

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No.: ICC-01/04-01/18

Date: 29 August 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-ÉDOUARD NGAÏSSONA***

Public Document

**Common Legal Representatives' Joint Response to the Yekatom Defence's
"Motion to Lift Redactions"**

Source: Common Legal Representatives of Victims

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

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I. INTRODUCTION

1. The Common Legal Representative of the Former Child Soldiers and the Common Legal Representatives of the Victims of Other Crimes (jointly the “Legal Representatives”)¹ hereby file their response to the “Motion to Lift Redactions” filed by the Defence for Mr Yekatom on 26 August 2019 (the “Defence Motion”).²

2. The Legal Representatives submit that the Defence Motion should be rejected as formulated far too broadly. The party seeking to lift redactions has the burden to identify material wherein redactions should be lifted and to support its request with relevant justification on a case-by-case basis. Therefore, they posit that the current redactions should be maintained since the reasons justifying them remain unchanged.

3. It is further noted that the current applicable framework for disclosure and redactions does not provide for an involvement of the Legal Representatives in the consultation process on disputed redactions. In light of the timing of their appointment in the case, the Legal Representatives did not have the opportunity to present observations on the disclosure and redaction regime.

4. Accordingly, at this stage of the proceedings the Legal Representatives request the Chamber to find that, at a minimum, they have to be consulted in cases of disputed redactions that relate or appear to relate to dual status individuals and/or victims participating in the proceedings.

¹ See the “Decision regarding the Registry’s First Assessment Report on Applications for Victim Participation, the Registry’s First Transmission of Group C Applications, the appointment of counsel for Victims of Other Crimes, and the victims’ procedural position” (Pre-Trial Chamber II), No. [ICC-01/14-01/18-227-Conf](#), 21 June 2019, p. 14.

² See the “Motion to Lift Redactions”, No. [ICC-01/14-01/18-290](#), 20 August 2019 (the “Defence Motion”).

II. PROCEDURAL BACKGROUND

5. On 23 January 2019, the Single Judge of Pre-Trial Chamber II (the “Chamber”) issued the “Decision on Disclosure and Related Matters”, which included a redaction protocol.³

6. On 20 February 2019, the Chamber joined the case of Mr Yekatom with that of Mr Ngaïssona.⁴

7. On 4 April 2019, the Chamber issued its “Second Decision on Disclosure and Related Matters”.⁵

8. On 23 May 2019, the Chamber issued the “Decision on the Legal Representation of Victims” deciding, *inter alia*, to appoint counsel from the OPCV to act as the Common Legal Representative of the Former Child Soldiers.

9. On 21 June 2019, the Chamber appointed the Common Legal Representatives of Victims of other crimes than the former child soldiers.⁶

10. On 26 August 2019, the Defence filed its Motion requesting the Chamber “to carefully review all remaining redactions and order as many of them as possible to be lifted”.⁷

11. Pursuant to regulation 34(b) of the Regulations of the Court, the Legal Representatives herewith present their joint response to the Defence Motion.

³ See the “Public Redacted Version of ‘Decision on Disclosure and Related Matters’” (Pre-Trial Chamber II, Single Judge), No. [ICC-01/14-01/18-64-Red](#), 23 January 2019.

⁴ See the “Decision on the joinder of the cases against Alfred Yekatom and Patrice-Edouard Ngaïssona and other related matters” (Pre-Trial Chamber II), No. [ICC-01/14-01/18-87](#), 20 February 2019.

⁵ See the “Second Decision on Disclosure and Related Matters” (Pre-Trial Chamber II), No. [ICC-01/14-01/18-163](#), 4 April 2019.

⁶ See the “Decision regarding the Registry’s First Assessment Report on Applications for Victim Participation, the Registry’s First Transmission of Group C Applications, the appointment of counsel for Victims of Other Crimes, and the victims’ procedural position” (Pre-Trial Chamber II), No. [ICC-01/14-01/18-227-Conf](#), 21 June 2019.

⁷ See the Defence Motion, *supra* note 2, para. 60.

III. SUBMISSIONS

1. The Defence Motion should be rejected

12. The Legal Representatives submit that the Defence Motion should be dismissed as formulated far too broadly and premised on a misreading of the Chamber's regime on exceptions to disclosure.⁸ The Defence for Mr Yekatom requests in general terms "*a judicial review of any redactions in the disclosure material that have not yet been lifted*"⁹ and identifies broad categories of standard redactions to be reviewed¹⁰ and lifted "*in the vast majority of the cases*"¹¹ or even in their totality.¹²

13. The Legal Representatives posit that the party seeking to lift redactions has the burden to identify with the *maximum of precision*¹³ materials wherein redactions should be lifted and to support its request with relevant justification on a case-by-case basis.¹⁴ However, the Defence Motion lacks sufficient detail to meet the requirements of specificity and precision necessary to dispute a redaction under the regime established by the Chamber. In fact, the Defence for Mr Yekatom appears to impermissibly re-litigate the appositeness of the redactions' categories as such.

14. The Defence's contention that it cannot specify the information for which it seeks disclosure in the absence of access to said information¹⁵ is a circular argument. Following this approach, no information could ever be withheld. Nonetheless, contrary to the Defence's arguments, lifting redactions can only be authorised with a properly specified and grounded request.

⁸ See the "Public Redacted Version of 'Decision on Disclosure and Related Matters'", *supra* note 3 and the "Second Decision on Disclosure and Related Matters", *supra* note 5.

⁹ See the Defence Motion, *supra* note 2, para. 22.

¹⁰ *Idem*, paras. 28-59.

¹¹ *Ibidem*, para. 33.

¹² *Ibid.*, para. 59.

¹³ See for instance the "Supplementary Decision on the Situation of Witness 267" (Trial Chamber II), No. [ICC-01/04-01/07-1483-Red2-tENG](#), 30 August 2010, para. 25.

¹⁴ *Idem*.

¹⁵ *Ibid.*, para. 19.

15. As illustrated by the jurisprudence of other international criminal tribunals regarding the disclosure of evidence,¹⁶ a party who is prevented from having access to a particular piece of information may rely on the context of said information to show its relevance and challenge the redaction before the Chamber. It is only following a duly substantiated request to this end that the onus to justify the maintaining of the specific redaction is shifted on the disclosing party.¹⁷

16. Lastly, in relation to variation of protective measures granted to witnesses, it has also been found that the party seeking to rescind them “*should present supporting evidence capable of establishing on a preponderance of probabilities that the witness is no longer in need of such protection*”.¹⁸ In such cases, the burden therefore falls squarely upon the requesting party of establishing that circumstances have changed so that the applied protective measures are no longer necessary.

2. The Legal Representatives shall be consulted on certain disputed redactions

17. In light of the timing of their appointment in the case, the Legal Representatives did not have the opportunity to present observations on the applicable regime for disclosure and redactions. As a result - in case any of the disputed redactions relates or appears to relate to dual status individuals and/or victims participating in the proceedings - no automatic mechanism is foreseen in order to consult the Legal Representatives.

¹⁶ See, for instance, ICTR, *Prosecutor v. Karemera et al.*, “Decision on Joseph Nzirorera’s Appeal from Decision on Alleged Rule 66 Violation” (Appeals Chamber), [ICTR-98-44-AR73.18](#), 17 May 2010, para. 32; and MICT, *Prosecutor v. Ngirabatware*, “Decision on Augustin Ngirabatware’s Motion for Sanctions for the Prosecution and for Order for Disclosure” (Appeals Chamber), [MICT-12-29](#), 15 April 2014, paras. 12-13.

¹⁷ In this sense, see the “Decision on Disclosure and Related Matters”, *supra* note 3, para. 30.

¹⁸ See, for instance, SCSL, *Prosecutor v. Taylor*, “Decision on Defence Motion to lift the Redactions of Identifying Information of Fifteen Core Witnesses” (Trial Chamber II), No. [SCSL-03-1-PT](#), 21 March 2007, paras. 36-37. See also *Prosecutor v. Norman, Fofana, Kondewa*, “Ruling on Motion for Modification of Protective Measures for Witnesses” (Trial Chamber), No. [SCSL-04-14-T](#), 18 November 2004, para. 43.

18. The Legal Representatives underline that *inter partes* agreements are not binding on the Chamber;¹⁹ even less so when they are related to measures aiming to protect the safety and well-being of victims, which are the ultimate responsibility of the Chamber itself.²⁰ In the *Gbagbo* case, the Appeals Chamber stressed that “*the Trial Chamber has an independent duty to take the necessary steps to protect the safety of individuals at risk on account of the activities of the Court and to ensure the confidentiality of information, and that the Trial Chamber is the ‘ultimate arbiter’ in case of disagreement among the parties and the participants [...]*”.²¹

19. In this regard, the Appeals Chamber has also recognised that Legal Representatives of victims “*will sometimes be in a better position to assess the risk to victims and their intermediaries and there is, therefore, an interest in the Trial Chamber receiving their submissions*”.²²

20. Therefore, the Legal Representatives posit that it is essential that they are consulted prior to the lifting of any redactions related to dual status individuals and/or participating victims.

¹⁹ See the “Decision on the protocol concerning the handling of confidential information and contacts of a party with witnesses whom the opposing party intends to call” (Trial Chamber V), No. [ICC-01/09-01/11-449](#), 24 August 2012, para. 5 and the “Decision on the protocol concerning the handling of confidential information and contacts of a party with witnesses whom the opposing party intends to call” (Trial Chamber V), No. [ICC-01/09-02/11-469](#), 24 August 2012, para. 5.

²⁰ See the “Judgment on victim participation in the investigation stage of the proceedings in the appeal of the OPCD against the decision of Pre-Trial Chamber I of 7 December 2007 and in the appeals of the OPCD and the Prosecutor against the decision of Pre-Trial Chamber I of 24 December 2007” (Appeals Chamber), No. [ICC-01/04-556 OA4 OA5 OA6](#), 19 December 2008, para. 54 (“[v]ictims should be reminded that their protection and the sustenance of their interests is a recurring theme of the Statute”). See also the “Decision on victims’ participation” (Trial Chamber I), No. [ICC-01/04-01/06-1119](#), 18 January 2008, para. 129; the “Corrigendum to the Decision on Evidentiary Scope of the Confirmation Hearing, Preventive Relocation and Disclosure under Article 67(2) of the Statute and Rule 77 of the Rules” (Pre-Trial Chamber I, Single Judge), No. [ICC-01/04-01/07-428-Corr](#), 25 April 2008, para. 27; the “Annex 2 of Decision issuing a confidential and a public redacted version of ‘Decision on disclosure issues, responsibilities for protective measures and other procedural matters’” (Trial Chamber I), No. [ICC-01/04-01/06-1311-Anx2](#), 8 May 2008, para. 95; and the “Decision defining the status of 54 victims who participated at the pre-trial stage, and inviting the parties’ observations on applications for participation by 86 applicants” (Trial Chamber III), No. [ICC-01/05-01/08-699](#), 22 February 2010, paras. 24-26.

²¹ See the “Public Redacted Version of Judgment on the appeal of Mr Laurent Gbagbo against the oral decision on redactions of 29 November 2016” (Appeals Chamber), No. [ICC-02/11-01/15-915-Red OA9](#), 31 July 2017, para. 42.

²² *Idem*, para. 43.

21. Finally, the Legal Representatives recalls that regulation 42(3) of the Regulations of the Court expressly provides that once protective measures have been ordered, “[t]he Chamber shall seek to obtain, whenever possible, the consent of the person in respect of whom the application to rescind, vary or augment protective measures has been made”.

22. The practice of the Court in this regard shows consistency. In the *Lubanga* case, for instance, Trial Chamber I instructed the legal representatives of the victims to consider seeking the consent of the individuals concerned prior to the communication of their identities to the defence, and ordered the Registry to contact the relevant individuals to establish their views on disclosure of their identities to the defence, and thereafter to report to the Chamber.²³

23. In turn, in the *Katanga and Ngudjolo Chui* case, Trial Chamber II considered itself bound to implement regulation 42 of the Regulations of the Court *proprio motu*, concerning the non-disclosure of the identity of an individual for whom another Chamber had authorised protective measures and who still did not consent to the disclosure of his identity.²⁴

24. Similarly, other Chambers routinely verified whether the individuals concerned consent to their identities being disclosed to the Defence.²⁵

²³ See, for instance, the “Redacted Decision on the disclosure of information from victims’ application forms (a/0225/06, a/0229/06 and a/0270/07)” (Trial Chamber I), No. [ICC-01/04-01/06-2586-Red](#), 4 February 2011, paras. 15 and 43.

²⁴ See the “Decision concerning the situation of Witness 270 (regulation 42 of the Regulations of the Court)” (Trial Chamber II), No. [ICC-01/04-01/07-1448-tENG](#), 1 September 2009, para. 5.

²⁵ See, for instance, the “Decision on the prosecution’s applications for lifting redactions on material relating to Witnesses 307 and 484 pursuant to Regulation 42 of the Regulations of the Court” (Trial Chamber IV), No. [ICC-02/05-03/09-393](#), 12 September 2012, para. 9. See also the “Redacted Decision on the variation of protective measures under Regulation 42 on referral from Trial Chamber II on 22 July 2009” (Trial Chamber I), No. [ICC-01/04-01/06-2209-Red](#), 16 March 2010, para. 36.

IV. CONCLUSION

25. For the foregoing reasons, the Legal Representatives respectfully request the Chamber to reject the Defence Motion as being impermissibly far too broad and unspecified and to find that, at the present stage of the proceedings, as a minimum the Legal Representatives shall be consulted in cases of disputed redactions that relate or appear to relate to dual status individuals and/or victims participating in the proceedings.



Dmytro Suprun

Common Legal Representative of the
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Paolina Massidda
for the team of Common Legal
Representatives representing Victims of
Other Crimes

Dated this 29th day of August 2019

At The Hague, The Netherlands