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TRIAL CHAMBER VII

Before: Judge Chile Eboe-Osuji, Presiding Judge
Judge Olga Herrera Carbuca
Judge Robert Fremr

SITUATION IN THE CENTRAL AFRICAN REPUBLIC

IN THE CASE OF

***THE PROSECUTOR v. JEAN-PIERRE BEMBA GOMBO, AIME KILOLO
MUSAMBA, JEAN-JACQUES MANGENDA KABONGO, FIDELE BABALA
WANDU AND NARCISSE ARIDO***

**Public Document
with
Public Annexes A and B**

Prosecution's submission on proposed redactions protocol

Source: Office of the Prosecutor

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

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I. Introduction

1. Pursuant to the Trial Chamber's 23 February Order¹, and to streamline the disclosure process and provide the Defence with faster access to relevant materials, the Office of the Prosecutor ("Prosecution") proposes the adoption of the annexed redaction protocol ("Proposed Protocol").

2. The Proposed Protocol is based on redaction protocols adopted by Trial Chambers I and VI in the *Gbagbo* and *Ntaganda* cases ("Established Redaction Protocols").² These, in turn, were based on similar protocols adopted by Trial Chamber V in both the *Kenyatta* and *Ruto and Sang* cases.³ As detailed below, the Proposed Protocol modifies only slightly the Established Redaction Protocols, in two ways: (a) in respect of some of the sub-categories and the unique list of pseudonyms, and (b) in respect of the time-line for lifting redactions to the identifying information of investigators.

3. The decisions adopting these protocols set out in detail the reasoning behind, and the justifications for the redaction categories, which are incorporated by reference herein.⁴

4. Adopting the Proposed Protocol in this case would make the disclosure process more manageable and efficient, as well as promote uniformity⁵ in the Court's trial practice by building on the Established Redaction Protocols.

¹ ICC-01/05-01/13-824.

² ICC-02/11-01/11-737-AnxA (the protocol), ICC-02/11-01/11-737 (the decision adopting the protocol) and ICC-01/04-02/06-411-AnxA (the protocol), and ICC-01/04-02/06-411 (the decision adopting the protocol) respectively. Although the content of both protocols is almost identical, they use different letter codes, in a different order. The Prosecution's submissions are based on the order and the letter codes followed in the *Gbagbo* case.

³ ICC-01/09-02/11-495-AnxA-Corr (the protocol), ICC-01/09-02/11-495 (the decision adopting the Protocol) and ICC-01/09-01/11-458-AnxA-Corr (the protocol), and ICC-01/09-01/11-458 (the decision adopting the Protocol).

⁴ ICC-02/11-01/11-737, ICC-01/04-02/06-411, ICC-01/09-02/11-495 and ICC-01/09-01/11-458.

II. Submissions

A. General

5. The Proposed Protocol outlines an *inter partes* disclosure system whereby the disclosing party (i) applies redactions to information according to a set of categories pre-approved by the Chamber;⁶ (ii) similarly relies on a pre-approved standard set of justifications for each redaction category;⁷ (iii) lifts certain categories of redactions according to a fixed timeline determined by the Chamber;⁸ and (iv) only in limited cases falling outside the pre-approved categories or requiring exceptional measures, applies to the Chamber for redactions on a case-by-case basis.⁹

6. A streamlined redaction procedure is essential to an efficient and expeditious disclosure process.

7. The proposed approach is not prejudicial to the rights of the Accused, but instead consistent with the jurisprudence of the Appeals Chamber, as confirmed by Trial Chamber V in both the *Kenyatta* and *Ruto and Sang* cases: “under the Protocol, the Chamber's oversight role concerning the redactions will not be compromised, to the extent that (a) direct application of redactions is limited to those categories that are usually covered by common justifications ("Standard Justifications") and that are pre-approved by virtue of the present decision; (b) the Protocol provides for a procedure to address disputes

⁵ ICC-02/11-01/11-737, paras.3 and 15.

⁶ Paras.3 and 10 of the Proposed Protocol.

⁷ Paras.3 and 10 of the Proposed Protocol.

⁸ Paras.4 and 13 of the Proposed Protocol.

⁹ Paras.3, 5, 13 and 14 of the Proposed Protocol.

concerning the application of redactions covered by pre-approved categories on a case-by-case basis; and (c) redactions that do not fall under the pre-approved categories will always be subject to a case-by-case review by the Chamber. [...] Under the Protocol [...], a case-by-case assessment is never foreclosed and careful procedures are put in place to ensure that every contested redaction can reassessed by the Chamber.”¹⁰

8. Indeed, the Proposed Protocol entitles a party receiving disclosure to request, at any moment after reception that specific redactions falling under any standard category be submitted to the Chamber for adjudication.¹¹ Furthermore, the Proposed Protocol requires the disclosing party to: (i) individually assess whether Standard Justifications are appropriate for each document disclosed; and (ii) review and lift redactions applied should the relevant circumstances change.¹²

9. Finally, the standard redaction categories in the Proposed Protocol reflect those approved by Pre-Trial Chamber II,¹³ further broken down into sub-categories to provide more information to the party receiving disclosure.

10. As noted, to a limited extent the Proposed Protocol modifies the Established Redactions Protocol in relation to (a) some of the sub-categories and the list of unique pseudonyms referred to in paragraphs 12, 19, 22 and 30 of the Proposed Protocol, and (b) the timeline for lifting redactions to identifying

¹⁰ ICC-01/09-02/11-495, paras.12-15 and the references cited therein; and ICC-01/09-01/11-458, paras.12-15 and the references cited therein.

¹¹ Paras.3, 5, and 13 of the Proposed Protocol.

¹² Para.4 of the Proposed Protocol. This is in line with previous decisions on redaction protocols: ICC-02/11-01/11-737, paras.18-19; ICC-01/04-02/06-411, paras.20-21 and with the decisions; ICC-01/09-02/11-495, para.12; and ICC-01/09-01/11-458, para.12.

¹³ ICC-01/05-01/13-98; ICC-01/05-01/13-163; ICC-01/05-01/13-315; ICC-01/05-01/13-503; and ICC-01/05-01/13-516.

information of investigators referred to in paragraph 25 of the Proposed Protocol, as more fully discussed below.

11. For ease of reference, the Proposed Protocol is attached to this filing with comments and track-changes at Annex A. A clean version thereof is attached at Annex B.

B. Some of the sub-categories and the list of unique pseudonyms referred to in paragraphs 12, 19, 22 and 30

12. The Established Redaction Protocols provide for the assignment of 13 redaction categories (A.1. to A.7., B.1. to B.4., Rule 81(1), and C). Three of these redaction categories are further sub-divided into 19 sub-categories (A.2.1.-A.2.6., A.3.1-A.3.6., and A.6.1.-A.6.7.).

13. In addition, the Established Redaction Protocols provide for the assignment of a unique pseudonym in respect of persons redacted under categories and sub-categories A.2. to A.6.¹⁴ This results in a further break-down of the redaction sub-categories into individual sub-categories¹⁵ for each of the parties' staff members, translators, interpreters, stenographers, psychosocial experts, Victims and Witnesses Unit ("VWU") staff, other Court staff (including VWU partners), investigators, intermediaries, leads, and sources ("Cooperating Individuals").

14. The difficulty is that both during the investigation and prosecution of a case, the Prosecution may come in contact with a large number of Cooperating

¹⁴ Paragraph 12 of the Established Redaction Protocols.

¹⁵ For example translator John Johnson would be redacted as "A.3.2.1.", translator Peter Peterson as "A.3.2.2.", etc.

Individuals resulting in the need to create over a hundred individual sub-categories.

15. In Ringtail, these individual sub-categories are created as separate “redaction options” available to the redactor in implementing redactions to the wording or image of a document. However, the proliferation of these redaction options is ultimately counterproductive, rendering the process far more cumbersome and complex than it need be. Indeed, the redaction feature in Ringtail is not designed to deal with such a large number of redaction options. They inflate the redaction system to the point that their application becomes impracticable, error prone and inefficient.¹⁶

16. In addition, some individuals (for example, leads) will normally only be referenced once, thereby defeating the purpose of a unique pseudonym intended to facilitate their identification across multiple references and documents.

17. Accordingly, the Prosecution suggests grouping some of the sub-categories which identify similar classes of individuals, namely:

- A.2.1. (translators) and A.2.2. (interpreters): as A.2.1. (translators);
- A.2.4. (psycho-social experts) and A.2.5. (other medical experts): as A.2.3. (medical experts);
- A.3.1. (translators) and A.3.2. (interpreters): as A.3.1. (translators);
- A.3.4. (psycho-social experts) and A.3.5. (other medical experts): as A.3.3. (medical experts); and

¹⁶ By contrast, in the *Lubanga* case, the options available for implementing redactions were limited to four.

- A.6.2. (non-governmental organisations), A.6.3. (international organisations), and A.6.4. (national governmental agencies): as A.6.2. (non-profit organisations / governmental agencies).

18. In addition, the Prosecution proposes that unique codes be provided for intermediaries and investigators only. The other categories of individuals (A.2, A.3, and A.6) will still be redacted under codes identifying the applicable sub-category (e.g. for sources, whether they are individual or academic institutions). This allows the receiving party to identify with precision the type of individual concerned.

19. Proceeding in this way is not prejudicial to, or inconsistent with the rights of the Defence. As noted, the Proposed Protocol allows the receiving party to request the Chamber's review and adjudication of specific redactions falling under standard categories at any time after reception of the redacted material.¹⁷

C. The Time-line for lifting redactions to identifying information of investigators (Category A.4) in paragraph 25

20. The Established Redaction Protocols recognise the need to redact identifying information of investigators. However, the redactions are to be lifted "when the identity of the last witness interviewed or contacted by that investigator is disclosed".¹⁸

¹⁷ Paras.3, 5, and 13 of the Proposed Protocol.

¹⁸ ICC-02/11-01/11-737-AnxA, paras.23-25 (the protocol), ICC-02/11-01/11-737, para.32 (the decision adopting the protocol) and ICC-01/04-02/06-411-AnxA, paras.41-43 (the protocol), and ICC-01/04-02/06-411, para.57 (the decision adopting the protocol).

21. This time-line does not adequately account for the fact that the parties have a limited number of investigators on whom they continue rely until the end of trial (in the Prosecution's case, in discharging its article 54(1)(a) obligations).

22. Disclosing the identity of investigators may make surveillance of the investigative activities easier. Given that investigators regularly meet with witnesses or other individuals assisting the Court, the disclosure of the investigators' identities heightens the potential risks to those individuals. To minimise the chance of any link being made between investigators and those with whom they meet during the course of their activities, the Prosecution proposes the redaction of their identifying information on an ongoing basis.

23. Further, whether and when a particular investigator will be engaged in the future to conduct additional interviews cannot always be anticipated at the time the party is required to lift the redactions.

24. Finally, maintaining redactions to this information is not inconsistent with a fair and impartial trial.

25. The Chamber should weigh the risk of disclosing this information to ongoing and further investigations against any prejudice caused to the Accused by not receiving this specific information. Assigning codes or pseudonyms to investigators and disclosing this information to enable the Defence to analyse and identify the work of each investigator¹⁹ adequately meets any Defence concerns, as the redacted information is not relevant to substantive issues in the case. Moreover, should the Prosecution become aware of changed

¹⁹ See paras.14-15 above.

circumstances obviating the need or justification to maintain the redaction, the Proposed Protocol would require its lifting.²⁰ Finally, the Defence can always engage the Prosecution and, ultimately, the Chamber to lift redactions where it feels it is warranted.²¹

III. Relief Requested

26. The Prosecution requests that the Chamber adopt the Proposed Protocol, attached at Annex B.



Fatou Bensouda, Prosecutor

Dated this 25th day of February 2015
At The Hague, The Netherlands

²⁰ Para.4 of the Proposed Protocol.

²¹ Paras.3, 5, and 13 of the Proposed Protocol.