



Original: English

**No. ICC-01/14-01/18
Date: 21 December 2020**

TRIAL CHAMBER V

Before: Judge Bertram Schmitt, Single Judge

SITUATION IN THE CENTRAL AFRICAN REPUBLIC II

**IN THE CASE OF
*THE PROSECUTOR v. ALFRED YEKATOM AND PATRICE-EDOUARD
NGAISSONA***

Public redacted

Third Decision on the Prosecution Request for Non-Standard Redactions

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

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Judge Bertram Schmitt, acting as Single Judge on behalf of Trial Chamber V of the International Criminal Court, in the case of *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona*, having regard to Articles 64(6)(c) and 67 of the Rome Statute (the ‘Statute’) and Rules 77 and 81(2) of the Rules of Procedure and Evidence (the ‘Rules’), issues this ‘Third Decision on the Prosecution Request for Non-Standard Redactions’.

I. Procedural history and submissions

1. On 30 September 2020, in his first ‘Decision on the Prosecution Request for Non-Standard Redactions’ (the ‘First Decision’),¹ the Single Judge granted in part a request from the Office of the Prosecutor (the ‘Prosecution’), under Rule 81(2) of the Rules, for non-standard redactions to material related to six trial witnesses for the purpose of protecting the ongoing investigation into crimes allegedly committed by the Seleka (the ‘Seleka Investigation’).²
2. On 5 November 2020, the Chamber received the ‘Prosecution’s Request for Non-Standard Redactions to Call Data Records Relating to Seleka Investigation’ (the ‘Request’).³ The Prosecution seeks to redact information in: (i) call data records (the ‘CDRs’) collected as part of the Seleka Investigation;⁴ (ii) requests for assistance (the ‘RFAs’) sent to the national authorities;⁵ and (iii) related documentation, including transmission letters sent between the relevant national authorities and to the telecommunications companies, other correspondence, or

¹ First Decision, ICC-01/14-01/18-670-Conf-Exp, confidential *ex parte*, only available to the Prosecution and the Registry (confidential redacted version notified the same day, ICC-01/14-01/18-670-Conf-Red).

² Prosecution’s Request for Non-Standard Redactions under Rule 81(2) for Trial Witnesses P-1143, P-1172, P-2377, P-0992, P-1558 and P-2587, 30 July 2020, ICC-01/14-01/18-609-Conf-Exp, confidential *ex parte*, only available to the Prosecution and the Registry (with confidential *ex parte* Annexes A-O, only available to the Prosecution and the Registry) (confidential redacted version notified on 5 August 2020, ICC-01/14-01/18-609-Conf-Red), paras 1, 43. In this regard, the Single Judge also notes his Second Decision on the Prosecution Request for Non-Standard Redactions, 14 December 2020, ICC-01/14-01/18-767-Conf-Exp, confidential *ex parte*, only available to the Prosecution and the Registry (confidential redacted version notified the same day, ICC-01/14-01/18-767-Conf-Red).

³ Request, 4 November 2020, ICC-01/14-01/18-714-Conf-Exp, confidential *ex parte*, only available to the Prosecution (with confidential *ex parte* Annexes A, B and C, only available to the Prosecution) (confidential redacted versions of the filing and annexes notified on 5 November 2020, ICC-01/14-01/18-714-Conf-Red).

⁴ Request, ICC-01/14-01/18-714-Conf-Red, paras 1, 20-22, 367.

⁵ Request, ICC-01/14-01/18-714-Conf-Red, paras 1, 23-24, 367.

technical reports relating to the processing of the data (the ‘Related Documentation’).⁶

3. The Prosecution submits that the material is disclosable in the present case as it contains both data relating to the present case and the Seleka Investigation. According to the Prosecution, separating the relevant data in the CDRs into different Excel files would be time-consuming, prone to human error and could affect the structural integrity of the data.⁷ Accordingly, the Prosecution seeks redactions to information relating to [REDACTED], specific witnesses and victims and other persons relevant to the Seleka Investigation (the ‘Relevant Individuals’).⁸ It submits that the requested redactions are necessary and proportionate ‘as they would only affect CDRs which are attributed to [the Relevant Individuals], leaving the CDRs relating to the Anti-Balaka Investigation and these proceedings completely intact and accessible to the Defence’.⁹
4. On 13 November 2020, the Yekatom Defence responded to the Request (the ‘Yekatom Defence Response’).¹⁰ The Yekatom Defence submits that it does not oppose the requested redactions to the: (i) RFAs; (ii) Related Documentation; and (iii) names contained in specific CDRs, listed as item 6 in Annex A to the Request.¹¹ However, the Yekatom Defence submits that any redactions of telephone numbers, International Mobile Subscriber Identity (the ‘IMSI’) and International Mobile Equipment Identity (the ‘IMEI’)¹² to the CDRs are ‘unnecessary and overly intrusive’ and requests that they be rejected.¹³ Further, the Yekatom Defence requests that the Request and the Yekatom Defence Response be reclassified as public (the ‘Yekatom Defence Request’).¹⁴

⁶ Request, ICC-01/14-01/18-714-Conf-Red, paras 1, 25-27, 367.

⁷ Request, ICC-01/14-01/18-714-Conf-Red, para. 29.

⁸ Request, ICC-01/14-01/18-714-Conf-Red, paras 2, 46 *et seq.*

⁹ Request, ICC-01/14-01/18-714-Conf-Red, para. 2.

¹⁰ Yekatom Defence Response to the Prosecution Request for Redactions to CDRs, ICC-01/14-01/18-729-Conf.

¹¹ Yekatom Defence Response, ICC-01/14-01/18-729-Conf, paras 2, 10. *See* Call Data Record, CAR-OTP-2011-0849.

¹² The IMSI is a unique identification number attributed to the user within a cellular network and stored on the SIM card, whereas the IMEI is a unique 15 digit identification associated with the telephone. *See* Request, ICC-01/14-01/18-714-Conf-Red, para. 9.

¹³ Yekatom Defence Response, ICC-01/14-01/18-729-Conf, paras 3, 10.

¹⁴ Yekatom Defence Response, ICC-01/14-01/18-729-Conf, paras 9-10.

5. On 16 November 2020, the Ngaïssona Defence responded, indicating that it:
 - (i) leaves it to the discretion of the Chamber to assess each request for redactions on a case-by-case basis; and (ii) invites the Prosecution to engage in *inter partes* discussions in relation to [REDACTED].¹⁵

II. Analysis

6. The Single Judge recalls the applicable law as set out in his First Decision, in particular the following criteria concerning whether to authorise the non-disclosure of information pursuant to Rule 81(2) of the Rules:
 - i. there is an *objectively justifiable risk of prejudice* to further or ongoing investigations which arises from disclosing the information to the Defence, as opposed to the general public;
 - ii. the non-disclosure of the information could overcome or reduce the risk and it is *necessary*, i.e. it is the least intrusive measure available to the Prosecution to safeguard the investigation; and
 - iii. the non-disclosure of the information is *proportionate*, in that it is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.¹⁶
7. The Single Judge further recalls that, in assessing whether the non-disclosure of the information is proportionate, he will enquire whether the information is relevant to the Defence, i.e. whether the information concerned is potentially exculpatory or material to the preparation of the Defence. This is a significant

¹⁵ Email from the Ngaïssona Defence, 16 November 2020, at 12:25. Hereinafter, the Yekatom Defence and the Ngaïssona Defence will be jointly referred to as 'the Defence', unless otherwise indicated.

¹⁶ First Decision, ICC-01/14-01/18-670-Conf-Exp, paras 6-10, *referring to Appeals Chamber, The Prosecutor v. Germain Katanga*, Judgment on the appeal of Mr Germain Katanga against the decision of Pre-Trial Chamber I entitled 'First Decision on the Prosecution Request for Authorisation to Redact Witness Statements', 13 May 2008, ICC-01/04-01/07-476, paras 59-62; Judgment on the Appeal of the Prosecutor against the decision of Pre-Trial Chamber I entitled 'First Decision on the Prosecution Request for Authorisation to Redact Witness Statements', 13 May 2008, ICC-01/04-01/07-475, paras 71-73, 98-99; Trial Chamber VI, *The Prosecutor v. Bosco Ntaganda*, Decision on the Protocol establishing a redaction regime, 12 December 2014, ICC-01/04-02/06-411, paras 14-15.

factor in determining whether the interest of protecting the investigation outweighs the interests of the Defence.¹⁷

8. The Prosecution requests authorisation to redact information in CDRs, RFAs and Related Documentation. Specifically, it requests the redaction of names, telephone numbers, IMEI and IMSI, ‘related user identities’ or other identifiable information, such as nicknames or email addresses, (the ‘Identifiable Information’) pertaining to the Relevant Individuals.¹⁸
9. At the outset, the Single Judge notes that there are some discrepancies between the description of the requested redactions as set out in Annex B and Annex C to the Request, on the one hand, and the proposed redactions as currently applied in the relevant documents in e-court, on the other hand. While this is unfortunate and has complicated the present analysis, the Single Judge trusts that the Prosecution will avoid any such inaccuracies in future filings. In the present case, a holistic reading of the Request, its annexes and the material in e-court enabled the Single Judge to ascertain which redactions the Prosecution intended to request and, in the interest of efficiency, the Single Judge considers that no corrected version of the Request is warranted.
10. For the reasons that follow, the Single Judge grants the Request. First, the Single Judge finds that there is an objectively justifiable risk of prejudice to the Seleka Investigation arising from the disclosure of the above-mentioned information. The Identifiable Information entirely relates to the Relevant Individuals. Specifically, the Single Judge notes that the Identifiable Information may reveal: (i) [REDACTED]; (ii) [REDACTED];¹⁹ (iii) the identity of crime-based witnesses and insider witnesses for, and victims of, incidents that remain under investigation [REDACTED],²⁰ including (iv) the identity [REDACTED];²¹ and (v) the identity of potential perpetrators of crimes allegedly committed by the Seleka.²² Therefore, the Single Judge finds that disclosing the Identifiable

¹⁷ See First Decision, ICC-01/14-01/18-670-Conf-Exp, para. 9.

¹⁸ Request, ICC-01/14-01/18-714-Conf-Red, para. 3.

¹⁹ Request, ICC-01/14-01/18-714-Conf-Exp, para. 60.

²⁰ Request, ICC-01/14-01/18-714-Conf-Red, paras 162, 229.

²¹ Request, ICC-01/14-01/18-714-Conf-Exp, paras 233, 242, 319, 338.

²² Request, ICC-01/14-01/18-714-Conf-Exp, paras 252, 255, 263, 271, 275, 285, 346, 348, 358, 365.

Information would risk revealing the direction and targets of the Seleka Investigation.

11. The Single Judge further considers that the risk of prejudice to the Seleka Investigation arises from the disclosure of the above-mentioned information to the Defence, as opposed to the public, for the reasons set out in his First Decision.²³
12. Second, the Single Judge finds that the requested redactions are necessary in that they are the least intrusive measure available to the Prosecution to protect the Seleka Investigation. The Single Judge has considered alternative measures, such as limiting the redactions in the CDRs to the names of the Relevant Individuals while disclosing the telephone numbers, IMEI and IMSI, as suggested by the Yekatom Defence.²⁴
13. In this regard, the Single Judge notes the Yekatom Defence's argument that its ability to infer the targets and direction of the Seleka Investigation through analysing the CDRs would be diminished, if the names of the Relevant Individuals were redacted.²⁵ However, the Single Judge notes the Prosecution's submission that the IMEI and IMSI can be used to identify the telephone number used with that device and SIM card, and vice-versa²⁶ and that, if individuals still use the same telephone number as they did 'during the crisis', this further facilitates their identification.²⁷
14. Accordingly, the Single Judge considers that with this data, the identity of the Relevant Individuals may be ascertained. Further, this data could also link the Relevant Individuals to specific locations, as certain CDRs contain data on the cell site locations.²⁸ Therefore, the Single Judge finds that disclosing the telephone numbers, IMEI and IMSI risks revealing the direction and targets of

²³ First Decision, ICC-01/14-01/18-670-Conf-Red, para. 16.

²⁴ Yekatom Defence Response, ICC-01/14-01/18-729-Conf, paras 3, 10.

²⁵ Yekatom Defence Response, ICC-01/14-01/18-729-Conf, para. 4.

²⁶ Request, ICC-01/14-01/18-714-Conf-Red, para. 9.

²⁷ Request, ICC-01/14-01/18-714-Conf-Exp, para. 42.

²⁸ Request, ICC-01/14-01/18-714-Conf-Red, para. 10.

the Seleka Investigation and that the requested redactions are necessary in this instance.

15. Third, the Single Judge finds that the requested redactions are proportionate and not prejudicial to or inconsistent with the rights of the accused. In reaching this conclusion, the Single Judge was guided in particular by the fact that the requested redactions entirely relate to the Relevant Individuals. As such, this information is not relevant to the Defence. The data is neither exculpatory in nature under Article 67(2) of the Statute, nor does it appear to be in any other way material to the preparation of the Defence under Rule 77 of the Rules.
16. For these reasons, the Single Judge grants the Prosecution's request to redact the:
 - i.* CDRs, as requested in Annex A to the Request;
 - ii.* RFAs, as currently applied in e-court for: CAR-OTP-2107-9058²⁹, CAR-OTP-2117-0168,³⁰ and CAR-OTP-2117-0211;³¹ and otherwise as requested in Annex B to the Request; and
 - iii.* Related Documentation as follows:
 - a. as requested in Annex C to the Request, for: CAR-OTP-2015-0129, CAR-OTP-2015-0160, CAR-OTP-2015-0168, CAR-OTP-2015-0170, CAR-OTP-2015-0203, CAR-OTP-2017-0174, CAR-OTP-2018-0024, CAR-OTP-2018-0613, CAR-OTP-2018-0617, CAR-OTP-2018-0630, CAR-OTP-2019-1182, CAR-OTP-2019-1185, CAR-OTP-2019-1481, CAR-OTP-2023-0768, CAR-OTP-2025-0638, CAR-OTP-2054-1475, CAR-OTP-2055-2496, CAR-OTP-2057-0882, CAR-OTP-2060-0070 (as requested, with the exception of the pages as indicated below),³² CAR-OTP-2068-0176, CAR-

²⁹ The Single Judge notes the discrepancy between the redactions described in Annex B and those currently applied to pages 9069 and 9070.

³⁰ The Single Judge notes the discrepancy between the redactions described in Annex B and those currently applied to the first telephone number on page 0174.

³¹ The Single Judge notes the discrepancy between the redactions described in Annex B and those currently applied to pages 0218 and 0219.

³² The Single Judge notes the following discrepancies: (i) on page 0078, two telephone numbers [REDACTED] are currently redacted, but no corresponding redactions were requested in Annex C; and

OTP-2069-0477, CAR-OTP-2082-1016,³³ CAR-OTP-2089-1340, CAR-OTP-2090-0427, CAR-OTP-2107-9185, CAR-OTP-2110-0317, CAR-OTP-2112-1602, CAR-OTP-2112-1610, CAR-OTP-2112-1618, CAR-OTP-2112-1656, CAR-OTP-2121-2844, CAR-OTP-2127-1012, CAR-OTP-2127-1015, CAR-OTP-2127-1059, CAR-OTP-2127-1183, and CAR-OTP-2127-4464; and

- b. as currently applied in e-court, for: CAR-OTP-2011-0845 (lines 2 to 5); CAR-OTP-2015-0206 (including [REDACTED] on page 0208, paragraph 6); CAR-OTP-2020-0352;³⁴ CAR-OTP-2059-1308;³⁵ CAR-OTP-2060-0070 (as currently applied, as an exception to the above, for pages 0073, 0145, 0156 and 0160);³⁶ and CAR-OTP-2112-1356.³⁷

FOR THESE REASONS, THE SINGLE JUDGE HEREBY

GRANTS the Request as set out above in paragraph 16;

DIRECTS the Registry to reclassify the Yekatom Defence Response as public; and

ORDERS the Prosecution to file a public redacted version of its Request or request reclassification within one week of notification of the present decision.

two telephone numbers are requested, but not currently redacted in e-court [REDACTED]; (ii) on page 0140, there are currently more redactions applied than requested; and (iii) page 0157 currently contains redactions that were not requested.

³³ The Single Judge notes the discrepancy between the telephone numbers as indicated in Annex C and as redacted on page 1018 in e-court. Notably, [REDACTED].

³⁴ The Single Judge notes the discrepancies between the requested redactions in Annex C and the proposed redactions as currently applied in e-court, such as on page 0398.

³⁵ The Single Judge notes the discrepancies between the telephone number in Annex C [REDACTED] and the currently redacted telephone number on page 1327 in e-court [REDACTED]. The redaction is granted as currently applied on page 1327 on the condition that the number on that page is [REDACTED] or that the number on page 1327 contains an error of a typographical nature.

³⁶ The Single Judge notes the following discrepancies: (i) [REDACTED] telephone number is on page 0073 in e-court and not on page 0072 as indicated in Annex C; (ii) in Annex C, [REDACTED]; (iii) page 0155 is listed twice in Annex C, the second reference corresponds to page 0156 in e-court; and (iv) with regard to page 0160, the last telephone number misses one digit in Annex C.

³⁷ The Single Judge notes the discrepancy between one of the telephone numbers on page 1356 and as indicated in Annex C (this concerns the telephone number of [REDACTED]).

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



Judge Bertram Schmitt
Single Judge

Dated this 21 December 2020

At The Hague, The Netherlands