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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
THE PROSECUTOR v. ALFRED YEKATOM AND PATRICE-EDOUARD
NGAISSONA**

Public

**Public Redacted Version of “Defence Response to the “Confidential Redacted version of
“Prosecution’s Request to Postpone the
Confirmation Hearing and all Related Disclosure Deadlines”, 2 May 2019, ICC-01/14-
01/18-186-Conf-Exp” (ICC-01/14-01/18-186-Conf-Red)”, 8 May 2019**

Source: Defence of Patrice-Edouard Ngaïssona

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

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I. Introduction

1. If, facially, the Office of the Prosecutor (“Prosecution”) is requesting the postponement of the confirmation of charges hearing and the attendant disclosure deadlines into September 2019,¹ it effectively seeks a postponement of the confirmation of charges hearings much later into the year.²
2. Even if the Pre-Trial Chamber (“Chamber”) were to authorise the Prosecution to use one of the alternatives it suggested to the full disclosure of witnesses’ identities and statements containing exculpatory and rule 77 information, which, as elaborated below, the Defence opposes, the Prosecution admits that it would in any event not guarantee the elimination of such further delay.³
3. The factors that are allegedly preventing the Prosecution from respecting the fixed deadlines should have been brought before the Chamber at an earlier stage of the proceedings and in any event, do not constitute good cause, let alone exceptional circumstances,⁴ to postpone the confirmation of charges, for the second time in the case of Mr Alfred Yekatom.
4. The Prosecution has also failed to substantiate the reasons why it needed additional time to comply with the Chamber’s order to attribute unique pseudonyms to redacted names of third parties.
5. Besides, and contrary to the Prosecution’s assertion, the Request unduly prejudices the Suspect, [REDACTED].
6. The Defence therefore strongly opposes the Prosecution’s request for postponement of the confirmation of charges hearings.

II. Confidentiality

¹ Request, paras 1, 37.

² Request, para. 25.

³ Request, para. 26.

⁴ ICC-01/14-02/18-34, para. 18.

7. These submissions are filed as confidential as they respond to a request of the same classification. As ordered by the Chamber, a public redacted version of the present response will be filed contemporaneously.

III. Procedural history

8. On 23 January 2019, Mr Patrice-Édouard Ngaïssona was transferred to the ICC Detention Centre where he is currently held. On the same date, the Single Judge of the Pre-Trial Chamber issued its Decision on Disclosure and Related Matters (“First Disclosure Decision”).⁵
9. During Mr Ngaïssona’s initial appearance hearing held on 25 January 2019, the Chamber scheduled the confirmation hearing to commence on 18 June 2019.⁶ This date was maintained as the confirmation hearing date for both Mr Ngaïssona and Mr Yekatom in the Chamber’s Decision on joinder.⁷
10. On 4 February 2019, the Prosecution issued the “Prosecution’s Provisional Schedule for the Disclosure of Evidence Prior to the Confirmation Hearing” in which the Prosecution [REDACTED].⁸
11. On 14 March 2019, the Chamber ordered the Prosecutor to submit any applications for the authorisation of the non-disclosure of witnesses’ identities and/or the non-disclosure of entire items of evidence by 29 March 2019 at the latest.⁹
12. On 29 March 2019, the Prosecution filed its « Prosecution’s Requests in Response to “Decision setting a deadline for the submission of applications prior to the Confirmation Hearing (ICC-01/14-01/18-148-Conf)” », which was communicated to the Defence in Confidential Redacted form on 2 April 2019.¹⁰ The Prosecution requested, *inter alia*, an extension of three weeks to request authorization to withhold the identities of additional witnesses.¹¹ On 10 April 2019, the Chamber granted the

⁵ ICC-01/14-01/18-64-Conf.

⁶ Transcript of Hearing, ICC-01/14-01/18-T-2-ENG, p. 9, lines 5-6.

⁷ ICC-01/14-01/18-121, para. 18.

⁸ ICC-01/14-01/18-77-Conf, para. 7.

⁹ ICC-01/14-01/18-148.

¹⁰ ICC-01/14-01/18-162-Conf-Red.

¹¹ *Ibid*; ICC-01/14-01/18-168, para. 8.

Prosecution's request for an extension of time and ordered the Prosecution to submit any and all applications for the authorisation of the non-disclosure of witnesses' identities and/or the non-disclosure of evidence by 18 April 2019.¹²

13. On 4 April 2019, the Chamber issued its "Second Decision on Disclosure and Related Matters" ("Second Disclosure Decision") ordering the Prosecution to disclose, in addition to a list of evidence it intends to present at the confirmation of charges hearing, all evidence within the meaning of article 67(2) of the Statute in her possession or control and all Rule 77 material in her possession or control by 17 May 2019 at the latest.¹³

14. On 2 May 2019, the Prosecution filed its «Confidential Redacted version of "Prosecution's Request to Postpone the Confirmation Hearing and all Related Disclosure Deadlines", 2 May 2019, ICC01/14-01/18-186-Conf-Exp», with a Confidential *ex parte* Annex which is only available to the Victims and Witnesses Unit ("Request").¹⁴

IV. Submissions

A. A postponement of the Confirmation Hearing and the related disclosure deadlines is not justified

i. The Request could and should have been brought earlier in the proceedings

15. The Defence notes that the Chamber from the beginning of the proceedings has set clear deadlines and given the Prosecution clear instructions as to the required timeline, and the different disclosure obligations to be expected during that timeline.¹⁵

16. As a result of the decision on joinder rescheduling the confirmation of charges hearings for both suspects on 18 June 2019, the Prosecution has *de facto* benefited from two additional months to assess the evidentiary material, expected to be substantially the same for both cases.¹⁶ On this occasion, the Chamber emphasised

¹² ICC-01/14-01/18-168.

¹³ ICC-01/14-01/18-163.

¹⁴ ICC-01/14-01/18-186-Conf-Red.

¹⁵ First Disclosure Decision.

¹⁶ ICC-01/14-02/18-34, para. 11.

that “*any request to amend this new date will only be entertained if exceptional circumstances are established*” (emphasis added).¹⁷

17. Despite the extreme clarity of the First Disclosure Decision as to the disclosure deadlines,¹⁸ the Prosecution chose to ignore those instructions, by contending, in its response to the Defence observations on the First Disclosure Decision, that a firm deadline for the completion of all disclosure was unnecessary and premature.¹⁹ The Chamber had to remind the Prosecution that “*it ought to be assumed that the Prosecutor had been acting in accordance with the First Disclosure Decision*” which, contrary to the Prosecutor’s argument concerning the absence of decision enabling the disclosure process,²⁰ set in place, as early as 23 January 2019, a disclosure system.²¹

18. [REDACTED].²² It would appear that [REDACTED], no progress whatsoever has been made by the Prosecution as far as the evidence review is concerned as [REDACTED] it “*has substantially completed its review of all information in its possession*”.²³ Yet, the Prosecution fails to substantiate why it was not able to make such progress.

19. Another contradiction of the Prosecution is that on the one hand, it avers that it continues to work towards a confirmation process before the judicial recess, on the other hand, it clarifies that “*neither undertaking can be reasonably completed by 17 May given the complexity of the matters at issue, the size of the case and the prosecution’s limited resources*”.²⁴ The Defence therefore wonders how these two statements are compatible in light of the disclosure obligations of the Prosecution having to be fulfilled reasonably and no later than 30 days in advance of any confirmation process.

20. The Chamber had invited the Prosecution as early as 4 April 2019 to submit a reasoned request for the postponement of the confirmation hearings as soon as

¹⁷ ICC-01/14-02/18-34, para. 18.

¹⁸ First Disclosure Decision, paras 13-16.

¹⁹ ICC-01/14-01/18-155-Conf, para. 20.

²⁰ ICC-01/14-01/18-155-Conf, para. 23, where the Prosecution states that “*there is no active disclosure protocol in the joint case, or a protocol on confidential material, without which confidential information cannot be provided to the Defence.*”

²¹ Second Disclosure Decision, para. 28.

²² [REDACTED].

²³ Request, paras 9, 11.

²⁴ Request, paras 1, 7.

possible.²⁵ It took the Prosecution a month to do so despite the Prosecution knowing it would not meet the deadlines.²⁶

ii. *The Request does not set out a sensible new timetable the Prosecution commits to adhere to*

21. The Prosecution now argues that it is unclear whether the Chamber requires full disclosure of all witnesses' identities or statements containing exculpatory and rule 77 information and that the exact duration of the postponement is conditional upon this clarification.

22. This argument is at the very least surprising as the requirements of the Chamber regarding the non-disclosure of witnesses' identities or statements has been clear from the outset and has even been the subject of specific decisions and submissions. Once again, it would appear that the Prosecution attempts to ignore the Chamber's disclosure regime. In its First Disclosure Decision, the Chamber had ruled that for the non-disclosure of witnesses' identities before the commencement of the trial or the non-disclosure of entire items of evidence, the disclosing party should submit a discrete application for authorisation sufficiently in advance.²⁷ Later, in a separate decision, the Chamber set a specific time limit for those applications, which was finally extended upon request of the Prosecution.²⁸

23. The Prosecution cannot argue, now that the time limit for submitting those applications has passed without, as far as the Defence is aware, having made any such requests, that the rule on this point remains unclear. The Prosecution has not sought the Chamber's authorisation within the required time limit, nor has it requested an extension of time for it, and is therefore now prevented from making any future application for the authorisation of the non-disclosure of witnesses' identities. In all logics, it must be concluded that the identities of all witnesses the Prosecution will rely on for the purpose of the confirmation of charges need to be disclosed to the Defence, once security measures, if required, have been put in place.

²⁵ Second Disclosure Decision, para. 28.

²⁶ See ICC-01/14-01/18-155-Conf, dated 21 March 2019, para. 22, in which the Prosecution had already admitted that "an 18 May 2019 deadline for the disclosure of all incriminating and exculpatory information and all information falling under rule 77 is not realistic".

²⁷ First Disclosure Decision, para. 32.

²⁸ ICC-01/14-01/18-148; ICC-01/14-01/18-162-Conf-Red; ICC-01/14-01/18-168.

24. In addition, full disclosure of witness statements containing exculpatory and rule 77 information is absolutely necessary to the adequate preparation of the suspect's defence and constitutes a minimum guaranteed right of the suspect, in light, notably of Article 61(6) of the Rome Statute.²⁹ The Chamber has also been very clear in both Disclosure Decisions as to the importance of disclosing all such evidence to the Defence, immediately after having identified it.³⁰

25. This request for clarification from the Prosecution should be considered as a masked request for reconsideration of the First Disclosure Decision, but which fails to meet the requisite standard.³¹

26. It is of concern that the Prosecution fails to set out a detailed and sensible timeline to which it intends to adhere but instead, remains extremely vague as to the duration of the postponement, putting the responsibility on the Chamber to "clarify" its - already very clear - disclosure system.

iii. The alleged factors preventing the Prosecution from meeting the deadlines do not constitute exceptional circumstances or even good cause

27. The Prosecution also fails to substantiate why the implementation of witness protection activities would be of such exceptional nature in this case so as to justify additional delay.³²

28. The fact that the assessment and implementation of adequate security measures for witnesses whose information must be disclosed requires time, could have been anticipated by the Prosecution. The Chamber has previously been very clear in reminding the Prosecution that "*the mere fact that the Prosecutor is undertaking witness protection activities does not, in and of itself and in the absence of a detailed assessment regarding such activities, suffice to reject the proposed deadline. The Prosecutor is obliged to organise her activities regarding witness protection in such a*

²⁹ The Defence includes by reference its previous submissions in relation thereof. ICC-01/14-01/18-165-Conf.

³⁰ First Disclosure Decision, para. 16, p. 12. Second Disclosure Decision, p.16.

³¹ Prosecutor v. Dominic Ongwen, 'Decision on Request for Reconsideration of the Order to Disclose Requests for Assistance', ICC-02/04-01/14-468, 15 June 2016, para. 4, stating that a reconsideration of the Chamber's decision must be "*exceptional and should only be done if a clear error of reasoning has been demonstrated or if it is necessary to do so to prevent an injustice. New facts and arguments arising since the decision was rendered may be relevant to this assessment*".

³² ICC-01/14-02/18-34, para. 18.

*manner so as to enable her to comply with her disclosure obligations”.*³³

29. The Prosecution also refers to the “*immense volume of information collected*” and the “[REDACTED]”.³⁴ These factors, according to the Prosecution, would have made the completion of the disclosure review virtually impossible. However, the first factor could clearly have been foreseen since the Prosecution concedes that this case is “larger” than other cases.³⁵ Also, the Prosecution knows well the situation in Central Africa for having investigated there for years in relation to different situations and different suspects and accused. As regards to the second factor, [REDACTED]. [REDACTED].

30. The arrest cannot be used as an excuse for the request for additional delay since it is the reason why the whole disclosure process is launched in the first place.³⁶ The Chamber recalled that the Prosecution has the obligation to conduct the review of the evidence as soon as it is collected during investigation on an ongoing basis so as to be ready to comply with disclosure obligation *upon surrender of the suspect to court*.³⁷ If one would agree that the implementation of security measures could not have begun until the suspects’ arrests,³⁸ the identification of the witnesses requiring information to be disclosed could have. Given that Mr Alfred Yekatom has been surrendered to the Court on 17 November 2018, and given that both cases have been joined due to an alleged evidence overlap, the assessment and implementation of adequate security measures for witnesses whose information must be disclosed could have started as early as on 17 November 2018 and the Prosecution fails to substantiate why it did not do so.

31. The identification of additional witnesses requiring clearance during the course of its disclosure review cannot work as a valid justification for postponement either. The Prosecutor’s investigation should largely be completed prior to the confirmation hearing in order to present a reliable case record at the confirmation hearing stage. As

³³ Second Disclosure Decision, para. 28. *See also* First Decision on Disclosure, para. 14.

³⁴ Request, para. 10.

³⁵ Request, para. 36.

³⁶ Request, para. 17. The Defence notes that contradictorily, the Prosecution admits it in paragraph 14 of the Request in which it is stated that the implementation of security measures could not have begun until the Suspects’ arrests.

³⁷ First Disclosure Decision, para. 14.

³⁸ Request, para. 15.

raised by the Prosecution itself, the Prosecution will have the possibility to disclose further evidence after the confirmation of the charges, if confirmed.³⁹ The Chamber needs not be in possession of all the evidence that could be available at trial and the fact that new evidence is identified should not justify per se a postponement of the confirmation of charges hearing under rule 121(7) of the Rules.⁴⁰ Also, the Prosecution has not shown why the reliance on these witnesses is essential for the purpose of confirming the charges.

32. While one might agree that the security assessment of witnesses be conducted reasonably close in time to the planned disclosure of their information and identity,⁴¹ given that the Prosecution itself controls such disclosure, it was therefore within its control to do it at the appropriate time and nothing prevented it from doing so.
33. In light of the above, and balancing the interests at stake, the Defence submits that the Prosecution failed to provide valid reasons for prejudicing the suspect's right to an expeditious confirmation process and his continuous pre-trial detention as it is only invoking its own failures as a reason for the postponement, while not being completely transparent as to its absence of compliance with the Chamber's instructions.

B. The question of alternative options to the non-disclosure of identities is premature and lacks purpose

34. The Appeals Chamber found that the Pre-Trial Chamber needs to provide adequate reasons to authorise non-disclosure of the identity of a witness and that, in particular, it has to take into account three of the most important considerations for an authorisation of non-disclosure of the identity of a witness pursuant to rule 81(4) of the Rules of Procedure and Evidence: (i) the endangerment of the witness or of members of his or her family that the disclosure of the identity of the witness may cause; (ii) the need to take protective measures; and (iii) why the Pre-Trial Chamber

³⁹ ICC-01/14-01/18-155-Conf, para. 23.

⁴⁰ ICC-02/11-02/11-108-Red, dated 11 July 2014, para. 10.

⁴¹ Request, para. 16.

considered that these measures would not be prejudicial to, or inconsistent with, the rights of the Defence and the requirements of a fair and impartial trial.⁴²

35. Therefore, assuming the Chamber would disagree with the Defence and determine that the Prosecution is not prevented by principle from withholding the identities of witnesses in the present case, discrete applications for authorisation would in any event need to be submitted to the Chamber which would then decide on the individual facts and circumstances of each case, bearing in mind the overriding principle of full disclosure, the authorisation of non-disclosure of information being the exception to this general rule.⁴³ In the same logic, irrespective of the Defence's position as to the suitability of any of those options which the Defence reserves the right to present if and when a specific request is permitted and made,⁴⁴ no blanket authorisation can be given at this stage for the use of any of the alternative options presented by the Prosecution, which should be addressed and justified on a case by case basis.

36. Thus, the Prosecution's question as to whether any of the alternative options could be considered is inapposite and premature as the Chamber cannot answer this question without having assessed each specific witness' situation.

37. Also, assuming one of the alternatives would be envisaged, the Prosecution suggests that it would not completely eliminate the risk of further postponement, which then renders the whole alternative scenario meaningless and disproportionate having regards to the impact such partial disclosure would have on the preparation of the Defence and its ability to object to the charges and challenge the Prosecution's evidence pursuant to article 61(6) of the Rome Statute.⁴⁵

38. Indeed, the overall analysis of paragraph 26 of the Request suggests that, among the three options provided, two of them would be too "labour-intensive" to meet the September deadline and the first one, which is unacceptable to the Defence as already

⁴² ICC-01/04-01/06-773, para. 21.

⁴³ The single judge in the *Ntaganda* case recalled that the Prosecutor must seek prior authorisation for withholding the identity of witnesses, and that this is in line with exceptions to the disclosure obligations under Rule 81, ICC-01/04-02/06-248-Red 2, para. 21; *See also* ICC-01/04-01/07-475, para. 70.

⁴⁴ The Defence notes however at this stage that the second "attorney-eyes only" option should not be considered as, while being highly labour-intensive according to the Prosecution, it is highly prejudicial to the suspect and absent of the practice of the Court at the confirmation of charges stage.

⁴⁵ *See* previous submissions on the topic in filing ICC-01/14-01/18-165-Conf, which the Defence incorporates here by reference.

developed,⁴⁶ and not to be seen as common practice before the Court during the confirmation stage, would not eliminate the risk of further delay into the year.

39. Therefore, since the delay is expected to be roughly similar whether or not the identities of all witnesses are disclosed, the right of the suspect to a fair trial requires that the Prosecution relies at the confirmation of charges hearings only on witnesses whose identity has been fully disclosed to the Defence, upon security clearance.

C. The Prosecution has failed to substantiate why additional time would be needed to implement the Chamber's Redactions Protocol

40. The Prosecution contends that it requires additional time to “*implement, inter alia, unique pseudonyms concerning redactions to the identities of all innocent third parties in accordance with the Decision on Disclosure and Related Matters.*”⁴⁷ At the outset, the Defence notes that although the Prosecution seems to suggest that it would need additional time to implement several provisions of the Decision, as emphasised by the use of “*inter alia*”, it limits its arguments to the issue of unique pseudonyms.⁴⁸ The Defence hence considers that contrary to what the Prosecution suggests, its argumentation related to the implementation of the Chamber's Redactions Protocol is actually limited to the issue of unique pseudonyms.

41. First, while the Prosecution asserts that “*the application of redactions [...] is in fact a highly labour intensive and painstakingly detailed process*”,⁴⁹ it has failed to substantiate this assertion. Although it refers to vague concepts such as “*quality control reviews*”⁵⁰ and “*layers of checks and controls*”,⁵¹ the Prosecution has not explained these concepts, nor has it presented an example or an illustrative situation that would have allowed the Chamber and the Defence to be fully informed on the

⁴⁶ See for instance, ICC-01/14-01/18-165-Conf, para. 44. The main Prosecution's argument for requesting to withhold the identities of six witnesses and disclose excerpts instead was the assurance that none of these witnesses would be relied upon for confirmation. ICC-01/14-01/18-162-Conf-Red, para. 10. *A contrario*, the disclosure of excerpts of witness statements on which the Prosecution intends to rely for confirmation should not be accepted.

⁴⁷ Request, para. 19.

⁴⁸ Request, paras 19-22.

⁴⁹ Request, para. 20.

⁵⁰ *Ibid.*

⁵¹ *Ibid.*

reasons why the process of applying redactions and unique pseudonyms would be a “*highly labour intensive and painstakingly detailed process*”.

42. The Defence has already argued that the Prosecution amplifies in a disproportionate fashion the work required by the application of unique pseudonyms.⁵² The Defence will not repeat its submissions but incorporate these by reference to paragraphs 28 to 36 of the “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)’”.⁵³ However, the Defence would like to add to these arguments that it is surprised by the Prosecution’s assertion that the application of unique pseudonyms would concern “*potentially thousands of individuals comprising the disclosed collection in this case*”.⁵⁴ The Defence indeed recalls that in the “Prosecution’s Observations pursuant to Decision ICC-01/14-01/18-33”,⁵⁵ the Prosecution announced that, in view of the confirmation hearing, it would rely on [REDACTED],⁵⁶ among which [REDACTED].⁵⁷ Although these observations had been submitted by the Prosecution in the *Yekatom* case, at a period of time predating the joinder of the cases, the Defence also recalls that in the “Prosecution’s Observations Regarding the Joinder”,⁵⁸ the Prosecution argued that “[*t*]he evidence [*it*] intends to use in support of charges against [*Mr*] YEKATOM is substantially the same as the evidence it intends to use against [*Mr*] NGAISSONA [...]. This means substantially the same witnesses, audio-visual information, and documentary evidence for both cases.”⁵⁹ To date, the Prosecution has uploaded onto e-Court 1262 items of allegedly incriminating evidence, representing around 13.000 pages, among which are [REDACTED].

43. Therefore, the Defence cannot be convinced that in a case involving only two Suspects, where the Prosecution has disclosed almost the entire volume of documentary evidence previously announced and where [REDACTED] are still to be disclosed, the application of unique pseudonyms would fall onto “*potentially*

⁵² ICC-01/14-01/18-160, paras 28-36.

⁵³ *Ibid.*

⁵⁴ Request, para. 20.

⁵⁵ ICC-01/14-01/18-40-Conf.

⁵⁶ *Ibid.*, para. 4.a.i., See also ICC-01/14-01/18-77-Conf, para. 5.

⁵⁷ *Ibid.*, para. 4.e.i.

⁵⁸ ICC-01/14-01/18-76.

⁵⁹ *Ibid.*, para. 6.

thousands of individuals". At least, the Prosecution has not announced that it would increase the amount of evidence and witness statements it intends to rely upon at the confirmation hearing. The Prosecution should thus have provided the Chamber and the parties with detailed and concrete factors that would tend to explain the necessity to attribute "thousands" of unique pseudonyms.

44. *Second*, the Defence reiterates that it cannot make fully informed submissions when important parts of the Request are redacted, especially when said redactions relate to the "*relevant evidentiary pool*".⁶⁰

45. Finally, as already discussed,⁶¹ the Defence notes that the Prosecution has been on notice since the First Disclosure Decision and the Joinder Decision that it had until 17 May 2019 to complete the whole disclosure of evidence process.⁶² Besides, the "Decision on the 'Prosecution's Request to Vary the Decision on Disclosure and Related Matters (ICC-01/14-01/18-64-Red)'" ,⁶³ issued by the Chamber on 10 April 2019, has also confirmed that the application of unique pseudonyms was part of this disclosure of evidence process and hence, had to be completed by 17 May 2019. The Prosecution was also reminded that:

[i]n the event that the Prosecutor considers the 17 May 2019 deadline for the disclosure of all incriminating and exculpatory information as well as information falling under rule 77 of the Rules to be 'not realistic' in view of the date of the confirmation of charges hearing, a reasoned request for the postponement of that hearing shall be submitted as soon as possible.⁶⁴

46. However, the Prosecution has waited until 2 May 2019 to file the Request⁶⁵ while being completely aware that on the one hand, its arguments on the alleged difficulty to apply unique pseudonyms had not changed and, on the other hand, that the ordinary deadline under which the Defence could respond to the Request would run until 16 May 2019,⁶⁶ which would put *de facto* the Chamber and the Defence before a *fait*

⁶⁰ Request, para. 21.

⁶¹ See paras 15-17.

⁶² Which the Prosecution already knew from rule 121(3) of the Rules and which has been recalled by the Second Disclosure Decision.

⁶³ ICC-01/14-01/18-169.

⁶⁴ Second Disclosure Decision, para. 28.

⁶⁵ Which was notified to the Defence on 3 May 2019.

⁶⁶ See Regulations 31 and 34 of the Regulations of the Court.

accompli. The Chamber has decided to shorten the deadline to respond,⁶⁷ which has consequently solved the situation of *fait accompli* while, at the same time, prejudicing the Defence by restraining the deadline to submit a response. The Defence therefore submits that by filing the Request in a very untimely manner, the Prosecution has lacked the necessary diligence expected from parties to a criminal trial, without even providing an explanation as to why the Request has not been filed immediately after 10 April 2019, at a time when the Prosecution could reasonably have anticipated any alleged difficulty to comply with the disclosure deadline.

47. For the foregoing reasons, the Defence submits that the Prosecution has failed to prove that additional time to comply with the Chamber's Protocol on redactions would be needed.

D. The Prosecution has failed to substantiate that the requested postponement is not unreasonable and does not unfairly prejudice the Suspects

i. The Request is unduly prejudicial to the Suspect

48. The Prosecution contends that the Request would not be "inexcusable" within the meaning of article 60(4) of the Statute and that granting it would not undermine Mr Ngaïssona's rights to a fair and expeditious trial.⁶⁸ However, the Prosecution has failed to substantiate both contentions.

49. *First*, by recalling the motives put forward throughout the Request to attempt to justify a postponement of the confirmation hearing,⁶⁹ the Prosecution has not addressed the unreasonable and prejudicial character of the Request for the Defence and for the interest of justice.

50. *Second*, the Prosecution cannot use the consideration of protection and privacy of witnesses, as expressed under rule 76(4) of the Rules, as a motive to consider that the requested postponement would not prejudice the Defence.⁷⁰ If the consideration set

⁶⁷ Email sent by the Chamber to the Parties on 3 May 2019, at 13:01.

⁶⁸ Request, paras 30-33.

⁶⁹ Request, para. 31.

⁷⁰ Request, para. 32.

out by rule 76(4) of the Rules is indeed shared in by the Court and all Parties and participants to the trial, including the Defence, it cannot be construed as taking precedence on the right of the Accused – or the Suspect – to be tried without undue delay, as set out by article 67(1)(c) of the Statute.

51. *Third*, the Defence takes note of the Prosecution’s undertaking to mitigate the prejudice to the Suspects resulting from the requested postponement by which the Prosecution hence acknowledges the existence of a prejudice to the Suspects.⁷¹ However, the Defence notes that the Prosecution has only vaguely undertaken to file the DCC “by 17 May 2019 or as soon as practicable thereafter, if so directed”, and “[i]ts Pre-Confirmation Brief will follow”.⁷² Not only an undertaking to file the DCC by a certain date close to 17 May 2019 “if directed so” would be the compliance with a Chamber’s order and not an undertaking from the Prosecution as such, but most importantly the phrasing is so vague and relative that it does not provide any clear indication as to when the DCC and the Pre-Confirmation Brief will effectively be filed, which increases the prejudice caused to the Mr Ngaïssona.

52. *Fourth*, the Defence also notes that the Prosecution’s contention that the Request would not be “inexcusable” within the meaning of article 60(4) of the Statute⁷³ appears irrelevant to the assessment of the Request. The potentially inexcusable character of the Request can only be assessed in the context of a debate on interim release either raised by the Chamber *proprio motu* or on request filed by Mr Ngaïssona. The Prosecution cannot speculatively anticipate such a debate.

53. *Fifth*, the Defence submits that the Request causes an undue prejudice to Mr Ngaïssona, by delaying the confirmation hearing, hence affecting his fundamental and statutory right to an expeditious trial and as a consequence, a limited pre-trial detention. [REDACTED].⁷⁴ [REDACTED].

54. For the foregoing reasons, contrary to the Prosecution’s assertions, Mr Ngaïssona would suffer from a serious prejudice if the Request was granted. Besides, the determination of the “inexcusable” character of the Request, within the meaning of

⁷¹ Request, para. 33.

⁷² Emphasis added.

⁷³ Request, para. 30.

⁷⁴ [REDACTED].

article 60(4) of the Statute is not to be discussed in the context of the Request, but in the context of a debate on interim release.

ii. *The Chambers' Practice Manual justifies maintaining the current schedule for the confirmation of charges hearing in the absence of justifiable reasons*

55. In arguing the reasonable nature of its request for postponement, the Prosecution refers to the ICC Chambers' Practice Manual ("Manual"),⁷⁵ which provides that a "typical target date for the confirmation hearing should be around 4-6 months".⁷⁶

56. Notwithstanding the fact that the Prosecution is already requesting a postponement of the confirmation of charges hearing which goes beyond the target time frame established by the Manual, namely, of at least 8 and 10 months since the initial appearance of Mr Ngaïssona and Mr Yekatom respectively, the Manual also provides that "*efforts should be made to reduce the average time that passes between the first appearance and the commencement of the confirmation of charges hearing*".⁷⁷ This is consistent with the Manual's nature as a "living document" whose stated aim is to "*contribute to the overall effectiveness and efficiency of proceedings before the Court*".⁷⁸ Therefore, the ICC Chambers' stated goal is to *improve* its practices and reduce the average time that passes between a suspect's initial appearance and the confirmation of charges hearing and not to unduly lengthen or perpetuate patterns of lengthy pre-trial delays at the Court.

57. The Manual further states that the length of time between first appearance and confirmation of charges "*depends on the circumstances of each particular case*".⁷⁹ The Prosecution purports that the "*circumstances present justify the additional time requested*", without however, making an effort in demonstrating those circumstances. The mere complexity and volume of evidence and charges in a case (the exact nature of which is still unknown to the Defence), in and of itself, cannot constitute a basis for requesting further delays in pre-trial proceedings. The same counts for the Prosecution assertion that this case would be larger than the Kenya and Democratic Republic of

⁷⁵ Last updated on 12 May 2017, available at: https://www.icc-cpi.int/about/judicial-divisions/Pages/chambers_practice_manual.aspx.

⁷⁶ Chambers' Practice Manual, p. 8.

⁷⁷ Chambers' Practice Manual, p. 8.

⁷⁸ Chambers' Practice Manual, p. 5.

⁷⁹ Chambers' Practice Manual, p. 8.

Congo cases.⁸⁰ This assertion is not at all substantiated. Investigations and pre-trials at the Court are inherently complex and voluminous in terms of evidence presented. This feature is common to every single case before the Court and before international criminal jurisdictions generally. The Prosecution has failed to substantiate how the case at hand differs from other cases, which could justify the requested additional delay of several months for the confirmation of charges hearing to take place.

iii. *The comparisons made by the Prosecution with other case at the Court are inapposite*

58. Moreover, the Prosecution's comparisons of the time elapsed between a suspect's first appearance and the confirmation hearings in other cases are entirely incorrect, as these cases are clearly distinguishable.

59. For instance, the Prosecution purports that should the confirmation hearing be postponed until 13 August 2019 – despite its indication that it seeks postponement for September – the “*period between YEKATOM's initial appearance and the Confirmation Hearing (263 days) would be less than in the Gbagbo, Ntaganda, Ongwen, and Al Hassan cases*” and that it would be “*within the median period normally required for the commencement of confirmation proceedings at the Court*”.⁸¹

60. Notwithstanding the fact that the four mentioned cases which entailed the most significant delays between initial appearances and confirmation of charges hearings in the Court's history should not be the standard by which the Prosecution or the Chamber should assess whether postponement is warranted, the “lengthy” pre-trial cases mentioned by the Prosecution exhibit significant differences with the case at hand and are clearly distinguishable.

61. For instance, in *Al Hassan*, both the Defence and the Prosecution had requested additional time in order to prepare for the confirmation of charges hearing,⁸² a feature which is not present in the instant case. The Defence wishes to maintain the scheduled date of 18 June 2019 for the confirmation of charges hearing and does not want to create additional delay, as this would be highly prejudicial to Mr Ngaïssona, who has

⁸⁰ Request, para. 36.

⁸¹ Request, ICC-01/14-01/18-186-Conf-Red, para. 34.

⁸² ICC-01/12-01/18-74; ICC-01/12-01/18-75.

already spent 4 four months in pre-trial detention, under a restriction on communication regime, and without full knowledge of the charges against him, pending issuance of the DCC.

62. The Prosecution's reliance on the *Ongwen* case, where a time frame of more than 11 months separated Mr Ongwen's initial appearance and the confirmation hearing, to argue the reasonableness of its request for postponement in the instant case is entirely misplaced. Similarly to the *Al Hassan* and *Gbagbo* cases, the *Ongwen* case presented features which are not present in the case at hand and which are clearly distinguishable. The arrest warrant against him had been issued in 2005 but Mr Ongwen was only arrested 10 years later, in 2015. The Prosecution had therefore requested a postponement of the confirmation hearing on the basis that the case had been "dormant" for almost a decade and that they required significant resources and additional time to suddenly "re-animate" the case.⁸³

63. The same argument had been a key ground upon which a postponement had been granted in the *Ntaganda* case.⁸⁴ Mr Ntaganda had eluded arrest for 7 years, and the Prosecution had argued, similarly to the *Ongwen* case, that it had to become reacquainted with the case upon Mr Ntaganda's surrender to the Court.⁸⁵ Among others, the Prosecution had argued that given that the case had "hibernated" for a number of year, it had to "*reconstitute prosecution and investigation teams where the original team resources had been diverted to other cases, [...] to identify and engage new intermediaries given that it had, in the meantime, ceased its engagement with intermediaries in the region [...], to establish contact with a number of witnesses, some of whom moved or changed contact details in the interim period [...]*".⁸⁶ The fact that Mr Ongwen and Mr Ntaganda remained fugitives for so many years was a key consideration for the purposes of the Prosecution's application for a postponement in those cases respectively.

64. Other issues relating to translations of witness statements into Kinyarwanda and into Acholi arose in the *Ntaganda* and *Ongwen* cases respectively which justified the

⁸³ ICC-02/04-01/15-196-Red2, para. 1.

⁸⁴ ICC-01/04-02/06-73.

⁸⁵ ICC-01/04-02/06-65, para. 1.

⁸⁶ ICC-01/04-02/06-65, para. 15.

postponement of the confirmation hearings in those cases. In the *Ntaganda* case, the Single Judge found that given “*that translation into Kinyarwanda, in principle, takes more time than translation into the working languages of the Court, the Single Judge cannot ignore this factor in its determination on the issue at hand*”,⁸⁷ which again, is another distinguishing factor from the case at hand given that the Defence of Mr Ngaïssona requested that witness statements be translated into one of the working languages of the Court.

65. There are several and significant distinguishing factors between the case at hand and the cases cited by the Prosecutor upon which it relied to argue that its request was reasonable. Thus, the Defence submits that the aforementioned circumstances which had justified postponements in the other cases are absent in the case of Mr Ngaïssona. The time frame originally established by the Pre-Trial Chamber, which scheduled the confirmation of charges hearing for 18 June 2019 is entirely reasonable and sufficient in order for the Prosecution to fulfil its statutory obligations.

66. No delay is warranted in this case and any delay occasioned can only arise, unreasonably and inexcusably, as a result of mismanagement and/or miscalculation on the part of the Prosecution. In the absence of exceptional circumstances or even "good cause", the Chamber should reject the Prosecution's Request.

RELIEF SOUGHT

1. The Defence respectfully requests the Chamber to:
 - **REJECT** the Prosecution's Request.

Respectfully submitted,



⁸⁷ ICC-01/04-02/06-73, para. 47.

Mr Knoops, Lead Counsel for Patrice-Edouard Ngaïssona

Dated this 8 May 2019,
At The Hague, the Netherlands.