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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 YEKATOM AND
PATRICE-EDOUARD NGAÏSSONA***

Public Redacted

Decision on the Defence Motion for an Extension of Time to File List of Evidence
and Related Motions

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

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PRE-TRIAL CHAMBER II of the International Criminal Court issues this Decision on the Defence Motion for an Extension of Time to File List of Evidence and Related Motions.

I. Procedural History

1. On 11 November 2018, the Chamber issued the ‘Warrant of Arrest for Alfred Yekatom’.¹ On 17 November 2018, Yekatom was surrendered to the Court by the authorities of the Central African Republic (the ‘CAR’).²

2. On 7 December 2018, the Chamber issued the ‘Warrant of Arrest for Patrice-Edouard Ngaïssona’.³ On 23 January 2019, Ngaïssona was surrendered to the Court by the authorities of the French Republic.⁴

3. On 23 January 2019, the Chamber issued the ‘Decision on Disclosure and Related Matters’ (the ‘Disclosure Decision’).⁵

4. On 20 February 2019, the Chamber issued the ‘Decision on the joinder of the cases against Alfred Yekatom and Patrice-Edouard Ngaïssona and other related matters’, thereby joining the cases against Yekatom and Ngaïssona.⁶

5. On 4 April 2019, the Chamber issued the ‘Second Decision on Disclosure and Related Matters’ (the ‘Second Disclosure Decision’), thereby deciding, *inter alia*, that the Disclosure Decision was applicable to the joint case, as modified by the Second Disclosure Decision.⁷

6. On 15 May 2019, the Chamber issued the ‘Decision on the “Prosecution’s Request to Postpone the Confirmation Hearing and all Related Disclosure

¹ ICC-01/14-01/18-1-US-Exp. A public redacted version is also available; see [ICC-01/14-01/18-1-Red](#).

² Registry, Rapport du Greffe sur l’Arrestation et la Remise de M. Alfred Yekatom, ICC-01/14-01/18-17-US-Exp, paras 19-24.

³ ICC-01/14-01/18-89-Conf-Exp. A public redacted version is also available; see [ICC-01/14-01/18-89-Red](#).

⁴ Registry, Rapport du Greffe sur la Remise de Patrice-Edouard Ngaïssona, ICC-01/14-01/18-101-US-Exp, paras 5-14.

⁵ ICC-01/14-01/18-64-Conf. A public redacted version is also available, see [ICC-01/14-01/18-64-Red](#).

⁶ [ICC-01/14-01/18-87](#); [ICC-01/14-01/18-121](#).

⁷ [ICC-01/14-01/18-163](#).

Deadlines””, thereby deciding that the confirmation hearing in the case against Yekatom and Ngaïssona shall commence on 19 September 2019.⁸

7. On 19 August 2019, the Chamber received the ‘Prosecution’s Notification of Filing of the Document Containing the Charges and List of Evidence’ (the ‘DCC’).⁹

8. On 20 August 2019, the Chamber received the Yekatom Defence’s ‘Motion for Disclosure of Rule 76 Material’.¹⁰

9. On 26 August 2019, the Chamber received the Yekatom Defence’s ‘Motion to Lift Redactions’.¹¹

10. On 27 August 2019, the Chamber received the Yekatom Defence’s ‘Motion to Compel Inspection of Documents Used to Obtain Call Location Records’.¹²

11. On 27 August 2019, the Chamber received the ‘Prosecution’s Response to the Yekatom Defence’s Motion for Disclosure of rule 76 Material’.¹³

12. On 28 August 2019, the Chamber received the Yekatom Defence’s ‘Motion for Inspection of Information on the Organisation of the Seleka’.¹⁴

13. On 28 August 2019, the Chamber received the Yekatom Defence’s ‘Motion for Extension of Time to File List of Evidence’ (the ‘Request for Extension of Time’).¹⁵

14. On 29 August 2019, the Chamber received the ‘Common Legal Representatives’ Joint Response to the Yekatom Defence’s “Motion to Lift Redactions”” (the ‘LRV’ and the ‘Joint Response’, respectively).¹⁶

15. On 29 August 2019, the Chamber received the Yekatom Defence’s ‘Motion for Finding of Disclosure Violation and for Remedial Measures’.¹⁷

⁸ [ICC-01/14-01/18-199](#).

⁹ [ICC-01/14-01/18-282](#), together with confidential annexes A to J.

¹⁰ ICC-01/14-01/18-285-Conf. A public redacted version is also available; see [ICC-01/14-01/18-285-Red](#).

¹¹ [ICC-01/14-01/18-290](#).

¹² [ICC-01/14-01/18-294](#), together with confidential annexes A and B.

¹³ ICC-01/14-01/18-295-Conf.

¹⁴ ICC-01/14-01/18-297-Conf, together with confidential annexes A to C. A public redacted version is also available; see ICC-01/14-01/18-297-Red.

¹⁵ [ICC-01/14-01/18-298](#).

¹⁶ [ICC-01/14-01/18-299](#).

16. On 30 August 2019, the Chamber received the ‘Consolidated Ngaïssona Defence Response to “Motion for Extension of Time to File List of Evidence” (ICC-01/14-01/18-298).¹⁸

17. On 2 September 2019, the Chamber received the: (i) ‘Prosecution’s Consolidated Response to the YEKATOM and NGAISSONA Defence’s Requests for Extension of Time to File the List of Evidence’;¹⁹ (ii) ‘Prosecution’s Response to the YEKATOM Defence “Motion to Compel Inspection of Documents Used to Obtain Call Location Records”, ICC-01/14-01/18-294’;²⁰ (iii) ‘Prosecution’s Response to the YEKATOM Defence “Motion to Lift Redactions”, ICC-01/14-01/18-290’;²¹ (iv) ‘Prosecution’s Response to the Yekatom Defence’s “Motion for Finding a Disclosure Violation and for Remedial Measures”, ICC-01/14-01/18-301-Conf’;²² and (v) ‘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’.²³

18. On 3 September 2019, the Yekatom Defence filed the ‘Motion for Leave to Reply to Prosecution’s Response to the Yekatom Defence’s Motion to Lift Redactions’.²⁴

II. Submissions of the Parties and Determination by the Chamber

19. The Chamber notes articles 67(2) and 69(7) of the Rome Statute (the ‘Statute’), rules 76, 77, 121(6) and (9), and 122(9) of the Rules of Procedure and Evidence (the ‘Rules’), and regulations 24(5), 35(2), and 42(2) of the Regulations of the Court (the ‘Regulations’).

20. At the outset, the Chamber notes that the Yekatom Defence submitted the Request for Extension of Time ‘due to incomplete disclosure by the Prosecution’.²⁵ This assertion is essentially based on the four motions it filed preceding the Request

¹⁷ ICC-01/14-01/18-301-Conf, together with confidential annexes A and B. A public redacted version is also available; see [ICC-01/14-01/18-301-Red](#).

¹⁸ ICC-01/14-01/18-303-Conf.

¹⁹ ICC-01/14-01/18-307-Conf.

²⁰ ICC-01/14-01/18-309.

²¹ ICC-01/14-01/18-310.

²² ICC-01/14-01/18-311-Conf.

²³ ICC-01/14-01/18-312-Conf.

²⁴ ICC-01/14-01/18-314.

²⁵ [ICC-01/14-01/18-298](#), para. 1.

for Extension of Time, namely the ‘Motion for Disclosure of Rule 76 Material’, the ‘Motion to Lift Redactions’, the ‘Motion to Compel Inspection of Documents Used to Obtain Call Location Records’ and the ‘Motion for Inspection of Information on the Organisation of the Seleka’. In addition, the ‘Motion for Finding of Disclosure Violation and for Remedial Measures’, which was filed after the Request for Extension of Time, is equally relevant to the Request for Extension of Time since it concerns a further alleged disclosure violation on the part of the Prosecutor. The Chamber also notes the Yekatom Defence’s ‘Motion for Leave to Reply to Prosecution’s Response to the Yekatom Defence’s Motion to Lift Redactions’.

21. Accordingly, the Chamber will first address these six pending motions. Subsequently, on the basis of its determination of each of these motions, it will decide the Request for Extension of Time.

A. Motion for Disclosure of Rule 76 Material

The parties’ submissions

22. The Yekatom Defence submits that while the Prosecutor has provided a considerable amount of disclosure, she has ‘generally limited its Rule 76 disclosure to the final signed statement of the witness or the final transcript of the audio recording of the witness’ interview’. While the Defence has requested other items, it submits that the Prosecutor has responded that ‘all other material [...] will be disclosed in accordance with our disclosure obligations under the Statute, Rules and Orders of the Chamber’.²⁶

23. As such, the Defence moves for an order directing the Prosecutor to disclose all items encompassed by rule 76 of the Rules, including:

- i. Screening notes of all witnesses;
- ii. All material provided by or shown to witnesses that is referenced in witness statements;

²⁶ [ICC-01/14-01/18-285-Red](#), para. 13.

- iii. Other information from witnesses concerning the subject matter of their testimony, as reflected in interviewer's notes, draft or unsigned statements, or email correspondence with witnesses; and
- iv. Statements in the possession of third parties, including domestic authorities in CAR, international and other national authorities, and non-governmental organisations.

24. In the response, the Prosecutor submits that the requested relief is not necessary or required, but that she is nevertheless 'disposed to provide certain requested material'.²⁷

25. The parties' submissions with regard to each category of items are as follows.

Screening notes

26. The Yekatom Defence submits that the Prosecutor should be ordered to disclose all screening notes of Prosecution witnesses. The Defence notes that the Prosecutor has declined to disclose certain screening notes, such as those for P-1839. In the view of the Defence, screening notes 'can contain extensive information about the crimes charged', and it cannot be claimed that they are 'internal work product'. In this regard, the Defence notes the Appeals Chamber's finding that the ordinary meaning of the term 'statement' in rule 76 of the Rules is broad, and that in the *Ruto* and *Ntaganda* cases, it was held that 'information from screening of Prosecution witnesses must be disclosed pursuant to Rule 76 when they reflect the witness' answers to relevant questions about the case'.

27. The Prosecutor argues that 'the Defence is not entitled to *all* notes of every screening the Prosecution has done through the course of its investigation. While the Defence is entitled to screenings containing PEXO or rule 77 material, the Prosecution does not [...] have an obligation to disclose screenings of witnesses providing no information relevant to the investigation'.

28. The Prosecutor indicates that she has already disclosed all witness statements cited in the DCC, 'along with any necessary translations, except one Witness for

²⁷ ICC-01/14-01/18-295-Conf, para. 1.

whom it disclosed an anonymous summary instead'. There are 108 screening notes associated with these witnesses. While noting that the screenings are 'less detailed' and 'largely duplicative and cumulative of the disclosed Witness Statements', the Prosecutor indicates that to 'encourage as an efficient proceeding as possible, the Prosecution will do its best to accommodate this Defence request, and expects to be able to review, redact, and disclose these 108 screenings within one week'. The Prosecutor notes that included within these 108 screening notes are the two screening notes referenced by the Defence.

Items provided by or shown to witnesses

29. The Yekatom Defence submits that while the Prosecutor has disclosed some written material provided by witnesses during their interviews, she has declined to provide all such material to the Defence 'on the basis that the Prosecution does not intend to rely on the material *per se* for the confirmation proceedings'. As examples of material that has not been disclosed, the Defence cites a curriculum vitae for P-0434, letters provided by P-0487 'concerning an event that he is not being truthful about and that was discussed at length during the interview'; and a letter provided by a third witness as an example of the kind of reporting the witness did during the events. The Defence argues that 'material provided by, or shown to the witness by the Prosecution, when referenced in the statement of the witness, constitutes an integral part of the statement such as to come within Rule 76'.

30. In the response, the Prosecutor submits that this portion of the request is overly broad, and ignores the Court's jurisprudence that 'not all items containing information obtained from a witness necessarily constitute a "statement" within the meaning of rule 76'. Where items of evidence have been assessed as relevant to a witness statement, the Prosecutor indicates that they have been disclosed. In this regard, the Prosecutor notes that over 2,000 items of evidence were disclosed 'which are either sources or attachments related to the Witnesses on whom the Prosecution relies for confirmation purposes and cited in the DCC', and the Prosecutor states that she has 'endeavoured to avoid overburdening the Defence with irrelevant material' in accordance with the instructions of the Chamber, and in view of the limited purposes of the proceedings.

31. The Prosecutor submits that ‘[i]f the Defence has any concerns about items shown to a Witness but not disclosed other than the three instances cited in the Motion, the Prosecution invites their specific identification, as this would greatly facilitate any further or necessary review’.

Other information from the witnesses

32. The Yekatom Defence submits that ‘the Chamber should order the Prosecution to disclose all information received from its witnesses concerning the subject matter of their testimony, as reflected in interviewer’s notes, draft or unsigned statements, or email correspondence with the witness’. In this regard, the Defence argues, *inter alia*, that ‘[t]he Trial Chamber in the *Ruto* case has held that the definition of “statement” in Rule 76 is sufficiently broad to include records of information provided by a trial witness during an interview, regardless of the question whether such a record would technically qualify as a “statement” of the witness for the purposes of impeachment on the stand or submission under Rule 68’.

33. The Prosecutor argues that this request is overly broad, and ‘ignores the Court’s jurisprudence’, and that she has ‘generally disclosed this type of information under rule 77, as PEXO, or as INCRIM’. Further, in the view of the Prosecutor, draft statements are ‘not generally disclosable in that they are not final and have not been signed or ratified by the Witness’, and ‘[e]mails to investigators about organising the date, time, and location of an interview [...] are in general not disclosable’.

34. Finally, the Prosecutor submits that ‘[i]f the Defence has concerns in respect of the materiality of specific types of notes or email communications, the Prosecution would invite their identification and is more than disposed to review (or re-review) such material.

Statements to third parties

35. The Yekatom Defence argues that the Prosecutor has an obligation to make sufficient efforts to obtain and disclose prior statements of those witnesses on whom she intends to rely at the confirmation hearing that have been taken by other entities. In this regard, the Defence refers to the Trial Chamber’s findings in the *Lubanga* and *Bemba et al.* cases. Specifically, the Defence states that there are indications that certain Prosecution witnesses have been interviewed by either national or international authorities in the CAR, or non-governmental organisations.

36. In the view of the Prosecutor, this request is ‘unwarranted and unsupported’, and jurisprudence ‘from the ICC, the ad hoc tribunals, and the Special Court for Sierra Leone, all indicate that “prior statements” within the meaning of rule 76 (or similar provisions) comprise statements made by witnesses when questioned on their knowledge of the case in the course of its investigation’.

37. While the Defence provides examples of third party organisations to which it suggests witnesses could have provided statements, the Prosecutor submits that she is unable to verify the extent to which statements have been provided as these sources redact the identities of witnesses. [REDACTED], the Prosecutor’s understanding is that the UN Panel of Experts did not take formal statements, but would quote witnesses in their reports.

38. The Prosecutor indicates that if the Defence has additional information about witnesses who have been questioned by third parties on their knowledge of the case in the course of an investigation relating to the present case ‘it would be helpful to the Prosecution to receive that information to facilitate any further or necessary review’.

The Chamber’s determination

39. The Chamber recalls rule 76 of the Rules and notes that, while screening notes, interview notes, or investigators’ notes *may* constitute a statement, not all items containing information obtained from a witness will necessarily constitute a ‘statement’ within the meaning of this rule.²⁸ The Chamber notes the finding of the Appeals Chamber in the *Ntaganda* case that ‘it is consistent with the purpose of rule 76(1) of the Rules’ that ‘disclosure of statements [is] made “when witnesses are ‘questioned about their knowledge of the case’”’.²⁹ Similarly, as regards statements provided to entities other than the Prosecutor, the Chamber notes that these ‘may still

²⁸ Trial Chamber VI, *The Prosecutor v. Bosco Ntaganda*, [Decision on Defence requests seeking disclosure orders and a declaration of Prosecution obligation to record contacts with witnesses](#), 16 October 2015, ICC-01/04-02/06-904, para. 29.

²⁹ Appeals Chamber, *The Prosecutor v. Bosco Ntaganda*, [Judgment on the appeal of Mr Bosco Ntaganda against the ‘Decision on Defence requests seeking disclosure orders and a declaration of Prosecution obligation to record contacts with witnesses’](#), 20 May 2016, ICC-01/04-02/06-1330, para. 38.

qualify as Rule 76 statements, provided such statements involve questioning witnesses “about their knowledge of the case in the course of its investigation””.³⁰

40. As regards the request for disclosure of screening notes, the Chamber notes the Prosecutor’s submission that she will disclose the 108 screening notes for witnesses upon whom she will rely at the confirmation hearing. Considering the urgency of this matter in light of the upcoming hearing, the Chamber directs the Prosecutor to provide any screening notes for witnesses upon whom she intends to rely for confirmation purposes as soon as possible, and by 9 September 2019 at the latest. In addition, the Chamber directs the Prosecutor to verify whether there are any additional screening notes within her possession that fall within the scope of rule 76 of the Rules and, if so, to disclose these to the Defence by 9 September 2019.

41. In regard to the remaining categories of evidence, the Chamber directs the Prosecutor to verify whether she has in her possession any additional material that may fall within rule 76 of the Rules, and if so, to disclose it to the Defence by 9 September 2019. To facilitate this process, and for the sake of expediency, the Chamber instructs the Defence to provide to the Prosecutor references to any specific material that, in its view, falls within the scope of rule 76 of the Rules, as soon as possible, and by no later than 6 September 2019. The Chamber encourages the Prosecutor and the Defence to engage in *inter partes* discussions as necessary to facilitate any additional disclosure of rule 76 material.

42. In light of the above, the Chamber authorises the Yekatom Defence to, if necessary, amend its list of evidence by 16 September 2019, at the latest. In the interests of fairness, the Chamber also authorises the Ngaïssona Defence, if it so wishes and if necessary, to amend its list of evidence by 16 September 2019, at the latest.

³⁰ Trial Chamber VII, *The Prosecutor v. Jean-Pierre Bemba Gombo et al.*, [Decision on Request for Disclosure or Securing of Prior Statements Given by Prosecution Witnesses to Domestic Judicial Authorities and International Organisations](#), 9 September 2015, ICC-01/05-01/13-1227, para. 9.

B. Motion for Leave to Reply to Prosecution's Response to the Yekatom Defence's Motion to Lift Redactions

43. In the motion, the Yekatom Defence requests leave to reply, arguing that 'the Prosecution has not in fact lifted the redactions as it claims'. Further, the Defence submits that this issue 'could not have been reasonably anticipated when the Motion was filed, since the Prosecution's email with these errors was only sent the day after the Motion was filed'.

44. The Chamber notes that pursuant to regulation 24(5) of the Regulations, a reply may only be filed with the leave of the Chamber.

45. The Chamber considers that it has before it all the information necessary in order to render a decision on the Motion to Lift Redactions, and thus would not be assisted by further submissions. On this basis, the Chamber rejects the Motion for Leave to Reply to Prosecution's Response to the Yekatom Defence's Motion to Lift Redactions.

C. Motion to Lift Redactions

The parties' submissions

46. The Yekatom Defence 'disputes all remaining redactions' and requests 'judicial review of any redactions in the disclosure material that have not yet been lifted'.³¹ The Defence submits that it is 'impossible for Mr. Yekatom to verify that the redactions are warranted' since he does not have full access to the relevant material. Further, the Defence argues that the Prosecutor has 'failed to respond to the majority of the requests to lift redactions', and 'where the Prosecution provided a substantive response, the undertaking [...] remain[s] unfulfilled to date'.

47. In the view of the Defence, the Prosecutor has taken a 'very broad view of redactions under Category A.6 "leads and sources"' 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'. Further, the Defence argues that the 'identities of many eyewitnesses to relevant events have been

³¹ [ICC-01/14-01/18-290](#), para. 22.

redacted’ and that this ‘has prevented the defence from interviewing those eyewitnesses, or even determining if they are mentioned anywhere else in the disclosure material’.

48. By way of example, the Defence argues that (i) the Prosecutor has applied ‘leads and sources’ redactions to the names of eyewitnesses who likely have exculpatory information about the incident at the Yamwara School; and (ii) without knowing the identity of those alleged to be child soldiers, Yekatom cannot defend himself on charges that he enlisted and used those individuals as child soldiers.

49. The Defence asserts that the Prosecutor has been overly broad in its use of the ‘family members’ category, and has redacted ‘virtually every family member mentioned by the witness, including those who were eye witnesses to the events or whose identity [*sic*] are relevant to the evidence of the witness in that they can contradict, or confirm, relevant information provided by the witness’. By way of example, the Defence indicates that the identity of a child soldier who is also a family member of a witness was redacted, as were the identities of eye witnesses to the Yamwara School incident, who also happened to be family members of the witnesses.

50. The Defence alleges that the Prosecutor has used redaction category B.1 ‘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’.

51. As to the ‘innocent third parties’ category, the Defence asserts that this category is ‘intended to protect individuals other than those involved in the relevant events’, and 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’.

52. In addition, the Defence argues that, in instances where the Chamber authorised the redaction of specified paragraphs or annexes, the Prosecutor has ‘redacted other paragraphs as well’. In relation to ongoing investigations, the Defence requests the Chamber to put an end to redactions relating to the Seleka group, arguing that the

‘Prosecution’s investigation into Seleka crimes is well known to the public and to any suspects’. The Defence further submits that 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’.

53. In the Joint Response, the LRV submits that the Yekatom Defence’s motion should be rejected on the basis that it is too broadly formulated, and that the ‘party seeking to lift redactions has the burden to identify material wherein redactions should be lifted and to support its request with relevant justification on a case-by-case basis’. In addition, the LRV submits that ‘it is essential that [the LRV] are consulted prior to the lifting of any redactions related to dual status individuals and/or participating victims’, and requests that the Chamber make a finding to this effect.

54. In the response, the Prosecutor argues that the motion ‘fails to request relief that can be reasonably granted’ given the volume of material, and that ‘the failure to particularise the contested redactions would render the exercise abstract’. Specifically, the Prosecutor submits that ‘the Motion effectively asks the Chamber to engage in the review of over 1,400 documents, each of which contains at least one redaction’. The Prosecutor further asserts that the motion is premature, since the parties ‘are currently in the process of resolving issues regarding redactions *inter partes*’, and that the request to end any ‘ongoing investigation’ redactions ‘amounts to an unsubstantiated application for the Chamber to reconsider its previous decision’. By seeking judicial review of all remaining redactions, the Prosecutor argues that the Motion ‘effectively contests redactions far exceeding those brought to the Prosecutor’s attention through previous Defence letters’.

55. In regard to the Defence’s assertion that the Prosecutor has not responded to the majority of requests to lift redactions, the Prosecutor asserts that it ‘has now responded to at least 41 out of 58 letters’. The Prosecutor ‘remains willing to resolve disclosure disputes *inter partes*, in good faith’, and submits that she ‘should be afforded an opportunity to respond to the outstanding Defence letters as soon as practicably possible’. The Prosecutor asserts that the Defence has identified ‘only 12 documents containing examples of disputed redactions’, which in her view, does not ‘sustain an inference that the numerous remaining documents require review’. Further, the Prosecutor ‘is willing to review and consider the contested redactions within the 12 documents cited by the Defence’.

56. In relation to the redactions to material concerning the Seleka investigation, the Prosecutor argues that the Motion transparently seeks to re-litigate the prior decision of the Chamber, and that the Chamber has ‘already considered and rejected the Defence’s objections’.

The Chamber’s determination

57. At the outset, the Chamber finds that the Defence request for judicial review of all outstanding redactions is overly broad, and moreover, does not comply with the redaction regime adopted by the Chamber in the Disclosure Decision. In particular, the redaction regime entails that where the receiving party considers that a specific redaction is unwarranted or should be lifted as a result of changed circumstances, it shall approach the disclosing party and, failing that, the Chamber with a *specific* request, concerning particular redaction(s).³² The Defence request to review of all outstanding redactions is rejected accordingly.

58. Turning to the remainder of the motion, the Chamber notes that the Defence has approached the Prosecutor regarding various points of disagreement, and that the Prosecutor has yet to respond to a number of these requests. In this regard, the Prosecutor asserts that she intends to ‘respond to [the] Defence letters as soon as practicable’. The Chamber notes the urgency of this matter given the current stage of proceedings, notably, that the confirmation hearing will commence on 19 September 2019.

59. Noting that *inter partes* discussions are ongoing, the Chamber finds that it would be premature to intervene at this stage. Accordingly, the Chamber directs the Prosecutor to respond to all outstanding communications from the Defence regarding redactions, including all examples cited within the Motion to Lift Redactions, as soon as possible, and no later than 9 September 2019, and for *inter partes* discussions on the topic of redactions to be finalised no later than 11 September 2019.

60. Upon finalisation of discussions, in the event that there are any remaining points of disagreement, the Chamber directs the Defence to submit a precise and detailed request regarding any redactions which the Defence considers to be unwarranted, by

³² [ICC-01/14-01/18-64-Red](#), para.30.

no later than 13 September 2019. The Chamber calls on the parties to consult one another in good faith with a view to resolving this matter in an expeditious fashion.

61. In light of the above, the Chamber authorises the Yekatom Defence to, if necessary, amend its list of evidence by 16 September 2019, at the latest. In the interests of fairness, the Chamber also authorises the Ngaïssona Defence, if it so wishes and if necessary, to amend its list of evidence by 16 September 2019, at the latest.

62. As regards the Defence request to end redactions relating to ongoing investigations, the Chamber recalls that this matter has been fully considered and decided upon by the Chamber in a previous decision. In particular, the Chamber recalls its finding that ‘to the extent that the [request for non-disclosure] is granted, the risk of prejudice to the Prosecutor’s investigation and, incidentally, to the witnesses outweighs the interests of the Defence’, and that ‘the Chamber has made sure that the Defence will have disclosed all portions of the statements which are potentially exculpatory or material to its preparation’.³³ As such, the Chamber rejects the request to end all redactions related to ongoing investigations. However, the Chamber reminds the Prosecutor of her obligation to continually assess the risk of prejudice to further or ongoing investigations, and immediately inform the Chamber of any changes to the current situation which may warrant a variation of the redactions.

63. As regards the LRV’s request in the Joint Response, the Chamber considers that the LRV should be consulted in cases of disputed redactions that relate to dual status individuals and/or victims participating in the proceedings.

³³ First Decision on the Prosecutor’s Request for Authorisation to Withhold the Identities of Witnesses and Apply Non-Standard Redactions, 28 June 2019, ICC-01/14-01/18-232-Conf-Exp, para. 27. A confidential redacted version is also available, see ICC-01/14-01/18-232-Conf-Red.

D. Motion to Compel Inspection of Documents Used to Obtain Call Location Records

The parties' submissions

64. The Yekatom Defence requests, pursuant to rule 77 of the Rules, the Chamber to order the Prosecutor to allow it to inspect: (i) all requests for assistance (the 'RFAs') submitted by the Prosecutor to obtain the mobile telephone records referenced in the DCC and its annexes; and (ii) the resulting judicial or administrative orders from domestic jurisdictions or the Court.³⁴ The Yekatom Defence submits that these items are material to its preparation as it plans to bring a motion under article 69(7) of the Statute at or before the confirmation hearing to exclude call location evidence if that evidence has not been obtained pursuant to a judicial order supported by sufficient facts.

65. The Prosecutor submits that she is prepared to disclose the RFAs and 'resulting orders' in the interests of promoting the efficiency of the confirmation proceedings and reducing unnecessary litigation.³⁵ Nevertheless, she advances that: (i) the Defence's submission that the RFAs and 'resulting orders' are material to its preparation is tenuous; (ii) RFAs are not routinely disclosed, and are considered sensitive and highly confidential documents relating to State cooperation; and (iii) she will require at least three weeks to locate the materials, register, review and redact them, as appropriate.

The Chamber's determination

66. The Chamber recalls the Appeals Chamber's finding that 'the legal framework of the Court does not contain any provision stipulating that requests for assistance must be disclosed to the accused person'. Nevertheless, such material may fall within the scope of rule 77 of the Rules, depending on the content, context and purpose of the RFA in the specific circumstances of each case.³⁶

³⁴ [ICC-01/14-01/18-294](#).

³⁵ [ICC-01/14-01/18-309](#), para. 1.

³⁶ Appeals Chamber, *The Prosecutor v. Jean-Pierre Bemba Gombo et al.*, [Judgment on the appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr](#)

67. When deciding on a request pursuant to rule 77 of the Rules, the Chamber must determine: (i) whether, on a *prima facie* basis, the objects the Defence seeks to inspect are ‘material to the preparation of the Defence’; and, if so, (ii) whether any restrictions on disclosure are justified under the Statute and rules 81 and 82 of the Rules.³⁷ The phrase ‘material to the preparation of the defence’ must be interpreted broadly and it is ‘understood as referring to all objects that are relevant for the preparation of the defence’, including those that are not directly linked to exonerating or incriminating evidence.³⁸

68. The Chamber finds that, in the circumstances of this case, the RFAs submitted by the Prosecutor to obtain the mobile telephone records referenced in the DCC and the resulting judicial or administrative orders are material to the preparation of the Defence. The Chamber notes that the Prosecutor relies extensively on call data records to support certain allegations contained in the DCC. The RFAs submitted by the Prosecutor to obtain those call data records and the resulting judicial or administrative orders could assist the Yekatom Defence in deciding whether to bring a motion under article 69(7) of the Statute, at or before the confirmation hearing, to exclude call location evidence. It is imperative that the Defence is provided with the relevant material allowing it to test the reliability of the procedure employed in collecting the evidence against it if it wishes to do so. Accordingly, the Chamber grants the Defence’s motion and orders the Prosecutor to disclose or allow the Defence to inspect all RFAs submitted by the Prosecutor to obtain the mobile telephone records referenced in the DCC and its annexes and the resulting judicial or administrative orders from domestic jurisdictions.

69. The Chamber is mindful of the fact that the RFAs and any resulting judicial or administrative orders have to be reviewed and redacted before inspection or

[Fidèle Babala and Mr Narcisse Arido against the Decision of Trial Chamber VII entitled ‘Judgment pursuant to Article 74 of the Statute’](#), 8 March 2018, ICC-01/05-01/13-2275-Red, para. 641.

³⁷ Appeals Chamber, *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, [Judgment on the appeal of Mr Abdallah Banda Abakaer Nourain and Mr Saleh Mohammed Jerbo Jamus against the decision of Trial Chamber IV of 23 January 2013 entitled ‘Decision on the Defence’s Request for Disclosure of Documents in the Possession of the Office of the Prosecutor’](#), 28 August 2013, ICC-02/05-03/09-501, paras 35, 42.

³⁸ Appeals Chamber, *The Prosecutor v. Thomas Lubanga Dyilo*, [Judgment on the appeal of Mr. Lubanga Dyilo against the Oral Decision of Trial Chamber I of 18 January 2008](#), 11 July 2008, ICC-01/04-01/06-1433, para. 77.

disclosure, which is a time-consuming process. At the same time and notwithstanding the limited scope of the confirmation hearing, the Defence has the right to challenge the admissibility of evidence, pursuant to article 69(7) of the Statute and rule 122(9) of the Rules, should it be prepared to do so at this stage of the proceedings. Therefore, after balancing the different interests and in view of the approaching date of the confirmation hearing, the Chamber orders the Prosecutor to either disclose the aforementioned material or allow the Yekatom Defence – and, in the interest of fairness, also the Ngaïssona Defence – to inspect the aforementioned material by 13 September 2019. The Prosecutor may redact the RFAs and resulting judicial or administrative orders in accordance with the redaction protocol.³⁹

E. Motion for Inspection of Information on the Organisation of the Seleka

The parties' submissions

70. The Yekatom Defence requests, pursuant to rule 77 of the Rules, the Chamber to order the Prosecutor to allow the Defence to inspect any information she may have obtained about the organisation of the Seleka and ex-Seleka from any of the 31 individuals whom the Defence has identified as likely having such information.⁴⁰ The Yekatom Defence submits that said information is needed to contest at the confirmation hearing one of the *chapeau* element of war crimes in a non-international armed conflict, *i.e.* that the parties to the conflict were sufficiently organised.⁴¹

71. The Prosecutor requests the Chamber to dismiss the motion. She asserts that the information sought is not material to the preparation of the Defence under rule 77 of the Rules as: (i) the Defence has already received a number of reports and witness statements containing information on the organisation of the Seleka; (ii) 'the Seleka was for all intents and purposes running the Government of the Central African Republic [...] rendering the issue of "organisation" [...] effectively moot' during the relevant temporal period; and (iii) the scope of the confirmation hearing is limited.⁴²

³⁹ See [Disclosure Decision](#).

⁴⁰ ICC-01/14-01/18-297-Conf, paras 1, 9-11, 21.

⁴¹ ICC-01/14-01/18-297-Conf, paras 7, 9.

⁴² ICC-01/14-01/18-312-Conf, paras 5, 6, 8.

The Prosecutor asserts that, in discharging her disclosure obligations, she has sought to review all of the information in her possession to determine whether it is subject to disclosure under article 67(2) of the Statute or rule 77 of the Rules and has disclosed to the Defence a substantial amount of information concerning the Seleka organisation or structure.⁴³

The Chamber's determination

72. For the reasons that follow, the Chamber finds the Yekatom Defence's request to be unsubstantiated. The Prosecutor is under an obligation – independently of any order from the Chamber – to disclose any evidence in her possession that is material to the preparation of the Defence, including information on the organisation of the Seleka. Nothing in the Defence's submission suggests that the Prosecutor has not complied with her obligations and has failed to disclose such information. To the contrary, the Chamber notes the Prosecutor's submission that she has sought to review all of the information in her possession to determine whether it is subject to disclosure under article 67(2) of the Statute or rule 77 of the Rules and has disclosed to the Defence a substantial amount of information concerning the Seleka organisation or structures. Beyond referring to persons likely possessing certain information, the Defence has not advanced any basis for its submission that information material to its preparation has been withheld by the Prosecutor. In light of the above, the Yekatom Defence's motion is rejected.

F. Motion for Finding of Disclosure Violation and for Remedial Measures

The parties' submissions

73. The Yekatom Defence submits that the Prosecutor relies upon Witness [REDACTED] evidence in the DCC but, '[w]hat appears nowhere in the DCC, or in the material disclosed to the defence, is that Witness [REDACTED] was heavily involved in the fabrication of false evidence' [REDACTED]. The Yekatom Defence further claims that the Prosecutor has conceded that information related to this witness is exculpatory and that it has not been disclosed to the Defence. In this regard, the

⁴³ ICC-01/14-01/18-312-Conf, paras 10-11.

Yekatom Defence asserts that ‘the Appeals Chamber has squarely held that the Prosecution has an obligation to disclose items to the defence even if they are publicly available’. [REDACTED]. Lastly, according to the Yekatom Defence, the Prosecutor ‘never even notified the Defence of the existence’ of such material. Accordingly, the Yekatom Defence requests the Chamber to ‘A) direct the Prosecution to disclose all information in its possession concerning the fabrication of evidence by Witness [REDACTED] [...] and to take whatever steps necessary to obtain modification of any protective measures to effect such disclosure; and (B) require Witness [REDACTED] to testify *viva voce* at the confirmation hearing where he can be fully cross examined [...]’. The Ngaïssona Defence has joined this motion.

74. The Prosecutor requests that the Chamber reject this motion. The Prosecutor asserts that ‘information regarding the credibility of Witness [REDACTED] is readily available in the public sphere’. [REDACTED]. In addition, according to the Prosecutor, ‘[t]he Defence has had sufficient time to review the publicly available information involving Witness [REDACTED], seize the Prosecution with a demand for it to prioritise any request for variances of applicable protective measures for any specific witnesses, and/or to make such other applications as may be necessary’. The Prosecutor further adds that ‘the information bearing on Witness [REDACTED] does not concern any substantive circumstance, event, fact, or even the actual evidence provided by Witness [REDACTED] in *this* case and on which the Prosecution relies’. Lastly, the Prosecutor takes the view that ‘[t]here is no compelling reason for a *viva voce* testimony’ since ‘the presentation of evidence in documentary form is the preferred modality by which evidence is introduced at this stage of the proceedings’ [REDACTED].

The Chamber’s determination

75. The Chamber recalls that the Appeals Chamber has found that ‘the Prosecutor, pursuant to rule 77, has an obligation to disclose information that is in her possession or control to the defence even if it is publicly available’.⁴⁴ In the view of the Chamber,

⁴⁴ Appeals Chamber, *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, [Judgment on the Appeal of Mr. Abdallah Banda Abakaer Nourain and Mr. Saleh Mohammed Jerbo Jamus against the Decision of Trial Chamber IV of 23 January 2013 entitled “Decision on the](#)

this holds all the more true for '[...] evidence in the Prosecutor's possession or control [...] which may affect the credibility of prosecution evidence' under article 67(2) of the Statute. Thus, the public nature of some of the information pertaining to Witness [REDACTED] does not affect the Prosecutor's obligation to disclose it.

76. Furthermore, regulation 42(2) of the Regulations requires the Prosecutor to 'inform the defence to whom disclosure is being made of the nature of [...] protective measures' ordered in other proceedings. The Chamber notes that the Yekatom Defence asserts that it has not been informed of such measures and the Prosecutor does not appear to contest this assertion. While the Prosecutor avers that the Yekatom Defence has had sufficient time to obtain access to the relevant information, this information remains inaccessible as a result of the failure of the Prosecutor to inform the Defence.

77. [REDACTED]. Furthermore, there is no exception to the Prosecutor's obligation to inform the Defence under regulation 42(2) of the Regulations in the event that members of the Defence may have independent knowledge of protective measures ordered in other proceedings.

78. Therefore, the Prosecutor has failed to fully discharge her obligation to disclose information relevant to Witness [REDACTED]. Accordingly, the Chamber directs the Prosecutor to disclose any information pertaining to Witness [REDACTED] and falling under article 67(2) of the Statute that has not been disclosed to the Defence, while respecting the protective measures ordered in relation to this witness in other proceedings before the Court by 9 September 2019, at the latest. Additionally, the Chamber authorises the Yekatom Defence and the Ngaïssona Defence to, if necessary, amend their lists of evidence by 16 September 2019, at the latest.

79. The Chamber considers that this measure sufficiently remedies the prejudice suffered by the Yekatom Defence. In this regard, the Chamber notes that Witness [REDACTED], which are not connected to the substantive allegations made against Yekatom and Ngaïssona in the DCC in the present case. The Chamber also recalls

[Defence's Request for Disclosure of Documents in the Possession of the Office of the Prosecutor](#), 28 August 2013, ICC-02/05-03/09-501, para. 34.

that the scope of the impending confirmation of charges hearing is limited to establishing whether or not there are substantial grounds to confirm the charges against Yekatom and Ngaïssona on which the Prosecutor intends to seek trial. For this reason, the information already available and the additional disclosure will sufficiently enable the Defence to exercise their rights in relation to this witness' evidence. Therefore, the Chamber rejects the additional measures requested by the Yekatom Defence.

G. Motion for Extension of Time to File List of Evidence

The parties' submissions

80. The Yekatom Defence submits that '[t]he failure of the Prosecution to complete the disclosure process by 19 August 2019 and to address and/or rectify redaction issues constitutes good cause under Regulation 35(2) for an extension of time for the Defence to file its list of evidence'. On this basis, the Yekatom Defence 'requests that the deadline for filing its list of evidence be extended to fifteen days after disclosure has been completed'. The Yekatom Defence adds that it 'does not envision a postponement of the commencement of the confirmation hearing as a result of this delay, but may seek to adjourn the hearing after it has commenced [...]'. The Ngaïssona Defence has joined this motion.

81. The Prosecutor opposes the Request for Extension of Time. The Prosecutor is of the view that the Yekatom Defence's 'assertion that it has "[...] not identified any evidence that it wishes to present at the hearing" at this stage, should dispose of [this Request] altogether'. The Prosecutor further highlights that, if the Chamber would consider the Request for Extension of Time, she 'has disclosed a significant amount of highly relevant incriminatory evidence to both Defence teams throughout the calendar year'. Furthermore, the Prosecutor avers that, supposing alleged disclosure violations occurred (without conceding that this is the case), 'it would not merit the relief requested, bearing in mind the stage of the proceedings and the limited scope of the Confirmation Hearing'. However, the Prosecutor is of the view that, if the Defence can show good cause to amend their lists of evidence, she 'would not object to the amendments within a reasonable time, as determined by the Chamber'.

The Chamber's determination

82. The Chamber considers that the Yekatom Defence has not established good cause within the meaning of regulation 35(2) of the Regulations for extending the deadline to provide its list of evidence pursuant to rule 121(6) of the Rules.

83. The Prosecutor has disclosed information to the Defence on a rolling basis. Furthermore, given the time elapsed since the arrest of the suspects, the Yekatom Defence and the Ngaïssona Defence have had the opportunity to identify any additional evidence. Lastly, as mentioned, the scope of the confirmation of charges hearing is limited. On this basis, the Chamber rejects the Request for Extension of Time in so far as it concerns information already in the possession of the Defence.

84. However, for the aforementioned reasons and to the extent specified above, the Chamber allows the Yekatom Defence and/or the Ngaïssona Defence to amend their lists of evidence, if necessary, by 16 September 2019 at the latest.

III. Conclusion

85. In conclusion, having rejected the Request for Extension of Time as specified above, the Chamber emphasises that, as mandated by rule 121(6) of the Rules, the Yekatom Defence and the Ngaïssona Defence shall file their lists of evidence in so far as they relate to information already in their possession on 4 September 2019.

86. In addition, for the reasons set out above, the Prosecutor shall:

- a. by 9 September 2019, at the latest: (i) disclose to the Defence any screening notes for witnesses upon whom she intends to rely for confirmation purposes; and (ii) verify whether she has in her possession any further evidence that may fall within rule 76 of the Rules, and disclose this to the Defence;
- b. by 9 September 2019, at the latest: respond to all outstanding requests from the Defence regarding redactions, including all examples included within the Motion to Lift Redactions;
- c. by 9 September 2019, at the latest: disclose any information pertaining to Witness [REDACTED] and falling under article 67(2) of the Statute that has not been disclosed to the Defence, while respecting the

protective measures ordered in relation to this witness in other proceedings before the Court; and

- d. by 13 September 2019 at the latest, either disclose or allow the Defence to inspect all RFAs submitted by the Prosecutor to obtain the mobile telephone records referenced in the DCC and its annexes and the resulting judicial or administrative orders from domestic jurisdictions.

87. Furthermore, the Prosecutor and the Defence shall finalise *inter partes* discussions, if any, regarding redactions by 11 September 2019 at the latest.

88. Lastly, the Yekatom Defence shall:

- a. as soon as possible and by no later than 6 September 2019, provide to the Prosecutor any specific examples of evidence that it believes may fall under rule 76 of the Rules, and any further information that may be of assistance in this regard;
- b. at the conclusion of *inter partes* discussions on redactions, if any, and by no later than 13 September 2019, submit precise and detailed arguments regarding any points of disagreement to the Chamber; and
- c. by 16 September 2019 at the latest, amend their lists of evidence, if necessary, with regard to the specific matters referred to in the present decision.

89. Accordingly, the Chamber underscores that the confirmation of charges hearing shall commence on 19 September 2019 as scheduled. All relevant deadlines must, thus, be observed by the parties, including, most pertinently, the submission of written submissions under rule 121(9) of the Rules, if any, no later than three days before the hearing, namely by 16 September 2019, at the latest. The Chamber further stresses that, in view of the advanced stage of the proceedings and barring exceptional circumstances, there is no room for postponing the hearing.

FOR THESE REASONS, THE CHAMBER HEREBY

- a) **DIRECTS** the Prosecutor to disclose to the Defence any screening notes for witnesses upon whom she intends to rely for confirmation purposes by 16.00 on 9 September 2019; **DIRECTS** the Prosecutor to verify whether she has in her possession any further evidence that may fall within rule 76 of the Rules, and to disclose this to the Defence as soon as possible, and by 16.00 on 9 September 2019 at the latest; and **INSTRUCTS** the Defence to provide to the Prosecutor (i) any specific examples of evidence that it believes may fall under rule 76 of the Rules, and (ii) any further information that may be of assistance in this regard, as soon as possible, and by no later than 16.00 on 6 September 2019;
- b) **REJECTS** the Motion for Leave to Reply to the Prosecution's Response to the Yekatom Defence's Motion to Lift Redactions; **REJECTS** the Defence request for judicial review of all remaining redactions; **DIRECTS** the Prosecutor to respond to all outstanding requests from the Defence regarding redactions, including all examples included within the 'Motion to Lift Redactions', as soon as possible, and by no later than 16.00 on 9 September 2019; and the parties to finalise *inter partes* discussions regarding redactions by 11 September 2019 at the latest; **DIRECTS** the Defence, at the conclusion of *inter partes* discussions on redactions, to submit precise and detailed arguments regarding any points of disagreement, if any, to the Chamber by no later than 16.00 on 13 September 2019; and **DIRECTS** the parties to consult with the LRV regarding disputed redactions that relate to dual status individuals and/or victims participating in the proceedings;
- c) **DIRECTS** the Prosecutor to either disclose or allow the Defence to inspect all RFAs submitted by the Prosecutor to obtain the mobile telephone records referenced in the DCC and its annexes and the resulting judicial or administrative orders from domestic jurisdictions by 16.00 on 13 September 2019;
- d) **REJECTS** the 'Motion for Inspection of Information on the Organisation of the Seleka';

- e) **DIRECTS** the Prosecutor to disclose any information pertaining to Witness [REDACTED] and falling under article 67(2) of the Statute that has not been disclosed to the Defence, while respecting the protective measures ordered in relation to this witness in other proceedings before the Court, by 16.00 on 9 September 2019, at the latest; and **REJECTS** the additional measures requested by the Yekatom Defence;
- f) **AUTHORISES** the Yekatom Defence and the Ngaïssona Defence to, if necessary, amend their lists of evidence by 16 September 2019, at the latest, as a result of the matters outlined in the present decision; and
- g) **REJECTS** the Request for Extension of Time.

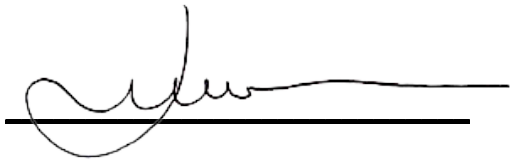
Done in both English and French, the English version being authoritative.



Judge Antoine Kesia-Mbe Mindua
Presiding Judge



Judge Tomoko Akane



Judge Rosario Salvatore Aitala

Dated this Monday, 3 February 2020

At The Hague, The Netherlands