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Date: **26 August 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 *THE PROSECUTOR v.*
*ALFRED ROMBHOT YEKATOM & PATRICE-EDOUARD NGAÏSSONA***

Public with Confidential Annexes A to E

Motion to Lift Redactions

Source: Defence for Mr. Alfred Rombhot Yekatom

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

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1. Counsel representing Mr. Alfred Rombhot Yekatom (“Defence” and “Mr. Yekatom”, respectively) respectfully requests that the Pre-Trial Chamber (“Chamber”) review (1) all of the remaining redactions maintained by the Prosecution and order the redactions to be lifted. In particular, Mr. Yekatom contends that the Prosecution has interpreted the (2) “leads and sources”; (3) “family members”; (4) “recent contact information”; and (5) “innocent third party” categories too broadly; that it has (6) exceeded redactions authorised by the Chamber; and that its (7) “ongoing investigation” redactions must be brought to an end.

RELEVANT PROCEDURAL HISTORY

2. On 11 November 2018, the Chamber issued a warrant of arrest for Mr. Yekatom, charging him with crimes against humanity and war crimes allegedly committed in the Central African Republic (“CAR”) between 5 December 2013 and August 2014.¹
3. Mr. Yekatom made his initial appearance on 23 November 2018.²
4. On 14 December 2018, the Single Judge issued a decision seeking observations for the purposes of establishing a disclosure calendar.³
5. On 21 December 2018, the Prosecution filed its observations,⁴ and requested the adoption of a redaction protocol.⁵ The Defence filed its observations on 28 December 2018,⁶ and responded to the proposed redaction protocol 7 January 2019.⁷

¹ [ICC-01/14-01/18-1 Red](#), para. 25.

² [ICC-01/14-01/18-T-1](#).

³ [ICC-01/14-01/18-33](#).

⁴ [ICC-01/14/01/18-40-Conf](#).

⁵ [ICC-01/14-01/18-39](#).

⁶ [ICC-01/14-01/18-45-Conf](#).

⁷ [ICC-01/14-01/18-47](#).

6. On 23 January 2019, the Single Judge issued its *Decision on Disclosure and Related Matters*, which included a redaction protocol.⁸
7. Disclosure commenced on 28 January 2019,⁹ and has continued throughout the period leading to the confirmation hearing.¹⁰ The Defence has contacted the Prosecution on many occasions in an effort to informally resolve redaction issues.¹¹
8. On 20 February 2019, the Chamber joined the case of Mr. Yekatom with that of Patrice-Edouard Ngaïssona, who had been arrested and transferred to the Court in the meantime.¹²
9. On 11 March 2019, Mr. Ngaïssona filed his observation on disclosure issues.¹³ The Prosecution responded on 23 March 2019,¹⁴ and on 4 April 2019, the Chamber issued its *Second Decision on Disclosure and Related Matters*. In that decision, the Chamber emphasised the safeguards existing in its redaction regime: (1) that the Chamber is furnished with unredacted versions of the evidence and (2) the Defence is permitted to challenge any specific redactions.¹⁵
10. On 20 March 2019, Prosecution filed a request seeking variation of the First Disclosure Decision and requesting the Chamber to rescind the requirement of

⁸ [ICC-01/14-01/18-64-Red](#), para. 33. Leave to appeal this decision was denied on 8 February 2019 ([ICC-01/14-01/18-79](#)).

⁹ [ICC-01/14-01/18-72](#).

¹⁰ [ICC-01/14-01/18-122](#), [ICC-01/14-01/18-159](#), [ICC-01/14-01/18-185](#), [ICC-01/14-01/18-191](#), [ICC-01/14-01/18-202](#), [ICC-01/14-01/18-221](#), [ICC-01/14-01/18-238](#), [ICC-01/14-01/18-251](#), [ICC-01/14-01/18-253](#), [ICC-01/14-01/18-260](#), [ICC-01/14-01/18-268](#), [ICC-01/14-01/18-271](#), [ICC-01/14-01/18-274](#), [ICC-01/14-01/18-278](#).

¹¹ A table reflecting the requests for lifting of redactions, and the Prosecution's responses, is attached as Confidential Annex A. Excerpts of all Prosecution's substantive responses and the corresponding Defence requests are reproduced in Confidential Annex B.

¹² [ICC-01/14-01/18-87](#). Leave to appeal this decision was denied on 21 March 2019 ([ICC-01/14-01/18-154](#)).

¹³ [ICC-01/14-01/18-143-Conf](#).

¹⁴ [ICC-01/14-01/18-155-Red](#).

¹⁵ [ICC-01/14-01/18-163](#), paras 31-32. Leave to appeal this decision was denied on 24 May 2019 ([ICC-01/14-01/18-206](#)).

assigning unique pseudonym to persons falling under categories A.2, A.3, A.6, B.2, and B.3.¹⁶ On 10 April 2019, the Chamber rejected this request.¹⁷

11. On 15 May 2019, the Chamber postponed the confirmation hearing until 19 September 2019 at the request of the Prosecution, and ordered disclosure to be completed by 19 August 2019.¹⁸
12. The Prosecution had sought authorisation on 29 March 2019 for the non-disclosure of certain material on the grounds that disclosure would prejudice its ongoing investigation into Seleka crimes.¹⁹ The Defense filed a joint response on 8 April 2019.²⁰ After the Chamber requested additional information,²¹ the Prosecution made additional submissions on 24 May 2019²² and 31 May 2019.²³ The Defence filed another joint response on 26 June 2019.²⁴
13. On 28 June 2019, the Chamber issued its *First Decision on the Prosecutor's Request for Authorisation to Withhold the Identities of Witnesses and Apply Non-Standard Redactions*, granting the proposed redactions, except for paragraphs of one witness' statement relating to the structure and capabilities of the Seleka.²⁵
14. On 17 July 2019, the Chamber issued its *Second Decision on the Prosecutor's Request for Authorisation to Withhold the Identities of Witnesses and Apply Non-Standard Redactions*, granting the Prosecutor's request for redactions based on prejudice to its ongoing Seleka investigations.²⁶

¹⁶ [ICC-01/14-01/18-64-153](#).

¹⁷ [ICC-01/14/-01/18-169](#).

¹⁸ [ICC-01/14/-01/18-199](#).

¹⁹ [ICC-01/14-01/18-162-Conf-Red](#).

²⁰ [ICC-01/14-01/18-148](#).

²¹ [ICC-01/14-01/18-201-Conf](#).

²² ICC-01/14-01/18-209-Conf-Exp (no redacted version available to the Defence).

²³ ICC-01/14-01/18-217-Conf-Exp (no redacted version available to the Defence).

²⁴ [ICC-01/14-01/18-230-Conf](#).

²⁵ [ICC-01/14-01/18-232-Conf-Red](#).

²⁶ [ICC-01/14-01/18-249-Conf-Red](#).

15. On 19 August 2019, the Prosecution filed its Document Containing the Charges (“DCC”).²⁷

RELEVANT PROVISION

16. The *Decision on Disclosure and Related Matters* contains the following relevant provisions:²⁸

24. The Prosecutor and the Defence as the case may be, may disclose evidence with redactions of information in standard categories under rule 81(2) and (4) of the Rules without discrete application to the Chamber, except as provided in paragraph 32 below. When disclosing redacted evidence, the disclosing party shall indicate the type of redaction in the redaction box by using the codes as set forth below. [...]

25. Under rule 81(2) of the Rules, the Prosecutor may withhold information falling under any of the following categories:

- [...]
- Category “A.6”: Identifying and contact information of leads and sources, insofar as disclosure of this information could result in the leads and sources being intimidated or interfered with and would thereby put at risk the ongoing or future investigations of the Prosecutor (to be further specified as “A.6.1” for individual sources, “A.6.2” for Non-Governmental Organisations, “A.6.3” for international organisations; “A.6.4” for national governmental agencies, “A.6.5” for academic sources, “A.6.6” for private-sector companies and “A.6.7” for other sources);
- [...]

26. Under rule 81(4) of the Rules, the Prosecutor and the Defence may withhold information falling under any of the following categories:

- Category “B.1”: Recent contact information of witnesses, insofar as necessary to protect the safety of the witness;
- Category “B.2”: Identifying and contact information of family members of witnesses, insofar as necessary to protect their safety;

²⁷ [ICC-01/14-01/18-282-Conf-AnxB1](#).

²⁸ [ICC-01/14-01/18-64-Red](#) (footnotes omitted).

- Category “B.3”: Identifying and contact information of “other persons at risk as a result of the activities of the Court” (“innocent third parties”), insofar as necessary to protect their safety.
- [...]

[...]

30. Should the receiving party consider that a particular redaction is unwarranted or should be lifted as a result of changed circumstances, it shall approach the disclosing party directly. The disputing parties shall consult in good faith with a view to resolving the matter [...] Calling on the professionalism of both parties, the Single Judge expects that the parties cooperate on this matter in good faith. If they are unable to agree, the receiving party may apply to the Chamber for a ruling. In such case, the onus shall be on the disclosing party to justify the particular redaction, and it shall file submissions in the record of the case within three days from notification of the application made by the receiving party, unless otherwise decided by the Chamber. Thereafter, the Chamber will rule as to whether the disputed redaction is to be lifted or maintained.

31. The disclosing party shall monitor the continued necessity for redactions and shall re-disclose evidence with lesser redactions as soon as the reasons justifying them cease to exist, or if applicable, make an application under regulation 42(3) of the Regulations of the Court. In order to verify, at its discretion, the validity of any redactions made by the disclosing party and, if necessary, order the disclosing party *proprio motu* to lift, partially or fully, any redactions, after having given the disclosing party the opportunity to submit its observations, the Single Judge considers it appropriate that the Chamber receive the evidence as disclosed to the Defence, but also in non-redacted version. The only purpose of communicating that non-redacted version of evidence to the Chamber shall be to give it the opportunity to verify, pursuant to rule 81 of the Rules, the scope and validity of any redactions made. Certainly, in its decision on the confirmation of charges, the Chamber shall take into account only the version of evidence that was disclosed between the parties.

ARGUMENT

A. Judicial Review of Redactions

17. The Single Judge has provided that, in the event of a dispute, the receiving party may apply to the Chamber for a ruling. The disclosing party must then

file submissions within three days, in an effort to satisfy its burden of justifying the particular redaction. Thereafter, the Chamber will rule as to whether the disputed redaction is to be lifted or maintained.²⁹

18. The Chamber subsequently cited this procedure as a fundamental safeguard that the Defence has against erroneous redactions.³⁰ Despite the Chamber's direction that "this exercise must be carried out with precision and care",³¹ there have been considerable inconsistencies in the Prosecution's application of redactions and the assignment of unique pseudonyms.³² As a result, the envisaged aim of this exercise to "allow the Defence to contextualize information, identify whether the same person is referenced across multiple pieces of evidence",³³ and satisfy "the need [for the Defence] to internally review the application of unique pseudonyms"³⁴ so as to "[protect] the persons concerned and the rights of the suspects"³⁵ is largely undermined.
19. Because the Chamber has access to the unredacted material, giving it an unobstructed view of the redactions, while Mr. Yekatom does not, it is impossible for Mr. Yekatom to verify that the redactions are warranted.
20. Further, the Prosecution has also failed to respond to the majority of the requests to lift redactions,³⁶ including the non-standard redactions which were

²⁹ [ICC-01/14-01/18-64-Red](#), para. 30.

³⁰ [ICC-01/14-01/18-163](#), paras 31-32.

³¹ [ICC-01/14-01/18-199](#), para. 36.

³² See, e.g., issues identified in letter ARY-2019-0049 dated 15 August 2019 (attached as Confidential Annex E), to which the Defence received no response by far.

³³ [ICC-01/14-01/18-169](#), para. 18.

³⁴ [ICC-01/14-01/18-199](#), para. 36.

³⁵ [ICC-01/14-01/18-199](#), para. 36.

³⁶ By far, no substantive response has been provided to the following redaction lift requests despite follow up through emails and phone calls with the Prosecution: ARY-2019-0030, ARY-2019-0031, ARY-2019-0032, ARY-2019-0033, ARY-2019-0034, ARY-2019-0035, ARY-2019-0036, ARY-2019-0037, ARY-2019-0038, ARY-2019-0040, ARY-2019-0041, ARY-2019-0042, ARY-2019-0043, ARY-2019-0044, ARY-2019-0045, ARY-2019-0046, ARY-2019-0047, ARY-2019-0048, ARY-2019-0049, ARY-2019-0051, ARY-2019-0052, ARY-2019-0053. For details, see the corresponding entries in Annex A.

not authorised by the Chamber.³⁷ In the few instances where the Prosecution provided a substantive response, the undertaking to correct, assign, and/or supplement information to unique pseudonyms remain unfulfilled to date,³⁸ while other were never addressed by the Prosecution's response.³⁹

21. Bearing in mind the redaction regime's spirit to entertain good faith consultation among the parties with a view to resolving the matter, the Defence initiated telephonic and in-person meetings to remind the Prosecution that many *inter partes* requests remained unanswered for several weeks.⁴⁰ At this juncture the Defence believes that the only way to safeguard the fairness of this process is through the Chamber's intervention.
22. Mr. Yekatom therefore disputes all remaining redactions and triggers these provisions so as to obtain judicial review of any redactions in the disclosure material that have not yet been lifted.⁴¹
23. Mr. Yekatom underlines that "the burden is on the Prosecutor to satisfy the Chamber that requests for non-disclosure are fully justified" and that "should the Prosecutor fail to do so such requests will have to be rejected".⁴²
24. The Chamber in the *Gbagbo* case recognised that "under the redaction regime outlined in the Protocol, a case-by-case assessment is never foreclosed and mechanisms are put in place to ensure that every contested redaction is

³⁷ See ARY-2019-0040 dated 19 July 2019 concerning decision [ICC-01/14-01/18-232-Conf-Red](#) (a redacted version with description of inadvertently disclosed content removed is reproduced in Confidential Annex C), and ARY-2019-0042 dated 1 August 2019 concerning decision [ICC-01/14-01-18-249-Conf-Red](#) (attached as Confidential Annex D). For details, see below paras 50-51.

³⁸ See Annex B, pp. 1 (ARY-2019-0013), 2 (ARY-2019-0014, item 26), and 6 (ARY-2019-0027, paras 7-11).

³⁹ See Annex B, pp. 4 (ARY-2019-0014, items 32-33), 6 (ARY-2019-0027, para. 16); Annex C (Senior Trial Attorney Kweku Vanderpuye response to ARY-2019-0040).

⁴⁰ See Annex A, items 11, 16, 27.

⁴¹ Mr. Yekatom has previously notified the Prosecution by letter that he disputes all remaining redactions pursuant to the Chamber's redaction protocol (ARY-2019-0053, listed in Annex A, item 41). A copy of that letter can be provided upon request.

⁴² [ICC-01/14-01/18-201-Conf](#), para. 11.

reassessed by the Chamber in light of all relevant information. Indeed, the receiving party can, at any moment after reception, request that specific redactions falling under any of the standard categories be submitted to the Chamber for adjudication”.⁴³

25. When reviewing the individual redactions, the Chamber is requested to apply the overriding principle that *full* disclosure should be made and that non-disclosure is the *exception* to the rule.⁴⁴ The factors that must be considered when reviewing redactions are:

- (a) the objectively justifiable risk to the safety of an individual or prejudice to ongoing investigations from disclosing the information to the Defence;
- (b) the redaction is the least intrusive measure available to the Prosecutor to protect the safety of an individual or an ongoing investigation; and
- (c) the non-disclosure of information is not prejudicial to or inconsistent with the rights of the suspect and a fair and impartial trial.
- (d) In addition to other grounds of criminal responsibility under this Statute for crimes within the jurisdiction of the Court:

If, the information is relevant to the Defence, the Chamber will take particular care when balancing the different interests at stake, especially if the information is potentially exculpatory or material to the preparation of the Defence.⁴⁵

26. The Chamber is required to rule on a case-by-case basis where the balance of interests lies on the facts of a specific application for non-disclosure.⁴⁶
27. To assist the Chamber in its review of all of the redactions, Mr. Yekatom hereby highlights some common problems with the redactions that he has been able to discern from his obstructed vantage point:

⁴³ *Prosecutor v. Gbagbo*, Decision on the Protocol Establishing a Redaction Regime, [ICC-02/11-01/11-737](#), 15 December 2014, para. 19.

⁴⁴ [ICC-01/14-01/18-169](#), para. 16.

⁴⁵ [ICC-01/14-01/18-232-Conf-Red](#), para. 21.

⁴⁶ [ICC-01/14-01/18-232-Conf-Red](#), para. 52.

B. Leads and Sources

28. The Prosecution has taken a very broad view of redactions under Category A.6 “leads and sources”. The protocol allows redacting “identifying and contact information of leads and sources, insofar as disclosure of this information could result in the leads and sources being intimidated or interfered with and would thereby put at risk the ongoing or future investigations of the Prosecutor”.⁴⁷
29. The Prosecution appears to have made redactions under this category by assuming that just about everyone with information about an event in CAR would *ipso facto* be interfered with or intimidated if their identities were disclosed to the defence.⁴⁸ The identities of many eyewitnesses to relevant events have been redacted. This has prevented the defence from interviewing those eyewitnesses, or even determining if they are mentioned anywhere else in the disclosure material.
30. For example, in the incident at the Yamwara School that is the subject of charges of murder, torture, cruel treatment, mutilation, imprisonment, persecution, and other inhumane acts, the Prosecution has applied “leads and sources” redactions to the names of eye-witnesses who likely have exculpatory information.⁴⁹

⁴⁷ [ICC-01/14-01/18-64-Red](#), para. 25.

⁴⁸ See [ICC-01/14-01/18-64-153](#), para. 22: “A ‘lead’ can be anyone mentioned in the course of an investigation who may be in a position to provide evidence. For example, Witness Y says: ‘my neighbour X was also present during the attack on the village’. Because X (a ‘lead’) has not yet provided evidence, their re-occurrence across the evidence collection is not per se material to the preparation of the Defence as their significance is, at best, speculative.”

⁴⁹ See, e.g., [CAR-OTP-2053-0086-R01](#), paras 24, 29, 44, 45, 49 redacting, *inter alia*, the names of the women who were abducted, and compare with [CAR-OTP-2058-0003-R01](#), paras 47-52 in which one of those women indicates that Mr. Yekatom ensured that they were not harmed. See also [CAR-OTP-2054-1136-R01](#), paras 47-48 redacting the name of an eyewitness to that same event. The issues were raised in letter ARY-2019-0049 dated 15 August 2019 (attached as Confidential Annex E).

31. Another example is the redaction of the names of alleged child soldiers under the “leads and sources” rubric.⁵⁰ Without knowing the identity of those who are alleged to be child soldiers, Mr. Yekatom cannot even begin to defend himself on charges that he enlisted and used those persons as child soldiers.
32. The Prosecution labelled efforts by the Ngaïssona Defence to narrow the scope of the leads and sources definition as “premature”.⁵¹ While the Chamber sided with the Prosecution back in April,⁵² with the filing of the DCC on 19 August 2019, and the imminence of the confirmation hearing on 19 September, this broad definition of leads and sources is no longer warranted. As recalled by the Chamber, “[t]he Prosecutor’s investigation ‘should largely be completed at the stage of the confirmation of charges hearing’”.⁵³ The Prosecution has now had adequate time to follow up on leads and protect vulnerable sources. These redactions can no longer be maintained at the expense of Mr. Yekatom’s right to a fair confirmation process, including the right to present his Defence evidence.
33. The Chamber is therefore requested to closely scrutinise the leads and sources redactions in the disclosure material, demand detailed and reasoned justifications from the Prosecution, and lift the redactions in the vast majority of cases.

C. Family Members

34. Standard redaction category B.2 allows for the redaction of “identifying and contact information of family members of witnesses, insofar as necessary to protect their safety”.⁵⁴ The Prosecution has used this category to redact the identifying information of virtually every family member mentioned by the

⁵⁰ See, e.g., [CAR-OTP-2071-0259-R01](#), paras 66, 72, 73, 75, 89-108. The issue was raised in letter ARY-2019-0041 dated 26 July 2019 dated 26 July 2019 (Annex A, item 30).

⁵¹ [ICC-01/14-01/18-163](#), para.31.

⁵² [ICC-01/14-01/18-163](#).

⁵³ [ICC-01/14-01/18-163](#), para. 28.

⁵⁴ [ICC-01/14-01/18-64-Red](#), para. 26.

witness, including those who were eye-witnesses to the events or whose identity are relevant to the evidence of the witness in that they can contradict, or confirm, relevant information provided by the witness.

35. For example, the identity of a child soldier who also happens to be a family member of the witness was redacted,⁵⁵ and the identity of eyewitnesses to the Yamwara School incident who happened to be family members of the witnesses have also been redacted.⁵⁶
36. Trial Chambers have recognised the importance of disclosure of the identity of family members with relevant information to the Defence and have rejected the broad application of this category of redactions. In the *Ntaganda* case, the Trial Chamber held that redaction of a family member's identifying information would be authorised only where his or her identity has no relevance to a known issue in the case.⁵⁷ The Trial Chamber in the *Gbagbo* case followed this formulation, adding that:

The authorisation is intended to capture only family members who are mentioned in an incidental manner or by way of general biographical background. Identifying information for all other family members should be disclosed, either immediately or, in the case of any witnesses for whom delayed disclosure may be granted, at the time of disclosing the identity of the relevant witness.⁵⁸

37. The lift of redactions of the identities of family members that lived with a witness or were present at the time of the incident referred to in his statement were subsequently ordered by the Trial Chamber in *Ntaganda*, recognising that knowledge of the identities of such family members were relevant to the

⁵⁵ [CAR-OTP-2094-0968-R01](#), para. 93.

⁵⁶ See [CAR-OTP-2058-0003-R01](#), paras 16-22, 26, 30-31, 35-40, 43, 45, 49-50; [CAR-OTP-2053-0012-R01](#), para. 28; [CAR-OTP-2054-1136-R01](#), paras 33, 57.

⁵⁷ *Prosecutor v. Ntaganda*, Decision on the Protocol establishing a redaction regime, [ICC-01/04-02/06-411](#), 12 December 2014, para. 35.

⁵⁸ *Prosecutor v. Gbagbo*, Decision on the Protocol establishing a redaction regime, [ICC-02/11-01/11-737](#), 15 December 2014, para. 50(iii).

Defence's ability to investigate the victim's account, and therefore material to the preparation of the Defence.⁵⁹ In the *Kenyatta* case, the Trial Chamber likewise found that generalised security concerns could not outweigh the need for the identities of relevant family members to ensure a fair trial.⁶⁰

38. The broad use of redactions of the identities of family members in this case is contrary to the principles set forth in these decisions. The Chamber is respectfully requested to carefully scrutinize these redactions, require detailed explanations from the Prosecution for any redactions it wishes to retain, and lift those redactions for family members who are in a position to have relevant information.

D. Recent Contact Information

39. Under standard redaction category B.1, the Prosecution is allowed to redact "recent contact information of witnesses, insofar as necessary to protect the safety of the witness".⁶¹ However, the Prosecution has used this category to redact telephone numbers used by the witness at the time of the events, preventing the Defence from determining, through call data records disclosed and/or referred to in the DCC, information that may contradict the witness, such as on the frequency of contact between the witness and the accused and other relevant persons, his approximate location at the time of the events, and his description of his activities during the time period in question.
40. The Prosecution used call data records to confront Witness P-0487 with his claim concerning the frequency of his contacts with Mr. Yekatom.⁶² Likewise, the Prosecution used call data records to confront Witness P-0884 with his claim

⁵⁹ *Prosecutor v. Ntaganda*, Decision on Defence request for lifting of redactions in documents related to victims authorised to present evidence, [ICC-01/04-02/06-1835](#), 24 March 2017, para. 15.

⁶⁰ *Prosecutor v. Kenyatta*, Decision on two Prosecution applications to maintain B3 redactions to certain disclosed materials, 4 April 2013, [ICC-01/09-02/11-712-Red](#), 3 February 2017, paras 34-36.

⁶¹ [ICC-01/14-01/18-64-Red](#), para. 26.

⁶² [CAR-OTP-2076-0435-R01](#) at 0437.

concerning his contacts with Anti-Balaka leaders in the morning of the attack on 5 December 2013.⁶³ By redacting the phone numbers used by Prosecution witnesses, the Prosecution prevents the Defence from doing the same.

41. For example, without the phone numbers of Witness P-1839 and other persons with whom the witness was in contact during the events, which were redacted from the transcripts of the witness' interview,⁶⁴ the Defence is unable to refute his claims to not have been in contact with certain persons and confirm his whereabouts at certain times through the entries on the call data records that show the cell tower through which the witness' calls were routed.
42. As another example, the redaction of the telephone number used by another Prosecution witness at the time of the events⁶⁵ prevents the Defence from verifying or contradicting the witness' claims, *inter alia*, that the witness was called to join an attack in the Cattin neighbourhood of Bangui,⁶⁶ which forms the basis of charges of murder, deportation, persecution, and attacks on civilians against Mr. Yekatom.
43. The Trial Chamber in the *Ntaganda* case has ordered the redaction of a phone number to be lifted where the witness used the phone at the time of the events.⁶⁷ For the reasons stated above, the Chamber is requested to do the same in this case.

⁶³ [CAR-OTP-2072-1616-R01](#) at 1633 to 1652

⁶⁴ [CAR-OTP-2072-0946-R01](#) at 0950, lns 131-134. The witness also provided the phone numbers of other Prosecution witnesses who participated in the events allegedly committed by Mr. Yekatom and/or his subordinates that were likewise redacted. See [CAR-OTP-2072-0946-R01](#) at 1140, 1145 to 1147.

⁶⁵ [CAR-OTP-2088-2057-R01](#), para. 91.

⁶⁶ [CAR-OTP-2088-2057-R01](#), para. 33.

⁶⁷ *Prosecutor v. Ntaganda*, Public redacted version of 'Decision on Defence requests regarding certain materials relating to P-0190 and P-0899', [ICC-01/04-02/06-1440-Red](#), 6 July 2016, para. 12.

E. Innocent Third Party

44. The redaction regime allows for standard category B.3 to be redacted when it relates to “[i]dentifying and contact information of ‘other persons at risk as a result of the activities of the Court’ (‘innocent third parties’), insofar as necessary to protect their safety”.⁶⁸ An innocent third party should be, by virtue of the qualifiers “innocent” and “third party”, not linked or involved in the relevant events. However, the Prosecution has used this category to redact the names of individuals who have substantive connection to the events.
45. For example, the identities of individuals who reportedly received weapons from Seleka and engaged in hostilities have been redacted under Category B.3.⁶⁹ The same redaction has also been applied to the phone numbers of military figures who was involved with Bozizé’s earlier rebellion and later joined the Seleka.⁷⁰
46. In other cases, B.3 redaction has been applied to individuals who could have relevant information on the alleged attacks on civilians in Cattin,⁷¹ a neighbourhood where Mr. Yekatom is facing serious charges.⁷² Individuals who were allegedly victimised by Mr. Yekatom’s elements have also been redacted under B.3,⁷³ despite not being a “third party”. In addition, the Prosecution also applied B.3 redaction on the identity of an Anti-Balaka element from whom the witness learnt of the event underpinning Counts 11-16 of the DCC,⁷⁴ even though the redacted individual was closer to the alleged incident than the Prosecution witness himself.

⁶⁸ [ICC-01/14-01/18-64-Conf](#), para. 26.

⁶⁹ [CAR-OTP-2100-0252-R01](#), para. 33.

⁷⁰ [CAR-OTP-2100-0252-R01](#), para. 44.

⁷¹ [CAR-OTP-2048-0757-R01](#), para. 36.

⁷² [ICC-01/14-01/18-282-Conf-AnxB1](#), para. 629; [ICC-01/14-01/18-1-Red](#), paras 14, 18(a).

⁷³ [CAR-OTP-2048-0171-R01](#), para. 84.

⁷⁴ [CAR-OTP-2076-0514-R01](#) at 0534, ln. 635, 638, 642, 644, and 645.

47. This redaction category is intended to protect individuals other than those involved in the relevant events. In the *Bemba et al.* and *Gbagbo* cases, it was specified in the redaction protocol that this category of standard redactions only applied to “individuals who are of no relevance to any known issues in the case”.⁷⁵
48. The identity of these individuals is relevant to the Defence’s ability to investigate the victim’s account as well as the underlining facts supporting the charges in the DCC and is therefore material to the preparation of the Defence.⁷⁶
49. The Chamber is respectfully requested to carefully scrutinise these redactions, require detailed explanations from the Prosecution for any redactions it wishes to retain, and lift those redactions for innocent third party who are in a position to have relevant information.

F. Excessive Redactions

50. In certain instances where the Chamber authorised the redaction of specified paragraphs in or annexes to a statement,⁷⁷ the Prosecution has redacted other paragraphs as well. The Defence has drawn this to the Prosecution’s attention but received no response or lesser redacted versions.⁷⁸

⁷⁵ *Prosecutor v. Bemba et al.*, Annex to the Decision on Modalities of Disclosure: Protocol Establishing a Redaction Regime, [ICC-01/05/01/13-959-Anx](#), 22 May 2015, para. 43; *Prosecutor v. Gbagbo*, Annex A to Decision on the Protocol Establishing a Redaction Regime, [ICC-02/11-01/11-737-AnxA](#), 15 December 2014, para. 43.

⁷⁶ An analogy can be drawn to the non-applicability of B.2 redaction on the witness’ family member who are similarly relevant to the Defence’s ability to investigate the victim’s account. See *Prosecutor v. Ntaganda*, Decision on Defence request for lifting of redactions in documents related to victims authorised to present evidence, [ICC-01/04-02/06-1835](#), 24 March 2017, para. 15.

⁷⁷ [ICC-01/14-01/18-232-Conf-Red](#); [ICC-01/14-01-18-249-Conf-Red](#).

⁷⁸ ARY-2019-0040 dated 19 July 2019 concerning decision [ICC-01/14-01/18-232-Conf-Red](#) (a redacted version with description of inadvertently disclosed content removed is reproduced in Confidential Annex C), and ARY-2019-0042 dated 1 August 2019 concerning decision [ICC-01/14-01-18-249-Conf-Red](#) (attached as Confidential Annex D). The unauthorised non-standard redactions identified therein have not been rectified to this day. See Annex A, items 28-29 and 31.

51. The Chamber is requested to order the Prosecution to disclose the paragraphs that it has redacted in excess of those authorised by the Chamber.

G. Ongoing Investigations

52. The Chamber has given the Prosecution great latitude, so far, in allowing redactions on the grounds that disclosure would impede the Prosecution's ongoing investigation of the Seleka group.⁷⁹ Huge swaths of redactions have been made based on this ground.⁸⁰
53. In his *Motion for Disclosure of Exculpatory Material*, Mr. Yekatom has explained the importance of information of Seleka crimes and structure to his defence. In the DCC, the Prosecution has affirmatively relied upon its knowledge of the structure of the Seleka forces to assert that the parties to the conflict were sufficiently organised to attract liability for crimes during a non-international armed conflict.⁸¹
54. The Chamber is respectfully requested to put an end to these redactions in light of the importance of the information to the Defence and the more than adequate time the Prosecution has now had to complete its investigation into Seleka crimes.
55. It is one thing to maintain "ongoing investigation" redactions in the period prior to confirmation, but it is quite another to maintain them during the confirmation hearing. The Prosecution's investigation into Seleka crimes is well known to the public and to any suspects. One knowledgeable commentator has written:

⁷⁹ [ICC-01/14-01/18-232-Conf-Red](#), para. 46; [ICC-01/14-01/18-249-Conf-Red](#), para. 35.

⁸⁰ See, e.g., the statement of Witness P-0291, [CAR-OTP-2034-0104-R01](#), paras 71-110; interviews of Witness P-0627, [CAR-OTP-2102-1171-R01](#), [CAR-OTP-2102-1196-R01](#), [CAR-OTP-2102-1229-R01](#); [CAR-OTP-2102-1431-R01](#), [CAR-OTP-2102-1470-R01](#).

⁸¹ [ICC-01/14-01/18-282-Conf-AnxB1](#), paras 618-619.

It is an open secret that the Prosecutor has compelling evidence of Séléka crimes, but has struggled to build cases against the anti-balaka, due to the group's diffuse command structure and its political connections to the current CAR government.⁸²

56. The Prosecution's failure to make arrests of Seleka leaders can no longer be used to shield exculpatory and relevant information from Mr. Yekatom and prevent him from using it in a fair confirmation hearing. With the advent of the confirmation hearing, the balance has now shifted in favor of lifting the redactions.
57. Mr. Yekatom is not seeking reconsideration of the Chamber's decisions at an earlier stage of the case to allow such information to be redacted. The Chamber's redaction protocol calls for monitoring the continued necessity for redactions the lifting of redactions as soon as the reasons justifying them cease to exist.⁸³ The redactions authorised by the Chamber may well have been justified at the time. Now, Mr. Yekatom calls upon the Chamber to put an end to the recurring excuse of "ongoing investigation" and order the lifting of all such redactions so that the confirmation hearing can be a fair one.
58. An analogous situation arose in the *Gbagbo* case, where the Prosecution's investigation of crimes by the other side continued after President Gbagbo's arrest. The Trial Chamber held that redactions related to the on-going investigation would not be sustained unless the prosecution could demonstrate an objectively justifiable risk of prejudice to the on-going investigation.⁸⁴

⁸² Patryk Labuda, "At Long Last: The International Criminal Court Strikes in the Central African Republic", 19 November 2018 (available at <http://opiniojuris.org/2018/11/19/at-long-last-the-international-criminal-court-strikes-in-the-central-african-republic/>).

⁸³ [ICC-01/14-01/18-64-Red](#), para. 30.

⁸⁴ *Prosecutor v. Gbagbo & Blé Goudé*, Decision on Prosecution application for non-standard redactions to material related to another and ongoing investigation in the Cote d'Ivoire situation, [ICC-02/11-01/15-1109-Red](#), 2 February 2018.

59. The Chamber is respectfully requested to order the Prosecution to now lift all redactions based on its “ongoing investigation” of Seleka crimes.

CONCLUSION

60. The Prosecution’s broad use of redactions in this case impedes the preparation of the Defence. If all of those redactions are maintained, it will be impossible for Mr. Yekatom to have a fair confirmation process. The Chamber is respectfully requested to carefully review all remaining redactions and order as many of them as possible to be lifted.

RESPECTFULLY SUBMITTED ON THIS 26TH DAY OF AUGUST 2019 ⁸⁵



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⁸⁵ The assistance of Legal Intern Pia Savart of France in the research for this motion is gratefully acknowledged.