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PRE-TRIAL CHAMBER II

Before: **Judge Rosario Salvatore Aitala, Single Judge**

SITUATION IN THE CENTRAL AFRICAN REPUBLIC II
IN THE CASE OF *PROSECUTOR v. MAHAMAT SAID ABDEL KANI*

Public

Public Redacted Version of "Confidential Redacted Version of "Prosecution's Reply to Defence's Consolidated Response - ICC-01/14-01/21-32-Conf", 25 March 2021" CC-01 14-01 21-48-Conf-Red, dated 25 March 2021

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I. INTRODUCTION

1. The Prosecution hereby replies to the Defence's "*Réponse Consolidée de la Défense à la "Prosecution's Submissions on the Modalities and Procedure for Evidence Evidence Dislcosure" (ICC-01/14-01/21-11-CONF) et à la "Prosecution's Proposal for Protocol on the Handling of Confidential Information and Contacts with Witnesses" (ICC-01/04-01/21-13)*" ("Response").[1] For the reasons submitted below, the Defence's proposed amendments to the said protocols should be rejected.

II. CONFIDENTIALITY

2. This Reply is filed confidential, EX PARTE, only available to the Prosecution, pursuant to regulation 23*bis*(2) of the Regulations of the Court as they relate to the submissions of the same designation.[2] The Prosecution will file a confidential redacted versions concurrently.

III. SUBMISSIONS

A) Reply related to the Modalities and Procedure for Evidence Disclosure

3. The Single Judge authorised the Prosecution to reply two issues advanced in the Response which relate to the Modalities and Procedure for Evidence Disclosure.

(i) *Ordonner à l'Accusation, dans le Protocole, de donner accès à la Défense à la base de données unique regroupant tous les éléments utiles dans le cadre de la situation CARII afin que la Défense puisse identifier, sans délai, elle-même, les éléments exculpatoires et utiles à la préparation de la Défense.*[3]

[1] ICC-01/14-01/21-32-Conf.
[2] *See* for instance decision ICC-01/14-01/21-46-Conf.
[3] Response, p. 17.

(a) Open file disclosure is unsupported by the Court's case-law and practice

4. Open file disclosure is inconsistent with the Prosecution making the primary determination on disclosure and with disclosure not being unlimited, two features of the disclosure regime before the Court.

5. Before the Court, the obligation to review and disclose material under Article 67(2) and rule 77 rests with the Prosecution. The Prosecution bears the primary burden of disclosure review,[4] including reviewing information which is genuinely *material* or exculpatory from that which is not.

6. In addition, as restated by the Appeals Chamber in the *Bemba et al.* case, "the right to disclosure is not unlimited".[5] Under the Court's statutory framework, the Prosecution's disclosure obligations extend only to material falling within Article 67(2) and/or rules 76 and 77.[6] "[M]aterials not falling within Rule 76 of the Rules must be disclosed only where they are material to the preparation of the Defence, within the meaning of Rule 77 […], or are potentially exculpatory in the sense of falling within Article 67(2) […]."[7]

7. Given that disclosure is not unlimited, "if requesting disclosure of items, it is incumbent on the defence to demonstrate that, *prima facie*, the requested items may be material to the preparation of the defence, or that they would fall under Article 67(2)".[8] Which items are 'material to the preparation of the defence' will depend upon the specific circumstances of the case".[9] Rather than blanket/open file disclosure, a particularised assessment is necessary. Where the Prosecution and

[4] ICC-01/05-01/08-3336, paras.34, 51; ICC-01/05-01/08-632, para.22.
[5] ICC-01/05-01/13-2275-Red, para.55, paras. 39, 42.
[6] ICC-02/11-01/15-350-Conf, para.65.
[7] ICC-02/11-01/15-350-Conf, para.65.
[8] ICC-02/11-01/15-350-Conf, para.66.
[9] ICC-01/05-01/13-2275-Red, para.55, paras. 39, 42.

Defence views differ on the materiality or exculpatory nature of certain material, the Chamber may settle the issue.[10]

8. A previous example illustrates that open file disclosure is inconsistent with the general understanding of the disclosure regime before the Court.[11] In rejecting a request for disclosure of material obtained as part of the Prosecution's investigations but which was eventually found to be unrelated to that case, the Appeals Chamber in *Bemba et al.* found that "[t]he fact that the Prosecutor's investigations led to the present case does not mean that all material collected as part of these investigations, including items found to have no connection with the case, must be disclosed to the accused."[12]

9. Open file disclosure is particularly inadequate when dealing with [REDACTED]. [REDACTED]. [REDACTED],[13] [REDACTED]. Open file disclosure makes the material accessible in a way that would be detrimental to this principle.

(b) Open file disclosure is impracticable and would lead to delay in the proceedings

10. Open file disclosure is not the simplest solution that would provide "*une plus grande marge de manœuvre à la Défense pour trouver les éléments qu'elle considérera utiles*".[14] Rather, it is an impracticable measure bound to cause delay in reviewing the material in the Prosecution's possession.

11. Faced with a similar request from an accused for open file disclosure, an ICTY Trial Chamber concluded that "granting the Accused access to the Prosecution's

[10] *See e.g.:* ICC-01/05-01/08-3336, para.51.
[11] *See e.g.* ICC-01/05-01/08-632, para.26 ("the Chamber rejects the defence submission that the prosecution has an obligation to provide the defence with all the material relating to an issue that is in its possession, to enable the accused to analyse it and to assess for himself whether or not it is relevant to the submissions he wishes to advance. The prosecution does not have the obligation of "handing the defence the keys to the warehouse" in this way.").
[12] ICC-01/05-01/13-2275-Red, para.55.
[13] *See e.g. by analogy* Chamber's Practice Manual at p.6 [referring to arrest warrant applications being submitted and issued *ex parte*].
[14] Response para. 17.

database is neither realistic nor practical, given the large volume of material involved, the necessary duplication of searches and the practical problems associated with identifying and controlling access to material provided by sensitive witnesses, material subject to protective measures and confidential third-party material."[15] Granting an open file disclosure in this case, for the purpose of searches along the broad lines submitted by the Defence, would present similar difficulties including duplication, and would inevitably lead to delay.

12. Further, since protective measures in the form of redactions for instance will be granted in this case and have already been granted in the *Yekatom and Ngaïssona* case on evidence to be disclosed to SAID, managing access rights would be time consuming and would heighten the risks of inadvertent disclosure of protected material to the Defence.

> (ii) *Indiquer, dans le Protocole, que le Procureur a l'obligation de divulguer en même temps tous les éléments utiles permettant de comprendre sa preuve, comme expliqué au paragraphes 20 à 21 de la présente réponse.*[16]

13. The Defence seeks to have disclosed, at the same time, "*tous les éléments utiles dont il dispose qui permettent de comprendre sa prevue*".[17] The Prosecution will strive to disclose, at the same time, all pieces of information relevant and related to the main material being disclosed. For instance, the Prosecution undertakes to disclose with the *incriminating* statement of witnesses other related material such as investigation reports, screening notes, psychological assessments and/or any other material relevant pursuant to its disclosure obligations. However, [REDACTED]. Hence,

[15] ICTY, *Prosecutor v. Radovan Karadžić*, IT-95-5/18-T, Decision on Accused's Seventy-Seventh and Seventy-Eighth Disclosure Violation Motions, 11 March 2013, para.22. Considering the similarities between the relevant provisions (the equivalent of article 67(2) and rule 77), the Appeals Chamber has found, specifically in the context of rule 77, that the jurisprudence of the ICTY and ICTR is useful when interpreting that rule: ICC-02/05-03/09-501, fn.103.
[16] Response, p. 17
[17] Response para. 19.

while complete disclosure of all relevant material related to a witness is the Prosecution's goal, [REDACTED] and the main evidence will be prioritised.

14. The same may also apply to other types of evidence such as and for instance, material seized at a given location from the local authorities. While the relevant material seized can be immediately disclosed, [REDACTED]. However and when feasible, the Prosecution will strive to disclose, at the same time, all information related to the main disclosed evidence pursuant to its disclosure obligation.

B) Reply related to the Protocol on Redactions

15. The Single Judge also authorised the Prosecution to reply the following issue advanced in the Response which relates to the Protocol on Redactions, namely:

> (i) *Rejeter la proposition du Procureur d'adopter les catégories résiduelles d'expurgations standard A.8 et B.5, puisqu'elles sont trop vagues et contraires à la logique du Protocole*.[18]

16. Contrary to the Defence's position the categories A.8. and B.5 are not too vague and will not prejudice the rights of the Suspect.[19] The redaction categories A.8 and B.5 have been accepted in past cases[20], most notably also in the case of *The Prosecutor v. Alfred Yekatom and Patrice Eduard Ngaissona*. [21] This established practice is also captured in the latest version of the Chambers Practice Manual[22] and has been

[18] Response, p. 17.
[19] Response, paras. 37-38.
[20] ICC-01/12-01/18-31-tENG-Corr, para.29-30, ICC-01/12-01/18-546, para.12-13, ICC-01/09-01/11-458, para. 27-28 and 29 and ICC-01/09-01/11-458-AnxA-Corr, page 13 at para.48 and page 16 [A.0 (other information including ongoing investigation and further investigation) and B.0 (other) categories equivalent of A.8 and B.5 in the present case]; ICC-01/09-02/11-495, para.24-25 and 26 and ICC-01/09-02/11-495-AnxA-Corr, page 13 at para.48 and page 16 [A.0 (other information including ongoing investigation and further investigation) and B.0 (other) categories equivalent of A.8 and B.5 in the present case]; ICC-02/05-01/20-116, para. 12; ICC-01/09-01/20-67, para.35; ICC-01/12-01/15-9 (para.4-5).
[21] ICC-01/14-01/18-163, para. 31-36.
[22] Chambers Practice Manual (2019), pages 31-34 at paras.99-101.

applied accordingly for the entire CARII situation including for the preparation of the disclosure process in the present case.[23]

17. The Defence's argument that these categories are too broad and go against the logic of defining an exhaustive list of information that the Prosecution would be authorized to redact as well as the aligned request that any information not falling into the A.1 to A.7 and B.1 to B.4 specific categories must be submitted through a separate redaction request,[24] are unwarranted. The Prosecution notes that safeguards to prevent a party from abusing the redactions categories or interpreting them too broadly are put in place. First, the Chamber can be furnished with unredacted versions of the evidence "to be able to verify, at its direction, the necessity of redactions".[25] Second, the Defence is permitted to challenge any specific redactions, through *inter partes* consultation or through litigation.[26]

18. The Prosecution intends to use the A.8 (other redactions) category under rule 81(2) only [REDACTED]. Standard redactions under rule 81(2) [REDACTED]. For non-standard redactions under rule 81(2) the Prosecution will need submit separate justified requests to the Chamber.

19. The Prosecution intends to use the B.5 (other redactions) category under rule 81(4) for any contact information such as phone numbers and home addresses of an individual source or lead or an intermediary or a witness whose name is mentioned but whose status and role should not be revealed yet at this stage of the proceedings. In order to protect him or her and to avoid additional redactions to his or her name, the Prosecution would use the B.5 category for his or her contact details instead of using the categories A.5 to A.6.7 under rule 81(2) and B.1 under rule 81(4) where appropriate. Furthermore, the Prosecution intends to use the B.5 category for any

[23] ICC-01/14-105-US-Exp and *see* ICC-01/14-01/21-11-Conf-AnxB.
[24] Response, para. 37.
[25] ICC-01/14-01/18-64-Red, para. 28.
[26] ICC-01/14-01/18-64-Red, para. 30.

contact information such as phone numbers and home address of a person who is not defined under the A.2.1 to A.6.7 categories under rule 81(2) and B.1 to B.4 categories under rule 81(4).

20. The Prosecution's approach to the B.5 category respects the overriding principle of full disclosure by making non-disclosure of information the exception. It will actually allow the Prosecution to disclose *more* information to the Defence unredacted such as names of persons mentioned by a witness, commented upon or referenced in a statement or document that would be otherwise redacted if it had to use the other categories like B.1 for a witness or A.6.1 for an individual source/ lead in correlation with contact details. As many witnesses in the present case tend to mention and cross reference other witnesses or sources or even name persons who are intermediaries, the B.5. category will limit the scope of redactions at this stage of the proceedings rather than expand them.

21. Accordingly, there is no less restrictive measure available than applying the B.5 standard redactions in appropriate cases to protect the privacy and well-being of persons named in a document which is to be disclosed while at the same time providing the necessary substantive information on the person. The redaction of the contact details will not prejudice SAID or impede on the fairness of the proceedings as they are not relevant to assessing the evidentiary basis of the charges brought against him. Redacting only contact information will also preserve the capacity of the Defence to conduct its own investigations and determine who they would need to contact. Overall, this narrow application of B.5. will ensure a harmonized disclosure process and contribute to the fairness and efficiency of the proceedings.

C) Reply related to the Protocol on Handling of Confidential Information and Contacts with Witnesses

22. Last, the Prosecution was authorised to reply to four issues related to the Protocol on Handling of Confidential Information and Contacts with Witnesses.

> (i) *Reformuler le titre de la section III.2 du Protocole de la manière suivante : «personnes dont le statut de témoin ou les relations avec la Cour n'ont pas été rendues publiques»*.[27]

23. The proposal of the Defence as drafted in French could be read to apply to *persons* that may have had *interactions* with the Court. Section II, article 4 provides the definitions applicable to the Protocol. While a *person* is not defined, the definition of a witness clearly is. A witness means "a person whom a party or participant intends **to call to testify** or on whose **statement a party or participant intends to rely**, […]" (emphasis added).[28] Nowhere in the Protocol is a witness to be considered a "*person* whose status of witness or *relations with the Court* have not been made public".[29] The Defence does not explain why the definition of witness should be expanded to include *persons*. Consequently, the proposed amendment should be rejected.

> (ii) *Adopter, dans le Protocole, une procédure portant sur les allégations de violences sexuelles qui reflète les propositions de la Défense aux paragraphes 48 et 49 de la présente réponse*.[30]

24. The Defence misconstrues the Protocol.[31] What article 15 of the Protocol foresees is that, when there are no suitable alternatives to disclosing the alleged

[27] Response, p. 17, *in fine*.
[28] ICC-01/14-01/21-13-Conf-AnxA, p. 2. The proposed amendment of the Prosecution do not modify *who* is to be considered a witness.
[29] Response, para. 43.
[30] *Ibid*., p. 18.
[31] Response, paras. 44 – 49.

victimisation of the victim to family members or third parties that could communicate it to the family, the investigating party may communicate the information of the victimisation but is barred from disclosing that the victim is a "Witness of the Court".[32] The rights of the investigating party are not violated since it can investigate fully the credibility of the allegation and victim since the fact of being a witness or not for the Court has no relevance to that assessment.

(iii) *Rejeter la proposition de paragraphe 40 dans le projet de Protocole portant sur l'obligation de communiquer à la Partie appelante un enregistrement de l'entretien entre la Partie non-appelante et un témoin de la Partie appelante.*[33]

25. The Defence's fears related to the audio or video recording of the investigating party's interview with the witness are unwarranted.[34] The recording of the interview promotes its integrity, including for any witness being interviewed. It is also a guarantee and helpful tool for the Chamber when faced with requests by a party or participants to use the content of this interview in Court, to refresh the memory of the witness or otherwise challenge the factual account of the witness.[35] The argument of the defence that a witness may be willing to disclose something to the investigating party that he has not been mentioned in his statement is pure speculation. If the investigating party has such information, it can either ask the Prosecution to verify such an allegation in light of its article 54(1) obligations or seek permission from the Chamber to interview the witness alone, including possibly without a recording but in the presence of a neutral third party like the Victim and Witnesses Unit. However, this remote possibility should not impede on the general obligation to record the interview.

[32] ICC-01/14-01/21-13-Conf-AnxA, article 15, *in fine*.
[33] Response, p. 18.
[34] Response, para. 57.
[35] This interview and recording becomes necessarily a statement of the witness. The best record would necessarily be a recording of the interview.

(iv) *Rejeter la proposition de paragraphe 41 dans le projet de Protocole portant sur la possibilité pour la Partie appelante de s'opposer à un entretien entre un de ses témoins et la Partie non-appelante, même dans le cas où le témoin a consenti à un tel entretien.*[36]

26. The Defence's proposed amendment should be rejected.[37] As currently stipulated at article 41, the Chamber retains the possibility to decide, beyond the consent of a witness, any objections to the investigating party conducting an interview of the witness of the opposing party. There is no reason why the Chamber should not retain the possibility to hear motions from the calling party that may oppose such interviews as the Chamber remains bound by its duties under article 68 of the Statute. The Protocol cannot deviate from the prescriptions of the Statute.

IV. RELIEF SOUGHT

27. For the above reasons, the Chamber should reject the Defence's proposed amendments.

Fatou Bensouda, Prosecutor

Dated this 8th day of April 2021
At The Hague, The Netherlands

[36] *Ibid.*
[37] Response, para. 58.