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

Public

**Prosecution's Response to the YEKATOM Defence "Motion to Lift Redactions",
ICC-01/14-01/18-290**

Source: Office of the Prosecutor

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I. INTRODUCTION

1. Pre-Trial Chamber II (“Chamber”) should reject the YEKATOM Defence “Motion to Lift Redactions” (“Motion”).¹ The Motion is overly broad, premature, and unjustified.

2. *First*, in asking the Chamber to “carefully review all of the remaining redactions maintained by the Prosecution and order as many of them as possible to be lifted”,² the Motion fails to request relief that can be reasonably granted. Not only is the relief sought unreasonable, given the volume of the material, but the failure to particularise the contested redactions would render the exercise abstract.

3. *Second*, the Parties are currently in the process of resolving issues regarding redactions *inter partes*. Thus, the Motion is premature.

4. *Third*, the Defence request to “bring to an end” to any “ongoing investigation” redactions amounts to an unsubstantiated application for the Chamber to reconsider its previous decision.³

II. SUBMISSIONS

A. The Motion is overly broad and fails to request relief that can be reasonably granted

5. The Motion fails to particularise any disputed redactions to be determined by the Chamber. Rather, it generally requests the Chamber to “review [...] all of the remaining redactions maintained by the Prosecution and order the redactions to be lifted”.⁴ The Prosecution agrees with the Common Legal Representatives of Victims

¹ See ICC-01/14-01/18-290.

² ICC-01/14-01/18-290, para. 1.

³ ICC-01/14-01/18-290, para. 1.

⁴ ICC-01/14-01/18-290, para. 1.

that the Defence Motion “lacks sufficient detail to meet the requirements of specificity and precision necessary to dispute a redaction under the regime established by the Chamber”.⁵

6. The “Decision on Disclosure and Related Measures” provides that “[s]hould 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”.⁶ Absent sufficient specificity, the Motion effectively asks the Chamber to engage in the review of over 1,400 documents, each of which contains at least one redaction.⁷ The request is untenable. Moreover, without any indication of which redactions are contested, the exercise would have to be undertaken in the abstract, making it unnecessarily burdensome, inefficient, and ultimately a waste of time.

7. The request is so far-reaching that it cannot be reasonably granted. The Chamber should therefore dismiss it, consistent with the Court’s general practice of rejecting motions or requests for relief which are “overly broad”,⁸ or “advanced essentially in general terms, without detailed particulars [...]”.⁹

B. The Motion should be dismissed as premature in favour of *inter partes* resolution

8. From 23 January 2019 until 19 August 2019, the Prosecution reviewed, redacted, and disclosed 7,595 individual exhibits comprising 41,545 pages in accordance with the Chamber’s Disclosure Decision. The disclosures amount to among, if not, the most voluminous evidence collection of a single case in the Court at this stage of the proceedings.

⁵ ICC-01/14-01/18-299, para. 13.

⁶ ICC-01/14-01/18-64-Conf, para. 30 (emphasis added) (“Disclosure Decision”).

⁷ This calculation is based on a search of all documents containing content and/or metadata redactions which have been disclosed to the Defence.

⁸ ICC-01/05-01/13-1234, paras. 8, 15; *see also* ICC-01/05-01/13-1172, para. 20.

⁹ ICC-01/05-01/08-769, para. 43.

9. The Disclosure Decision provides for an *inter partes* procedure through which redactions shall be contested prior to adjudication. Thus, the receiving party should “approach the disclosing party directly” to enable the disputing parties to “consult in good faith with a view to resolving the matter”.¹⁰ Where the Parties are unable to agree, “the receiving party may apply to the Chamber for a ruling”.¹¹ The *inter partes* nature of the procedure means that the Parties should not seek the Chamber’s intervention unless prior efforts to resolve a particular issue have failed. This is not the case here.

10. Where a request for judicial intervention is sought prematurely, it may be properly dismissed *in limine*. Indeed, in the *Ongwen* case, the Chamber held that:

“The Single Judge is not persuaded that any judicial action is required at this time. The Defence asks for the Prosecution to disclose materials in a collection being actively reviewed for disclosure. The Single Judge has no reason to doubt the exercise of the Prosecution’s obligations, and the Defence gives no indication that it has unsuccessfully engaged in *inter partes* communications in relation to any particular part of the Uganda Collection. This request is dismissed *in limine*.”¹²

11. The Motion is similarly premature. The Prosecution continues to actively review material for disclosure and respond to Defence letters as soon as practicable within the constraints of its limited resources, case preparation, and discharge of obligations within critical deadlines related to the upcoming Confirmation Hearing.¹³

¹⁰ ICC-01/14-01/18-64-Conf, para. 30.

¹¹ ICC-01/14-01/18-64-Conf, para. 30.

¹² ICC-02/04-01/15-457, para.7. *See also* ICC-01/09-02/11-465, para. 9.

¹³ *E.g.* the 19 August 2019 deadline to submit the Document Containing the Charges (“DCC”) and to have completed disclosure of all documents to be relied upon at the Confirmation Hearing.

12. Notwithstanding the Defence's assertion that "the Prosecution has [...] failed to respond to the majority of the requests to lift redactions",¹⁴ the Prosecution has now responded to at least 41 out of 58 letters, with the most recent round of re-disclosure in response to Defence letters occurring before 19 August 2019.¹⁵

13. The Prosecution has undertaken its disclosure obligations reasonably and in good faith. Prior to 19 August 2019, it has re-disclosed several documents,¹⁶ in part based on the requests of the YEKATOM Defence, and in part where the Prosecution has, consistent with its on-going review,¹⁷ independently identified that redactions are no longer warranted and should be lifted.

14. By seeking "judicial review of any redactions in the disclosure material that have not yet been lifted",¹⁸ the Motion effectively contests redactions far exceeding those brought to the Prosecution's attention through previous Defence letters. Thus, the Prosecution has not yet had an opportunity to amend or justify the contested redactions, as the Disclosure Decision requires.¹⁹ The Prosecution remains willing to resolve disclosure disputes *inter partes*, in good faith, and should be afforded an opportunity to respond to the outstanding Defence letters as soon as practicably possible.

¹⁴ ICC-01/14-01/18-290, para. 20.

¹⁵ Although the Defence identifies in Annex A a series of letters to which "no substantive response has been provided", these letters had indeed been reviewed and acted on. Documents were re-disclosed on 16 August 2019 in response to the Defence's contentions set out in letters: ARY-2019-0032, ARY-2019-0033, ARY-2019-0034, ARY-2019-0036, ARY-2019-0037, ARY-2019-0039, and ARY-2019-0040.

¹⁶ See, e.g. CAR-OTP-2008-0747; CAR-OTP-2017-0196; CAR-OTP-2024-0036; CAR-OTP-2025-0324; CAR-OTP-2029-0619; CAR-OTP-2045-0048; CAR-OTP-2050-0654; CAR-OTP-2053-0086; CAR-OTP-2068-0222; CAR-OTP-2072-0544; CAR-OTP-2072-0851; CAR-OTP-2072-0946; CAR-OTP-2072-1101; CAR-OTP-2072-1134; CAR-OTP-2082-0278; and CAR-OTP-2082-0285.

¹⁷ ICC-01/14-01/18-64-Conf, para. 31.

¹⁸ ICC-01/14-01/18-290, para. 22.

¹⁹ ICC-01/14-01/18-64-Conf, para. 30.

C. The requested relief is unjustified

15. The scope of the requested relief is unjustified. The Defence has not provided sufficient reasons justifying such an extensive review.

16. In requesting the independent review and lifting of *all* remaining Prosecution redactions, the Defence seeks to enlist the Chamber in effectively overseeing Prosecution disclosure decisions wholesale – an exercise that should not be undertaken in the absence of “good reasons”. In the *Gbagbo* case, it was held that:

“the Chamber will not routinely oversee or review the decisions taken by the prosecutor in fulfilment of [the duties of disclosure pursuant to article 67(2) of the Statute and Rule 77 of the Rules]. They are important Prosecutorial obligations, which must be discharged scrupulously and fairly. The Chamber will only intervene if there are other good reasons for doubting that the duty has been properly fulfilled [...]”.²⁰

17. The Motion fails to identify “good reasons” to doubt that the Prosecution’s disclosure obligations have been properly fulfilled – unsurprisingly, because they have been. In support of the request for the Chamber’s blanket review of “all of the remaining redactions”, the Defence identifies only 12 documents²¹ containing examples of disputed redactions in the categories of “leads and sources”,²² “family members”,²³ “recent contact information”,²⁴ and “innocent third party”.²⁵

²⁰ ICC-02/11-01/11-351-Red, para. 17.

²¹ See CAR-OTP-2053-0086-R01; CAR-OTP-2054-1136-R01; CAR-OTP-2071-0259-R01; CAR-OTP-2094-0968-R01; CAR-OTP-2058-0003-R01; CAR-OTP-2053-0012-R01; CAR-OTP-2072-0946-R01; CAR-OTP-2088-2057-R01; CAR-OTP-2100-0252-R01; CAR-OTP-2048-0757-R01; CAR-OTP-2048-0171-R01; and CAR-OTP-2076-0514-R01.

²² ICC-01/14-01/18-290, paras. 30-31.

²³ ICC-01/14-01/18-290, para. 35.

²⁴ ICC-01/14-01/18-290, paras. 40-42.

²⁵ ICC-01/14-01/18-290, paras. 45-46.

18. While the Prosecution is willing to review and consider the contested redactions within the 12 documents cited by the Defence (in addition to the ongoing review of contested redactions in Defence letters), this narrow selection of examples cannot reasonably sustain an inference that the numerous remaining documents require review.

D. The Defence request regarding on-going investigations amounts to an improper application for reconsideration

19. On 5 July 2019, the Chamber issued its “Decision on the Prosecutor’s Request for Authorisation to Withhold the Identities of Witnesses and Apply Non-Standard Redactions”.²⁶ After considering “each request for non-disclosure on a case-by-case basis”, the Chamber granted non-standard redactions, finding that, “to the extent that the Request is granted, the risk of prejudice to the Prosecutor’s investigation, and incidentally, to the witnesses outweighs the interests of the Defence”.²⁷

20. The Defence now contends that redactions made to protect the on-going Seleka investigation should be “put to an end.”²⁸ The Motion’s resort to the opinion of a “knowledgeable commentator” that the Prosecution’s compelling evidence of Seleka crimes is an “open secret”²⁹ is unavailing. Similarly, the Defence’s contention that the “advent of the confirmation hearing”³⁰ somehow sidesteps the otherwise plain intent of the Motion for “reconsideration of the Chamber’s decisions at an earlier stage of the case”,³¹ fails.

21. No matter what label is attached to the request, the Motion transparently seeks to re-litigate the prior decision without specifying “any change in

²⁶ ICC-01/14-01/18-232-Conf-Red, para. 27.

²⁷ *Ibid.*

²⁸ ICC-01/14-01/18-290, para. 54.

²⁹ ICC-01/14-01/18-290, para. 55.

³⁰ See ICC-01/14-01/18-290, para. 56.

³¹ See ICC-01/14-01/18-290, para. 57.

circumstances or new and compelling reasons justifying reconsideration”.³² The Chamber has already considered and rejected the Defence’s objections, repeated in the Motion.

22. The Pre-Trial Chamber’s 5 July 2019 Decision considered the Prosecution’s Seleka investigation sufficiently justified.³³ The Decision to allow non-standard redactions was issued after full consideration of any potential prejudice arising in the lead up to, and throughout, the Confirmation Hearing. Indeed, the Chamber explicitly stated that “the context of the present stage of the proceedings” was a significant factor in allowing the redactions, distinguishing “the purpose of the confirmation of charges hearing” from the nature of evidence required at Trial.³⁴

23. Although the Court has reconsidered interlocutory decisions as an “exceptional” remedy in recent cases, this is permitted “only [...] if a clear error of reasoning has been demonstrated or if it is necessary to do so to prevent an injustice”.³⁵ The Motion fails to identify – far less establish – any such error or injustice here.

III. THE COMMON LEGAL REPRESENTATIVES’ RESPONSE

24. As a matter of courtesy and prudence, the Prosecution agrees that the Common Legal Representatives of Victims should be consulted on matters pertaining to their clients. However, it does not consider that any judicial intervention is necessary in this respect.

³² ICC-01/05-01/08-3343, para. 30.

³³ See ICC-01/14-01/18-290, para. 57.

³⁴ ICC-01/14-01/18-232-Conf-Red, para. 40.

³⁵ ICC-01/04/-02/06-519, para. 12.

IV. CONCLUSION

25. For the foregoing reasons, the Chamber should reject the Motion.



Fatou Bensouda, Prosecutor

Dated this 2nd day of September 2019
At The Hague, The Netherlands