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PRE-TRIAL CHAMBER II

Before: **Judge Antoine Kesia-Mbe Mindua, Presiding Judge**
Judge Tomoko Akane
Judge Rosario Salvatore Aitala

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

Public

Prosecution's Request to Vary the Decision on Disclosure and Related Matters (ICC-01/14-01/18-64-Red)

Source: **Office of the Prosecutor**

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

The Office of the Prosecutor
Ms Fatou Bensouda
Mr James Stewart
Mr Kweku Vanderpuye

Counsel for Alfred Yekatom
Mr Stéphane Bourgon

Counsel for Patrice-Edouard Ngaïssona
Mr Geert-Jan Alexander Knoops

Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

Unrepresented Applicants (Participation/Reparation)

States Representatives

Amicus Curiae

REGISTRY

Registrar
Mr Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Detention Section

Victims Participation and Reparations Section

Other

I. INTRODUCTION

1. The Office of the Prosecutor ("Prosecution") requests Pre-Trial Chamber II ("Chamber") to vary its Decision on Disclosure and Related Matters in respect of its requirement of assigning unique pseudonyms to the identities of persons redacted under categories A.2, A.3, A.6, B.2, and B.3 of the Redactions Protocol[1] ("Requirement"). As applied, the implementation of the Requirement is disproportionate, overly burdensome, and slows down the disclosure process. By contrast, varying the Requirement to apply only to intermediaries and investigators redacted under categories A.4 and A.5 ("Request") is modest and disturbs no vested Statutory right or competing interest of the Defence.

2. *First*, the process of assigning and applying unique pseudonyms to individuals redacted under these categories is unduly onerous and time-consuming. Given the complexity and scope of this case, its implementation would undermine the interests of judicial economy and expeditious proceedings. In short, it will inevitably delay the disclosure process.

3. *Second*, the Requirement appears to be predicated on the assumption that tracking individuals through disclosable items *per se* falls within the ambit of rule 77 of the Rules of Procedure and Evidence ("Rules"). As clarified below and demonstrated by the Court's previous practice, this is not the case.

4. *Third*, while assigning unique pseudonyms to intermediaries and investigators may enable the Defence to track their *involvement with witnesses* and as such, may fall under rule 77 as at least presumptively material, that rationale does not necessarily apply to other categories of redactions.

[1] ICC-01/14-01/18-64-Red, paras. 25-26 ("Decision").

5. *Fourth*, limiting the Requirement to categories A.4 and A.5 is not prejudicial to, or inconsistent with, the rights of the Defence. The Defence is never deprived of the opportunity to request further relevant and material information and, as appropriate, request the Chamber to review and adjudicate any specifically contested 'standard redactions'.

II. SUBMISSIONS

A. Implementing unique pseudonyms for all individuals whose identities are subject to redaction is overly burdensome and time-consuming

6. While carefully observing the Decision in the context of its ongoing disclosure review, it has become clear to the Prosecution that the process of implementing the Requirement to assign "unique pseudonyms to any persons whose identity is redacted"[2] is unduly onerous, time-consuming, and will delay disclosure. This comprises translators, interpreters, stenographers, psycho-social experts, other medical experts and other individuals, staff members of the Court or not (redacted under categories A.2 and A.3); investigators (redacted under category A.4); intermediaries (redacted under category A.5); leads and sources (redacted under category A.6); family members of witnesses (redacted under category B.2); other persons at risk as a result of the activities of the Court ("innocent third parties") (redacted under category B.3), or any other redacted individual.

7. *First*, disclosure in the particular circumstances of this case is complex and voluminous. The matter comprises two Suspects and multiple events and incidents. The evidence collection is also very large and consists of a variety of material (including audio/video items, hand-written and typed documents and records, photographs, etc.). Based on the Prosecution's current review of documents, the

[2] Decision, para. 29.

number of individual identities requiring redaction and the application of unique pseudonyms will run into the thousands.[3]

8. *Second*, the process of implementing the Requirement across the various types of evidence in this case has proven to be particularly cumbersome and not straightforward. To properly implement any pseudonym, the Prosecution runs searches across its entire database to determine whether the protected person's name appears in any other document. Those searches are run against the *content* and *meta-data* of the entire collection.[4] This process, by itself, is time-consuming and prone to human error.

9. The process is further complicated by the following facts: (i) an important portion of the collection is unsearchable—for instance handwritten documents and audio-visual materials; (ii) some documents are only partially searchable electronically because the text is not clearly recognizable; (iii) the same person's name may have spelled phonetically, differently, or erroneously, by different individuals and in different documents, where literacy may be limited—Alfred Yekatom himself, for instance, has different variations of his first name, last name, and nickname;[5] (iv) a name may be incomplete, whereby for example an innocent third party might be referenced by their first name only, last name only, nickname, or an inversion or combination thereof, etc.; (v) a person may have a very common first or last name in the region (*e.g.*, the name "Mahamat"), especially when referred to by that one name only; and (vi) a person may be identified by different individuals under different names.

[3] For example, during an interview, witnesses will, as a rule, and for identification purposes only, state the names of their family members but often also mentioned possible leads, innocent third parties, victims of crimes that are not charged, etc. Likewise, certain documents may list hundreds of victims, who are not necessarily related to the crimes alleged.
[4] In addition to running such search within the document.
[5] *See* ICC-01/14-01/18-1-Red, p. 3 (noting that Yekatom is also known as "Alfred SARAGBA", "ROMBHOT", "RAMBO", "RAMBOT", "ROMBOT", "RHOMBOT", "ROMBO", or "ROMBOHT").

10. Importantly, these complications primarily exist when assigning pseudonyms for family members, innocent third parties, leads, sources, or non-Court staff. They do not arise regarding investigators or intermediaries. Because the Office usually generates the documents containing the names of investigators and intermediaries, such as witness statements, reports or metadata, references to them are almost always complete and readable/searchable.

11. Verifying whether a non-investigator or intermediary is referenced multiple times across the evidence collection requires a lengthy process and analysis as to the named individual's identity. Based on the Prosecution's experience, a document of 33 pages can sometimes involve three hours' worth of work simply to impose redactions to the names of third parties and without accounting for the time it takes to review other documents containing the same names. Further, in implementing unique pseudonyms, all of this would have to be completed, confirmed, and secondarily reviewed *before* any disclosure of the relevant items could take place.

12. As explained below, and barring any separate rule 77 disclosure obligations, such efforts are vastly disproportionate as compared to the marginal value that the resulting information may yield.

B. The assignment of pseudonyms to non-investigators and intermediaries does not fall *per se* within the ambit of rule 77 or any other rule of disclosure

a. Investigators and intermediaries are distinct from the other redacted individuals

13. Requiring the attribution of unique pseudonyms to investigators and intermediaries (redaction categories A.4 and A.5 respectively) arises from their

involvement with witnesses or evidence on which the Prosecution relies.[6] In this sense, there is at least a colourable *presumptive* relationship to the requirements of rule 77. By contrast, this rationale does not necessarily apply in respect of other individuals whose identities require redaction—*i.e.*, individuals who are not arguably *involved* with the witness or the production of evidence. These individuals are not in a position similar to intermediaries and investigators and their appearance across the collection is neither *per se* nor presumptively 'material' to the preparation of the Defence. For example, the fact that two unrelated witnesses mention the same, irrelevant, innocent third party would not be 'material' under rule 77.

14. In this regard, it is important to understand the historical context behind the assignment of pseudonyms. The Court's Chambers first required the assignment of unique pseudonyms in respect of intermediaries[7] in response to the issues which came up in the *Lubanga* case.[8]

15. Subsequently, when standard redactions were implemented in respect of investigators,[9] the Chambers expanded the requirement of unique pseudonyms to them[10] on the basis of their involvement with witnesses. The *Kenyatta* and *Ruto* cases limited the use of pseudonyms only to intermediaries, leads, and investigators. The obligation to provide unique pseudonyms was only later expanded without much further consideration in *Ntaganda*, *Gbagbo and Blé Goudé*, and the Article 70 cases which then included translators, interpreters, stenographers, psycho-social experts, other medical experts, etc. (*i.e.* individuals redacted under categories A.2 and A.3).[11]

[6] A unique pseudonym enables the Defence to track which intermediary handled particular witnesses without knowing the intermediary's identity, facilitating a potential request for such identifying information upon showing cause.
[7] ICC-01/09-02/11-495-AnxA-Corr, paras. 29, 40; ICC-01/09-01/11-458-AnxA-Corr, paras. 29, 40.
[8] See for example ICC-01/04-01/06-2582 OA18.
[9] Upon the request of the Prosecution to vary the Redaction Protocol: see ICC-01/09-02/11-558, which was granted: ICC-01/09-02/11-579, p. 10.
[10] ICC-01/09-02/11-579, para. 18.
[11] ICC-01/04-02/06-411-AnxA, para. 12; ICC-02/11-01/11-737-AnxA, para. 12; ICC-01/05-01/13-959-Anx, para. 12.

Subsequently, in the *Ongwen* case, the obligation to provide unique pseudonyms was abandoned,[12] before being expanded again in the *Al Mahdi* and *Al Hassan* cases[13] and in the 2016 Chamber Practice Manual.[14]

16. Importantly, in no case before the Court has the Defence's right to information material to its preparation been undermined by the absence of any requirement to provide unique pseudonyms for *all* redacted individuals. By contrast, the seeming proliferation of categories of individuals requiring the application of unique pseudonyms have placed a disproportionate burden on the Prosecution and significantly slows down the disclosure procedure, despite virtually no utility for the Defence. As such the variance requested will have no appreciable impact on the Defence, whereas it will significantly impact the timing of disclosure given the amount of work it takes to implement the Requirement as is.

17. In the rare occasion that the existence of multiple references to the same individual across the collection is indeed 'material' to the preparation of the Defence, rule 77 (or article 67(2) of the Rome Statute, as the case may be) requires the disclosure of this fact. This safeguard is already part of the well-established regulatory framework of the Court and the review and disclosure practice of the Prosecution. However, beyond that, the Requirement presents an undue burden and time-consuming implementation process unwarranted in the circumstances.

[12] ICC-02/04-01/15-224.
[13] ICC-01/12-01/15-9, para. 5; ICC-01/12-01/18-31-tENG-Corr, para. 30.
[14] *See* Chambers Practical Manual, February 2016, p. 25.

b. The individuals redacted under categories A.2, A.3, A.6, B.2 and B.3 have no substantive evidentiary value in themselves, and their position is clear from the context and/or further sub-categories

18. As detailed further below, in principle, individuals redacted under categories A.2, A.3, A.6, B.2 and B.3 have no substantive evidentiary value in themselves. They are largely immaterial to the case and they will not be relied on or 'taken into account' by the Chamber.[15] Their redaction does not affect the substance or the comprehensibility of the relevant evidence. Further, references to such individuals across the evidence collection do not go to the credibility of that evidence. The utility of requiring unique pseudonyms in such cases is little to none.

19. Moreover, in almost all circumstances, their position is clear in context. For instance, in most circumstances, a witness or document will contextualize the individual before providing their name (*e.g.* "my father", "my brother", "my friend", "my neighbour"). In addition, several of the redaction categories are further detailed in sub-categories (A.2.1, A.2.2, A.2.3, etc.) allowing the Defence to understand the type of information redacted. Irrespective of whether further specificity is provided through the use of pseudonyms, the sub-categories provide the Defence a clear and concrete idea as to the identity of the redacted person or organisation, enough so to determine whether the specific identity of the individual or organisation is material to their defence.

[15] The Chamber has access to the redacted information but will not take such information into account: Decision, para. 31.

i. Categories A.2 and A.3 (translators, interpreters, stenographers, psycho-social experts, other medical expert, etc.)

20. Chambers have consistently recognised that information redacted under categories A.2 and A.3 are, in principle, not relevant to the other Party.[16] While these individuals may assist investigators in the interview process, they have no independent relevance to the evidence provided.

21. In addition, through sub-categories A.2.1, A.2.2, A.2.3, A.2.4, A.2.5, A.2.6, A.3.1, A.3.2, A.3.3, A.3.4, A.3.5, and A.3.6, the Defence is aware of the type of individual involved in any given interview, and whether that person is an ICC staff member or not. On the basis of the sub-categories, the Defence can determine, for example, if five statements were taken in the presence of a medical expert; or whether two were taken in the presence of a psycho-social expert, two in the presence of an ICC medical expert, and one in the presence of a non-ICC medical expert (all mutually exclusive individuals). The Defence therefore has sufficient information to show cause and to make additional inquiries, or request judicial review of any contested redactions.[17]

ii. Category A.6 (leads and sources)

22. A 'lead' can be anyone mentioned in the course of an investigation who may be in a position to provide evidence. For example, Witness Y says: "my neighbour X was also present during the attack on the village". Because X (a 'lead') has not yet provided evidence, their re-occurrence across the evidence collection is not *per se* material to the preparation of the Defence as their significance is, at best,

[16] ICC-01/09-01/11-458-AnxA-Corr, paras. 32, 34; ICC-01/09-02/11-495-AnxA-Corr, paras. 32, 34. See also for example ICC-01/04-02/06-411, para. 42.
[17] *See further* paras. 26-27.

speculative.[18] Moreover, while their occurrence is often unique, the context in which they are mentioned usually allows the Defence to make additional inquiries.[19]

23. The redaction of sources on the other hand is limited to those individuals whose disclosure could result 'in them being intimidated or interfered with and would thereby put at risk the ongoing or future investigations'. They are further identified in sub-categories A.6.1, A.6.2, A.6.3, A.6.4, A.6.5, A.6.6, and A.6.7. As mentioned above, on the basis of the sub-categories, the Defence can determine, for example, if the evidence has been given by a non-governmental organisation, a university, an international organisation, or a private company. The Defence, therefore, has sufficient information to show cause and to make additional inquiries or request judicial review of any contested redactions.[20]

iii. Category B.2 (family members of witnesses)

24. Information redacted under category B.2 has no evidentiary value. In principle, it is irrelevant to the Defence. For instance, family members are often mentioned at the beginning of a statement simply to identify the witness. Also, the identification of family members across the evidence collection does not go to the credibility of the evidence. Moreover, references to family members are, in essence, unique to a given witness, save related witnesses (*e.g.* witness X mentions Z as her mother, and witness Y mentions Z as his aunt). Where two witnesses are related and the mentioned family members overlap, the familial relationship between the two witnesses may be particularly relevant; for instance, in respect of child soldiers and their parents, or where the individual is mentioned in other items in a different capacity. In such situations, the information could be material to the preparation of the Defence (obviously depending on the nature of the charges) and therefore disclosable under

[18] Which is separate from any other obligations under the Statute, including obligations under article 54.
[19] *See further* paras. 26-27.
[20] *See further* paras. 26-27.

rule 77. However, the regulatory framework and disclosure rules neither impose, nor otherwise necessitate the provision of this information as a matter of course, precisely because of the balance of burdens and efficiencies involved, particularly in complex proceedings.

iv. Category B.3 (innocent third parties)

25. The Appeals Chamber has defined 'innocent third parties' as "persons placed at risk as a result of the activities of the Court, but who are not victims, current or prospective Prosecution witnesses or sources, or members of their families".[21] Information redacted under category B.3 has no evidentiary value by definition and is, in principle, irrelevant.[22] Innocent third parties are not part of the investigation, and therefore their name usually only appears once in the collection. Accordingly, the information is immaterial to the Defence and their identification across the evidence collection does not allow the Defence to challenge the credibility of any evidence.

c. The Defence always retains the right to object to any specific redaction it considers prejudicial or overly broad

26. In all circumstances, the Defence retains the right to object to any specific redaction it considers prejudicial or overly broad.[23] The Decision permits the Defence to request the lifting of redactions it considers unwarranted or unnecessary due to changed circumstances,[24] and to seize the Chamber of the matter where the Parties

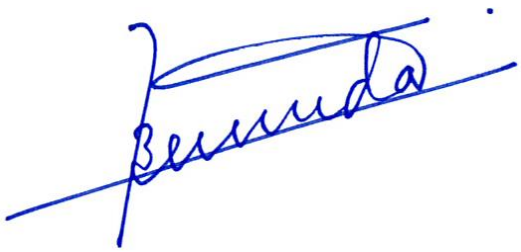
[21] ICC-01/04-01/07-475 (AO), para. 40.
[22] *See e.g.* ICC-01/04-02/06-411, para. 39.
[23] Decision, paras. 28-30.
[24] Decision, para. 30.

are unable to resolve disputes in good faith.[25] Altogether, this process is more efficient.

27. Even without knowing a specific person's identity, the Decision allows the Defence to determine their relevance (or lack thereof) to the case. Thus, instead of requiring the implementation of unique pseudonyms for thousands of individuals whose identities are *immaterial*, which complicates the disclosure process; managing the relative handful of instances in which the Defence legitimately consider a given redacted identity to be *material* to their preparation is simpler to manage — by far. This should be the focus of an efficient disclosure process.

III. RELIEF SOUGHT

28. For the above reasons, the Prosecution requests a variance of the Decision on Disclosure and Related Matters to limit the requirement of assigning unique pseudonyms to the individuals redacted under categories A.4 and A.5 of the Redactions Protocol.



Fatou Bensouda, Prosecutor

Dated this 20th day of March 2019
At The Hague, The Netherlands

[25] Decision, para. 30.