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**International
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TRIAL CHAMBER V

Before: Judge Bertram Schmitt, Presiding Judge
Judge Péter Kovács
Judge Chang-ho Chung

**SITUATION IN THE CENTRAL AFRICAN REPUBLIC II
IN THE CASE OF *THE PROSECUTOR v.*
*ALFRED ROMBHOT YEKATOM & PATRICE-EDOUARD NGAÏSSONA***

Public

**Public Redacted Version of Yekatom Defence Motion to Lift
Non-Standard Redactions: Seleka Investigation**

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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INTRODUCTION

1. Counsel representing Mr. Alfred Rombhot Yekatom (“Defence” and “Mr. Yekatom”, respectively) respectfully request that the Trial Chamber lift in their entirety the non-standard redactions granted by the Pre-Trial Chamber for Prosecution Witnesses P-0291, P-0567, and P-0627 based on the Prosecution’s ongoing investigation of Seleka crimes.¹ The Defence contends that now that the case has reached the trial stage, the redactions are no longer warranted.

RELEVANT PROCEDURAL HISTORY

2. On 24 September 2014, the Prosecution opened its investigation into crimes committed since 2012 in the Central African Republic.²
3. On 23 January 2019, the Pre-Trial Chamber’s Single Judge adopted a redaction protocol for standard redactions that could be made without prior judicial authorisation. Redactions due to further or ongoing investigations were not included among the standard redaction categories.³
4. On 29 March 2019, the Prosecution requested the Pre-Trial Chamber to authorise it to withhold the identities and portions of statements of six witnesses and to supply non-standard redactions to the statements of another four witnesses due to its ongoing investigation of the Seleka.⁴
5. On 8 April 2019, the Yekatom and Ngaïssona Defence teams filed a joint response, objecting to the proposed redactions.⁵

¹ The Prosecution did not include these witnesses in its *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* (5 August 2020), [ICC-01/14-01/18-609-Conf-Red](#). (“*Prosecution Request*”)

² [Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on opening a second investigation in the Central African Republic](#), ICC-OTP-20140924-PR1043, 24 September 2014.

³ [ICC-01/14-01/18-64-Red](#).

⁴ [ICC-01/14-01/18-162-Conf](#).

⁵ [ICC-01/14-01/18-165-Conf](#). A public redacted version can be found at [ICC-01/14-01/18-165-Red](#).

6. On 18 April 2019, the Prosecution submitted a second request for authorisation to withhold the identities and portions of statements of eleven more witnesses and to supply non-standard redactions to the statements of another two witnesses due to its ongoing investigation of the Seleka.⁶
7. On 26 June 2019, the Yekatom and Ngaïssona Defence teams filed a joint response, objecting to the proposed redactions in the second request.⁷
8. The Pre-Trial Chamber requested additional information from the Prosecution on 15 May 2019.⁸
9. On 28 June 2019, the Pre-Trial Chamber authorised the Prosecution to withhold the identities of five witnesses and redact portions of the statements of nine other witnesses because disclosure may prejudice the Prosecution's ongoing investigation of the Seleka.⁹ Among the witnesses for whom redactions were authorised were P-0291 and P-0567, who now appear on the Prosecution's Preliminary Witness List as witnesses who will testify at trial.¹⁰
10. On 17 July 2019, the Pre-Trial Chamber authorised the Prosecution to redact portions of the statements of three additional witnesses for the same reasons.¹¹ Among the witnesses for whom redactions were authorised was P-0627, who now appears on the Prosecution's Preliminary Witness List as a witness who will testify at trial.¹²

⁶ [ICC-01/14-01/18-179-Conf-Red](#).

⁷ [ICC-01/14-01/18-230-Conf](#). A public redacted version can be found at [ICC-01/14-01/18-230-Red](#).

⁸ [ICC-01/14-01/18-201-Conf](#).

⁹ [ICC-01/14-01/18-232-Conf-Red](#). A public redacted version can be found at [ICC-01/14-01/18-232-Red2](#).

¹⁰ [ICC-01/14-01/18-553-Conf-AnxA](#). The redacted witness statement of Witness P-0291 can be found at [CAR-OTP-2024-0036-R02](#). The redacted witness statement of Witness P-0567 can be found at [CAR-OTP-2059-0084-R01](#).

¹¹ [ICC-01/14-01/18-249-Conf-Red](#). A public redacted version can be found at [ICC-01/14-01/18-249-Red2](#).

¹² The redacted transcripts of Witness P-0627's interview can be found at [CAR-OTP-2102-1110-R01](#); [CAR-OTP-2102-1138-R01](#); [CAR-OTP-2102-1171-R01](#); [CAR-OTP-2102-1176-R01](#); [CAR-OTP-2102-1196-R01](#); [CAR-OTP-2102-1229-R01](#); [CAR-OTP-2102-1265-R01](#); [CAR-OTP-2102-1298-R01](#); [CAR-OTP-2102-1312-R01](#); [CAR-OTP-2102-1348-R01](#); [CAR-OTP-2102-1391-R01](#); [CAR-OTP-2102-1429-R01](#); [CAR-OTP-2102-1431-R01](#); [CAR-OTP-2102-1470-R01](#); [CAR-OTP-2102-1506-R02](#); [CAR-OTP-2102-1529-R01](#).

11. On 3 September 2019, the Pre-Trial Chamber rejected a request by the Yekatom Defence¹³ to lift the Seleka-related redactions.¹⁴
12. In its decision on the confirmation of charges on 11 December 2019, the Pre-Trial Chamber noted the objections of the Defence to the fairness of the proceedings in light of the failure to lift the Seleka-related redactions,¹⁵ and reaffirmed that its decision not to lift those redactions did not prejudice the Defence.¹⁶
13. On 5 August 2020, the defence received a confidential redacted version of the *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*.¹⁷
14. The Defence opposed the proposed redactions in a response filed on 13 August 2020.¹⁸
15. The Defence and the Prosecution engaged in *inter partes* discussions during the week of 10 August 2020 concerning the lifting of redactions for Witnesses P-0291, P-0567, and P-0627 but were unable to reach an agreement.

RELEVANT PROVISION

16. Rule 81(2)—Restrictions on Disclosure

Where material or information is in the possession or control of the Prosecutor which must be disclosed in accordance with the Statute, but disclosure may prejudice further or ongoing investigations, the Prosecutor may apply to the Chamber dealing with the matter for a ruling as to whether the material or information must be disclosed to the defence. The matter shall be heard on an ex parte basis by the Chamber. However, the Prosecutor may not introduce such material or information into evidence during the confirmation hearing or

¹³ [ICC-01/14-01/18-290](#).

¹⁴ [ICC-01/14-01/18-315-Conf](#), para. 62. A public redacted version can be found at [ICC-01/14-01/18-315-Red](#).

¹⁵ [ICC-01/14-01/18-340-Red](#), para. 25. [ICC-01/14-01/18-347](#), para. 7; Transcript of Hearing, [ICC-01/14-01/18-T-004-Red2-ENG](#), pp. 19-39 (19 September 2019).

¹⁶ [ICC-01/14-01/18-403-Red-Corr](#), para. 48.

¹⁷ [ICC-01/14-01/18-609-Conf-Red](#).

¹⁸ [ICC-01/14-01/18-623-Conf](#).

the trial without adequate prior disclosure to the accused.

ARGUMENT

17. When the Pre-Trial Chamber granted the proposed redactions to the statements of Witnesses P-0291, P-0567, and P-0627, it relied on the fact that the redactions were sought in the context of the confirmation stage of the proceedings where the Prosecution's evidence was being tested to determine if there were substantial grounds to believe that Mr. Yekatom had committed a crime.¹⁹ No witnesses were called to testify at the confirmation hearing and the inquiry into their credibility was therefore quite limited.
18. Now that the case has reached the trial stage, the circumstances have changed. The prejudice to the Defence from the redactions is much greater since the Trial Chamber will be evaluating the credibility of the witnesses and the witnesses' evidence will be used for a final determination of Mr. Yekatom's responsibility.
19. Therefore, the Trial Chamber is requested to revisit the redactions authorised by the Pre-Trial Chamber and apply the same standards that is applying to the *Prosecution's Request* when considering whether to lift, in whole or in part, the Seleka investigation redactions for Witnesses P-0291, P-0567, and P-0627.
20. The non-disclosure of portions of witness statements is an exception to the general rule of full disclosure.²⁰ Redactions may be granted if they satisfy the following requirements: (i) the existence of an objectively justifiable risk to the safety of the person or interest concerned, or which may prejudice further or ongoing investigations; (ii) the risk must arise from disclosing the particular information to the receiving party, as opposed to the public; (iii) the

¹⁹ [ICC-01/14-01/18-232-Red2](#), para. 26

²⁰ *Prosecutor v Katanga and Ngudjolo*, 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. 61, 70.

infeasibility or insufficiency of less restrictive protective measures and (iv) an assessment as to whether the redactions sought are prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.²¹

21. The burden is squarely on the party seeking the redactions to justify the need for them.²² The Pre-Trial Chamber's redaction protocol also provides that the onus is on the disclosing party to justify the particular redaction when challenged.²³
22. An application of these factors to the redactions for P-0291, P-0567, and P-0627 should result in a conclusion that the redactions are unwarranted.

(A) Prejudice to Further or Ongoing Investigations

23. When granting the redactions, the Pre-Trial Chamber identified the prejudice from disclosure of the redacted paragraphs as revealing the "direction and targets of the Seleka investigation".²⁴
24. However, now that the Prosecution's disclosure is more advanced, there have been numerous disclosures of Seleka-related crimes throughout Bangui and other areas,²⁵ including statements of witnesses claiming that they were abducted by the Seleka.²⁶ Some of the disclosed statements personally implicate the highest leaders of the Seleka, such as [REDACTED] and [REDACTED], as well as specific Seleka elements such as [REDACTED] and [REDACTED].

²¹ *Prosecutor v Bemba et al*, Decision on Modalities of Disclosure, 22 May 2015, [ICC-01/05-01/13-959](#), para. 11, citing authorities.

²² *Prosecutor v Gbagbo and Blé Goudé*, Judgment on the Appeal of Mr. Laurent Gbagbo against the Oral Decision on Redactions of 29 November 2016, 31 July 2017, [ICC-02/11-01/15-915-Red](#), paras. 61-62.

²³ [ICC-01/14-01/18-64-Red](#), para. 30

²⁴ [ICC-01/14-01/18-232-Red2](#), para. 68

²⁵ See, for example, [CAR-OTP-2073-0775-R01](#), paras. 21-24; [CAR-OTP-2105-0991-R01](#), paras. 17-24; [CAR-OTP-2100-0252-R02](#), paras. 21-35; [CAR-OTP-2041-0741-R01](#), paras. 24-26; [CAR-OTP-2039-0252-R01](#); [CAR-OTP-2083-0263-R01](#).

²⁶ See, for example, [CAR-OTP-2072-0521-R01](#) at 0527, [CAR-OTP-2072-0544-R02](#) at 0545-0551.

[REDACTED], in crimes.²⁷ Disclosure has also been made of statements made by Seleka leaders.²⁸

25. The Defence fails to see how disclosure of the redacted material for Witness P-0291, P-0567, and P-0627 would reveal the direction and targets of the Seleka investigation when viewed in the context of all of the disclosures that have already been made.
26. This appears to be particularly true when one considers the circumstances of the three witnesses.
27. Witness P-0291 is the [REDACTED]. Given the comprehensive nature of his involvement with the Seleka, providing an unredacted version of his statement will not reveal the direction and targets of the Seleka investigation.
28. Witness P-0567 was a [REDACTED] in CAR. The extensive redactions to his statement appear to involve the events of 5 December 2013 through early January 2014. Given the many disclosures that have been made about Seleka activities during that period, disclosure of the redacted material would not likely further reveal the direction and targets of the Seleka investigation.
29. Witness P-0627, a [REDACTED], likely had extensive contacts with many persons during the Seleka regime. The widespread nature of the redactions to his interview transcripts makes it impossible for the Defence to understand the nature of his relationship with the Seleka and its leaders. However, in light of the disclosure of Seleka crimes and attribution of those crimes to the leaders of the Seleka in items already disclosed, it is difficult to conclude how that

²⁷ See, for example, [CAR-OTP-2016-0652-R01](#), paras. 54-77; [CAR-OTP-2033-8177-R01](#); [CAR-OTP-2099-0165-R01](#), paras. 292-97; [CAR-OTP-2107-3696-R01](#), p. 3719; [CAR-OTP-2078-0059-R02](#), paras. 31-32, 37-38, 46; [CAR-OTP-2033-7885-R02](#), paras. 22-24; [CAR-OTP-2008-1188-R01](#), paras. 47-69; [CAR-OTP-2094-0228-R02](#), paras. 40-43; [CAR-OTP-2082-0299-R03](#), paras. 16-24; [CAR-OTP-2076-0037-R02](#) at 0051-0055.

²⁸ See, for example, [CAR-OTP-2076-0911-R01](#), paras. 35-41, 49-83, 93; [CAR-OTP-2065-0003-R01](#), paras. 34-35, 53, 104; [CAR-OTP-2058-0581-R01](#), paras. 35-43, 58-69; [CAR-OTP-2117-0645-R01](#), paras. 72-73.

disclosure of the redacted portions of his interview would identify the direction and targets of the Prosecution's Seleka investigation.

(B) Risk from Disclosure to the Defence Teams

30. During the proceedings before the Pre-Trial Chamber, the Prosecution offered no concrete reason why disclosure to the Defence teams, as opposed to disclosure to the public would prejudice its Seleka investigation. It likely relies on its general claim that dissemination of the information to the Defence would create the "risk of leaks or inadvertent disclosure".²⁹
31. Since this can be said in every case, to credit this blanket statement would be to give the Prosecution carte blanche to redact information at will.
32. It should be recalled that redaction of portions of witness statements to protect an ongoing investigation is unheard of at the ad hoc Tribunals. Indeed, more than a dozen Defence teams had access to information of crimes committed in Bosnia long before the leaders, Radovan Karadžić and Ratko Mladić, were captured. No prejudice to the Prosecution's ability to prosecute those men was ever claimed or demonstrated.
33. In domestic jurisdictions, redaction of witness statements due to ongoing investigations is also unheard of. The Prosecution knows that when it makes a decision to file charges and decides to call a particular witness, it is going to have to make full disclosure of that witness' statements. It takes those considerations into account in its charging and witness selection decisions. It is not privileged to withhold that information on the general fear that the accused might leak it to other associates who remain under investigation.
34. In fact, this case presents the weakest facts for the risk of leaks or inadvertent disclosure. Unlike ongoing investigations of other suspects from the same side

²⁹ [ICC-01/14-01/18-609-Conf-Red](#), para. 4.

of the conflict, the Seleka were the enemies of the two accused in this case. The Prosecution has made no showing that the accused or their Defence teams are collaborating with any targets of the Seleka investigation. Therefore, the risks of leaks or inadvertent disclosure to the Seleka targets is zero.

35. In addition, the unprecedented [REDACTED]. There has been no such incident in the almost two years that they have been in detention.
36. Therefore, the Prosecution has failed to demonstrate how disclosure of the redacted information to the Defence teams, as opposed to the public, would prejudice its further and ongoing investigation of the Seleka.

(C) Unavailability of Less Restrictive Protective Measures

37. The Appeals Chamber has held that if less restrictive protective measures are sufficient and feasible, a Chamber must choose those measures over more restrictive measures.³⁰
38. The Prosecution has several options available to it other than infringing on the rights of the accused to a fair trial.
39. One option, if the witness seems so important to the Seleka investigation, is to decide not to call the witness in the present case. With the exception of Witness P-0627, the witnesses do not have any information about Mr. Yekatom. Witness P-0567 is proposed to be called under Rule 68, ruling out any evidence of the acts and conduct of the accused. It does not seem unreasonable for the Prosecution to forego the testimony of these witnesses if disclosure would truly jeopardize its Seleka investigation.

³⁰ *Prosecutor v Lubanga*, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision of Pre-Trial Chamber I entitled “First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81, 14 December 2006, [ICC-01/04-01/06-773](#), para. 33.

40. When faced with a decision between the Prosecution's discretion and the accused's rights, the Trial Chamber should come down on the side of the rights of the accused to a fair trial.
41. Another option is for the Prosecution to call the witnesses involved at the end of its case, after the Seleka investigation has concluded and in ample time for preparation of cross examination after the redactions have been lifted. The Prosecution has not proposed this alternative. Should the Trial Chamber believe that the redactions are warranted, it should nevertheless order the Prosecution to call these witnesses at the end of its case.
42. Therefore, less restrictive measures are available other than granting the proposed redactions.

(D) Prejudice to the Rights of the Accused

43. The Defence is not limited to cross examining a witness on the subject of the direct testimony, but can question the witness' general credibility by cross-examination on subjects unrelated to the direct examination.³¹
44. It is well established that bias is an important factor in assessing witness credibility.³² A witness who downplays Seleka crimes might be seen to be biased when recounting Anti-Balaka crimes. Witness P-0291 in particular, [REDACTED], may be questioned about his recanting of the events during the Seleka time on the issue of his bias against the Anti-Balaka.
45. Lifting the Seleka-related redactions for Witness P-0567 would also be important when assessing the credibility of the witness, as it would provide a way for the Defence to assess, and challenge if necessary, the objectivity of his reporting.

³¹ *Prosecutor v Katanga and Ngudjolo*, Directions for the Conduct of the Proceedings and Testimony, 20 November 2009, [ICC-01/04-01/07-1665-Corr](#), para. 69.

³² *Prosecutor v Katanga*, Judgment pursuant to Article 74 of the Statute, 7 March 2014, [ICC-01/04-01/07-3436](#), para. 85.

46. Likewise, Witness P-0627 seems to make many unfounded statements about leaders of the Anti-Balaka. Access to the statements he has made about the Seleka leaders may allow the Defence to establish, after investigation, that the witness has made other unfounded statements. This would diminish the witness' credibility.
47. Therefore, there are important reasons to reject the proposed redactions without even considering how the subjects of the proposed redactions relate to the events that are the subject of the trial. This is why redactions are so exceptional.
48. Should the Trial Chamber examine the redactions and their relationship to the events in this case, it should refuse any redactions related to the time period of the charges—September 2013 through December 2014. Seleka crimes during that period can be falsely attributed to the Anti-Balaka,³³ and can form the basis of a legitimate military objective for attacks,³⁴ and reasons for displacement of the population.³⁵ This is particularly true when the subject of the redactions are events that took place in the same location as the crimes charged.
49. Therefore, even if the Trial Chamber finds it necessary to consider the connection between the Seleka crimes and the events at issue in this case, it should find that the rights of the accused will be prejudiced by redacting material that not only affects the credibility of the witnesses, but impacts on the very events that are the subject of the trial.

³³ See, for example, [CAR-OTP-2110-0355-R01](#), para. 25 claiming Anti-Balaka killed the patients at the Hôpital de l'Amitié while other material disclosed by the Prosecution indicates this was in fact the done by the Seleka; [CAR-OTP-2045-0348](#); [CAR-OTP-2107-1028-R01](#) at 1035; [CAR-OTP-2014-0129-R01](#), para. 37.

³⁴ See, for example, [CAR-OTP-2065-1300](#).

³⁵ [CAR-OTP-2104-0033-R01](#), paras. 19-24; [CAR-OTP-2063-0369-R01](#), para. 21; [CAR-OTP-2100-0226-R01](#), paras. 15-19.

CONCLUSION

50. The Trial Chamber is respectfully requested to lift the redactions in the statements and transcripts of Prosecution Witnesses P-0291, P-0567, and P-0627 in their entirety.

CONFIDENTIALITY

51. This pleading is filed confidentially because it may reveal the identities of Prosecution witnesses. A public redacted version is being filed simultaneously.

RESPECTFULLY SUBMITTED ON THIS 17th DAY OF AUGUST 2020



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