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**No. ICC-01/14-01/18
Date: 10 April 2019**

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

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

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

The Office of the Prosecutor
Fatou Bensouda, Prosecutor
James Stewart, Deputy Prosecutor

Counsel for Alfred Yekatom
Stéphane Bourgon
Mylène Dimitri

Counsel for Patrice-Edouard Ngaissona
Geert-Jan Alexander Knoops

Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparations**

The Office of Public Counsel for Victims

**The Office of Public Counsel for the
Defence**

States Representatives

Amicus Curiae

REGISTRY

Registrar
Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

PRE-TRIAL CHAMBER II of the International Criminal Court issues this decision on the ‘Prosecution’s Request to Vary the Decision on Disclosure and Related Matters (ICC-01/14-01/18-64-Red)’ (the ‘Request’ or the ‘Prosecutor’s Request’).¹

I. Procedural history

1. On 11 November 2018, the Chamber issued a warrant of arrest for Alfred Yekatom,² who was surrendered to the Court on 17 November 2018.³

2. On 7 December 2018, the Chamber issued a warrant of arrest for Patrice-Edouard Ngaïssona,⁴ who was surrendered to the Court on 23 January 2019.⁵

3. On 23 January 2019, the Single Judge, acting on behalf of the Chamber,⁶ issued the ‘Decision on Disclosure and Related Matters’ (the ‘First Disclosure Decision’), establishing the principles governing the disclosure of evidence between the parties in the case of *The Prosecutor v. Alfred Yekatom*.⁷ The Single Judge, *inter alia*, adopted a Redaction Protocol for the disclosure of evidence with redactions and defined 13 categories of information which the parties were authorized to redact under rule 81(2) and (4) of the Rules of Procedure and Evidence (the ‘Rules’) without discreet application to the Chamber (categories A.1 to A.8 and B.1 to B.5).⁸ The disclosing party was instructed to indicate the type of redaction (according to the redaction category) and assign unique pseudonyms to *any* person whose identity was redacted.⁹

¹ [Prosecutor’s Request](#), 20 March 2019, ICC-01/14-01/18-153.

² [Warrant of Arrest for Alfred Yekatom](#), ICC-01/14-01/18-1-Red (public redacted version issued on 17 November 2018).

³ Registrar, Rapport du Greffe sur l’Arrestation et la Remise de M. Alfred Yekatom, 22 November 2018, ICC-01/14-01/18-17-US-Exp, paras 19, 25.

⁴ [Warrant of Arrest for Patrice-Edouard Ngaïssona](#), ICC-01/14-01/18-89-Red (public redacted version issued on 13 December 2018).

⁵ Registrar, Rapport du Greffe sur la Remise de Patrice-Edouard Ngaïssona, 25 January 2019, ICC-01/14-01/18-101-US-Exp, paras 5, 15.

⁶ [Decision designating a Single Judge](#), 6 December 2018, ICC-01/14-01/18-27.

⁷ [First Disclosure Decision](#), ICC-01/14-01/18-64-Red.

⁸ [First Disclosure Decision](#), ICC-01/14-01/18-64-Red, paras 23-32, p. 13.

⁹ [First Disclosure Decision](#), ICC-01/14-01/18-64-Red, paras 24, 29.

4. On 15 February 2019, the Chamber joined the cases against Yekatom and Ngaïssona.¹⁰

5. On 20 March 2019, the Chamber received the Prosecutor's Request, seeking a variation of the First Disclosure Decision and requesting the Chamber to lift the requirement of assigning unique pseudonyms to persons coming under categories A.2, A.3, A.6, B.2 and B.3.¹¹

6. On 28 March 2019, the Chamber received the joint response of the Yekatom Defence and the Ngaïssona Defence (collectively, the 'Defence') to the Request (the 'Defence Response').¹²

7. 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 First Disclosure Decision was applicable to the joint case, as modified by the Second Disclosure Decision.¹³

II. Submissions of the parties

8. The Prosecutor submits that the requirement of assigning unique pseudonyms to any person whose identity is redacted is 'disproportionate', 'overly burdensome', 'time-consuming' and 'will inevitably delay the disclosure process'.¹⁴ The Prosecutor highlights that the process of assigning pseudonyms entails running thousands of searches against the entire evidence collection.¹⁵ This process has proven to be particularly cumbersome in the case at hand due to, among other things, the complexity and scope of the case, the large volume of evidence collected and the type of evidence, an important portion of which is unsearchable or only partially searchable.¹⁶

¹⁰ [Decision on the joinder of the cases against Alfred Yekatom and Patrice-Edouard Ngaïssona and other related matters](#), ICC-01/14-01/18-87.

¹¹ [Request](#), ICC-01/14-01/18-153, paras 1, 28.

¹² [Réponse de la Défense de M. Alfred Rombhot Yekatom et de M. Patrice-Edouard Ngaïssona à la «Prosecution's Request to Vary the Decision on Disclosure and Related Matters \(ICC-01/14-01/18-64-Red\)»](#), ICC-01/14-01/18-160.

¹³ [Second Disclosure Decision](#), ICC-01/14-01/18-163.

¹⁴ [Request](#), ICC-01/14-01/18-153, paras 1-2.

¹⁵ [Request](#), ICC-01/14-01/18-153, paras 7-8.

¹⁶ [Request](#), ICC-01/14-01/18-153, paras 2, 7-11.

9. The Prosecutor further submits that the appearance of individuals belonging to categories A.2, A.3, A.6, B.2 and B.3 across the evidence is not *per se* ‘material’ to the preparation of the Defence, within the meaning of rule 77 of the Rules.¹⁷ She argues that information redacted under these categories has ‘no evidentiary value’, does not go to the credibility of the evidence and is irrelevant to the Defence.¹⁸ Knowledge of the category to which a particular person belongs, together with the context in which it appears, is sufficient, according to the Prosecutor, for the Defence to determine whether the information is material to its preparation and whether it wishes to challenge the redaction.¹⁹ Therefore, lifting the requirement of assigning unique pseudonyms to individuals belonging to the above mentioned categories ‘is not prejudicial to, or inconsistent with, the rights of the Defence’, as the Defence is not deprived of the opportunity to contest the redactions.²⁰

10. The Defence responds that the Chamber should dismiss the Prosecutor’s Request *in limine*, for not having been submitted in a timely manner and lacking a legal basis.²¹ The Defence highlights that the Prosecutor herself has requested the adoption of a Redaction Protocol and at no point in time has she indicated – either before the adoption of the Redaction Protocol or after – that she has difficulties implementing the requirement of assigning unique pseudonyms.²²

11. The Defence further argues, in essence, that the Request is contrary to the established practice of the Court;²³ the Prosecutor is exaggerating the amount of work required;²⁴ and the assignment of pseudonyms to individuals whose identity is redacted is the bare minimum required to protect the rights of the Defence and the fairness of the proceedings.²⁵ More specifically, with regard to the last point, the Defence stresses that, contrary to the Prosecutor’s submissions, persons falling under categories A.2, A.3, A.6, B.2 and B.3 can have a decisive impact on the credibility

¹⁷ [Request](#), ICC-01/14-01/18-153, paras 3-4, 13, 22.

¹⁸ [Request](#), ICC-01/14-01/18-153, paras 18, 24, 25.

¹⁹ [Request](#), ICC-01/14-01/18-153, paras 19, 22, 23.

²⁰ [Request](#), ICC-01/14-01/18-153, paras 5, 26-27.

²¹ [Defence Response](#), ICC-01/14-01/18-160, paras 2, 20.

²² [Defence Response](#), ICC-01/14-01/18-160, paras 2, 18-19.

²³ [Defence Response](#), ICC-01/14-01/18-160, paras 21-27.

²⁴ [Defence Response](#), ICC-01/14-01/18-160, paras 28-36.

²⁵ [Defence Response](#), ICC-01/14-01/18-160, paras 37-53.

and reliability of the evidence.²⁶ Pseudonyms are essential to allow the Defence to follow the interactions between different individuals, witnesses and the Prosecutor, determine whether a particular lead or source has been in contact with different witnesses, identify whether and which pieces of evidence emanate from the same source, assess the risk of collusion and know how much of the evidence may have been tainted.²⁷ The prejudice, the Defence submits, outweighs any disadvantages associated with the implementation of unique pseudonyms.²⁸

III. Applicable law

12. The Chamber notes articles 21(1) and (3), 61, 67 and 68 of the Rome Statute (the ‘Statute’) and rules 63(1), 77, 81 and 121(2) of the Rules.

IV. Determination of the Chamber

13. At the outset, the Chamber notes the Defence’s argument that the Prosecutor’s Request should be dismissed *in limine*, for not having been submitted in a timely manner.²⁹ The Chamber will rule on this issue first, before addressing the merits of the Request. The Chamber recalls that, pursuant to article 61(3) of the Statute and rule 121(2) of the Rules, it has a duty to ensure that disclosure takes place under satisfactory conditions. If, at any stage during the disclosure process but prior to the 30 day time limit stipulated in rule 121(3) of the Rules, a party encounters issues that may affect the efficacy or otherwise of the disclosure process it is incumbent upon said party to bring these issues to the attention of the Chamber. If this were not possible, the Prosecutor would be prevented from raising any issues arising from the disclosure process, which would invariably have an impact on the Chamber’s duty to ensure that disclosure takes place under satisfactory conditions. As such, the Chamber considers that the Prosecutor’s Request is not untimely and accordingly rejects the Defence’s argument that the Request be dismissed *in limine*. The Chamber will now examine the merits of the Request.

²⁶ [Defence Response](#), ICC-01/14-01/18-160, paras 37-38.

²⁷ [Defence Response](#), ICC-01/14-01/18-160, paras 39-53.

²⁸ [Defence Response](#), ICC-01/14-01/18-160, para. 54.

²⁹ [Defence Response](#), ICC-01/14-01/18-160, paras 2, 18-20.

14. The Chamber recalls that the categories of individuals for which the Prosecutor seeks to lift the requirement of assigning unique pseudonyms when their identities are redacted are as follows:

- **A.2** and **A.3**: translators, interpreters, stenographers, psycho-social experts, other medical experts and other individuals, staff members of the Court or not, who travel frequently to, or are based in, the field;
- **A.6**: leads and sources;
- **B.2**: family members of witnesses; and
- **B.3**: ‘other persons at risk as a result of the activities of the Court’ (‘innocent third parties’).³⁰

15. The Prosecutor’s Request seems to be predicated on the assumption that the appearance across the evidence of persons falling under these categories is not ‘*per se* [...] “material” to the preparation of the Defence’, within the meaning of rule 77 of the Rules.³¹ She advances that the information has ‘no evidentiary value’ and is ‘irrelevant to the Defence’ in order to argue that ‘the regulatory framework and disclosure rules neither impose, nor otherwise necessitate the provision of this information as a matter of course’.³²

16. The Chamber wishes to recall in this regard the overriding principle that *full* disclosure should be made and that non-disclosure is the *exception* to the rule.³³ In light of this principle, information cannot be withheld from the Defence unless the Prosecutor has a pertinent justification demonstrating that disclosure of the information will ‘pose a risk to the ongoing investigation’ or is ‘necessary to protect the safety’ of witnesses, victims, members of their families or other persons put at risk on account of the activities of the Court, as envisaged by rule 81(2) and (4) of the Rules.³⁴ By claiming that she does not have an obligation to disclose information that has ‘no evidentiary value’ and is ‘irrelevant to the Defence’, the Prosecutor

³⁰ See [First Disclosure Decision](#), ICC-01/14-01/18-64-Red, paras 25-26.

³¹ [Request](#), ICC-01/14-01/18-153, paras 3-4, 12-13.

³² [Request](#), ICC-01/14-01/18-153, paras 18, 20, 22, 24, 25.

³³ Appeals Chamber, *Prosecutor v. Germain Katanga*, [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, para. 70.

³⁴ [First Disclosure Decision](#), ICC-01/14-01/18-64-Red, paras 24-26; *see also* Pre-Trial Chamber II, *Prosecutor v. Bosco Ntaganda*, [Redacted Decision on the “Prosecution’s Request to Redact Information in Supplementary Submissions related to the First Arrest Application and to Vary Protective Measures for Three Witnesses”](#), 3 July 2014, ICC-01/04-02/06-78-Red3, para. 24.

undermines the principle that disclosure is the rule and that non-disclosure is the exception.

17. Be that as it may, for the reasons that follow the Chamber finds no merit in the Prosecutor's submission that lifting the requirement of implementing unique pseudonyms is not prejudicial to, or inconsistent with, the rights of the Defence.³⁵ First, as argued by the Defence,³⁶ the Chamber finds that persons falling under categories A.2, A.3, A.6, B.2 and B.3 can have a decisive impact on the credibility and reliability of the evidence. The Chamber notes, in particular, that it is essential for the Defence to be able to follow the interaction between leads, sources (category A.6), witnesses and the Prosecutor and determine whether different pieces of evidence emanate from the same source, or whether a particular lead or source has been in contact with different witnesses. The Chamber is also persuaded that the work of translators and interpreters (categories A.2 and A.3) may, by its very nature, impact on the substance of a witness statement, which makes it essential for the Defence to be able to assess how many pieces of evidence may have been affected. Regarding the remaining individuals and categories, the Chamber considers that it is equally important for the Defence to be able to trace their appearance across the evidence in order to be able to assess any risk of collusion.

18. Second, the authorisation given to the Prosecutor to apply redactions to information falling under the standard categories without discrete application to the Chamber is counterbalanced by the fact that the Defence retains the possibility to challenge any redaction if it considers it unwarranted.³⁷ Without the assignment of unique pseudonyms, the Defence would not be in a position to make use of this avenue in an effective way and its right to request that any unwarranted redactions be lifted would become meaningless. Pseudonyms allow the Defence to contextualize information, identify whether the same person is referenced across multiple pieces of evidence, and eventually determine which particular redactions it wishes to have lifted.³⁸ The Chamber finds no merit in the Prosecutor's submission that the

³⁵ [Request](#), ICC-01/14-01/18-153, para. 5.

³⁶ [Defence Response](#), ICC-01/14-01/18-160, para. 38 *et seq.*

³⁷ [First Disclosure Decision](#), ICC-01/14-01/18-64-Red, para. 30.

³⁸ *See also* Trial Chamber VII, *Prosecutor v. Jean-Pierre Bemba Gombo et al.*, [Decision on Modalities of Disclosure](#), 22 May 2015, ICC-01/05-01/13-959, para. 16; Trial Chamber I, *Prosecutor v. Laurent*

categories provide the Defence with sufficient information to enable it to do so. The category alone, even when viewed in the context of the statement, does not allow the Defence to determine whether, for example, different pieces of evidence emanate from the same source, or whether a particular individual has been in contact with different witnesses.

19. While the Chamber appreciates the challenges faced by the Prosecutor in implementing unique pseudonyms, it nevertheless finds that the prejudice to the Defence outweighs the possible benefits to the Prosecutor. The Prosecutor concedes that, when a particular individual appears across different pieces of evidence, ‘the information could be material to the preparation of the Defence [...] and therefore disclosable’.³⁹ So as to comply with her disclosure obligations, she commits to assigning unique pseudonyms to such individuals even if the requirement under consideration is lifted.⁴⁰ This means that, in any case, the Prosecutor has to search the entire evidence collection to determine whether an individual’s identity is material for the Defence before she can redact it. The resources that the Prosecutor would save do not appear to be substantial and the Chamber considers them to be disproportionate to the restrictions that they would entail for the rights of the Defence.

20. Lastly, the Chamber stresses that the redaction regime in place is meant to streamline the process of disclosure between the parties. To say that the requirement of assigning unique pseudonyms ‘will inevitably delay the disclosure process’ is misplaced. The Chamber reminds the Prosecutor that, without the existing redaction regime in place, she would have to make discrete applications for each proposed redaction to the Chamber, which would be more time-consuming.

Gbagbo, [Decision on the Protocol establishing a redaction regime](#), 15 December 2014, ICC-02/11-01/11-737, para. 26; Trial Chamber VI, *Prosecutor v. Bosco Ntaganda*, [Decision on the Protocol establishing a redaction regime](#), 12 December 2014, ICC-01/04-02/06-411, para. 27.

³⁹ [Request](#), ICC-01/14-01/18-153, paras 17, 24.

⁴⁰ [Request](#), ICC-01/14-01/18-153, para. 17.

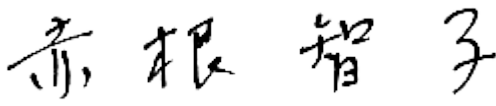
FOR THESE REASONS, THE CHAMBER HEREBY

- a) **REJECTS** the Defence's request to dismiss the Prosecutor's Request *in limine*;
and
- b) **REJECTS** the Prosecutor's Request.

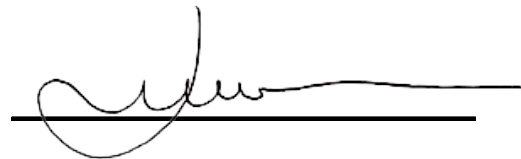
Done in both English and French, the English version being authoritative.



**Judge Antoine Kesia-Mbe Mindua,
Presiding Judge**



Judge Tomoko Akane



Judge Rosario Salvatore Aitala

Dated this Wednesday, 10 April 2019

At The Hague, The Netherlands