ongoing Seleka Investigation are still warranted. [REDACTED].²⁰ [REDACTED].

¹⁷ [REDACTED].

¹⁸ [REDACTED].

¹⁹ See CAR-OTP-2110-0620 (*Accord Politique Pour la Paix et la Reconciliation en Republique Centrafricaine*, February 2019). This alliance dates back to April 2015 when the Anti-Balaka and ex-Seleka representatives signed a cease fire agreement in Nairobi.

²⁰ [REDACTED].

C. The redactions are proportionate

a. The non-disclosure does not prejudice the Defence

18. The disclosure of the redacted statements does not prejudice the Accused or impede the fairness of the trial proceedings, as the redactions do not even affect the disclosure of information under article 67(2) or rule 77. Contrary to the Defence Motion, the redacted facts do not relate to the charges or any potential defence. None of the portions are relevant, let alone material to the preparation of the Defence. This includes redactions pertaining to discrete events occurring on 5 December 2013.

19. Not every occurrence on 5 December 2013 is automatically material to the preparation of the Defence. Materiality is defined in relationship to the charged incidents. The mere fact that there may be an overlap in timing between redacted information and a charged incident does not render the information material to the preparation of the Defence. For instance, information on events at Boeing or Cattin or PK5 on 5 December 2013 is not redacted. Also, general information pertaining to the military operations and Seleka leaders and personnel involved on that day has been disclosed. The redactions also do not relate to crimes that could falsely be attributed to the Anti-Balaka and could form the basis of a legitimate military objective of the charged attacks, or provide legitimate or concrete reasons for the displacement of the Muslim population as outlined by the Defence.

20. Contrary to the Defence's assertion and considering the Pre-Trial Chamber's additional request detailed above (see paragraph 5),²¹ the Prosecution was not given a "*carte blanche*" to apply redactions.²² As explained above, in accordance with the Pre-Trial Chamber's decision, all general information related to the Seleka deemed relevant under article 67 and rule 77 has been disclosed to the Defence, including

²¹ ICC-01/14-01/18-201-Conf.

²² ICC-01/14-01/18-232-Conf-Exp, para. 67.

general descriptions of Seleka leaders, the structure of the Seleka coalition, accounts of alleged Seleka criminality, and main historical events such as the 5 December 2013 attack on Bangui. [REDACTED].

21. Applying these principles, only certain concrete paragraphs of the statements of P-0291, P-0627, and P-0567 were redacted, and which would otherwise reveal the line of questioning and thereby the direction and targets of the Seleka Investigation. These are incorporated here by reference to decisions of the Pre-Trial Chamber and only summarised briefly.

22. Regarding P-0291, only selected portions of the statement were redacted, leaving general information about the Seleka and their acts in 2013 as well as the information about the 5 December 2013 attack on Bangui unredacted. [REDACTED].²³ [REDACTED].

23. [REDACTED].²⁴ [REDACTED].

24. [REDACTED].²⁵ [REDACTED].

25. That the Prosecution has also disclosed materials which reference or describe actions of the Seleka leaders, [REDACTED], does not render the redactions disproportionate as alleged by the Defence. The protection sought by the redactions under rule 81(2) is confined to the actual scope of the Seleka Investigation [REDACTED]. It does not touch upon general information which, if taken at face value, would not reveal the target and scope of the investigation. As the information also does not fall under rule 77 or article 67(2), the balance of the interests at stake tilts towards protecting the Seleka Investigation.

²³ ICC-01/14-01/18-162-Conf-Exp-AnxA (Nr. 9).

²⁴ ICC-01/14-01/18-162-Conf-Exp-AnxA (Nr. 6).

²⁵ ICC-01/14-01/18-217-Conf-Exp, paras. 15-41.

b. There are no less restrictive measures

26. As the redactions for the three witnesses only affect a small portion of their materials and not their identities, the Defence is not deprived of their right and the possibility to assess and investigate the credibility of these persons already at this stage. The identities have not been withheld nor has additional biographical information been redacted, including their positions at the relevant time. Therefore, the Defence is not precluded from assessing the information against the backdrop of the other materials already disclosed in the case, or from conducting any other investigations they deem necessary.

27. The Prosecution is well aware that rule 81(2) states that it may not introduce such material or information into evidence during the confirmation hearing or the trial without *adequate prior disclosure* to the Accused. To this end, in scheduling witnesses it intends to rely on, the Prosecution will carefully balance the interests at stake, including the Accused's ability to assess the credibility of trial witnesses in a timely manner. This may result in calling the three witnesses towards the end of the witness schedule, if the Seleka Investigation has not concluded, otherwise been made public, and lifting the redactions is still not an option at the start of the trial.

28. Foregoing the three witnesses in this case is not an option. Even if the Prosecution were to entertain the idea, the witnesses' information would have to be disclosed under rule 77. In that case, the possibility to redact under rule 81(2) would remain the same. If there are particular aspects of the Seleka's conduct that the Defence considers genuinely material for their preparation, the Prosecution invites the Defence to share these on an *inter partes* basis so that its review is more targeted and potential modification to the authorised redactions can be considered.

IV. RELIEF SOUGHT

29. For the above reasons, the Prosecution requests the Chamber to reject the Defence Motion.



Fatou Bensouda, Prosecutor

Dated this 27th day of August 2020

At The Hague, The Netherlands