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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 NGAÏSSONA***

Public Redacted

First Decision on the Prosecutor's Request for Authorisation to Withhold the
Identities of Witnesses and Apply Non-Standard Redactions

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

Office of the Prosecutor

Fatou Bensouda, Prosecutor
James Stewart, Deputy Prosecutor

Counsel for Alfred Yekatom

Mylène Dimitri
Peter Robinson

Counsel for Patrice-Edouard Ngaïssona

Geert-Jan Alexander Knoops

Legal Representatives of Victims

Abdou Dangabo Moussa
Elisabeth Rabesandratana
Yaré Fall
Marie-Edith Douzima-Lawson
Paolina Massidda

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparations**

The Office of Public Counsel for Victims

Dmytro Suprun

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

States Representatives

Amicus Curiae

REGISTRY

Registrar

Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Nigel Verrill

Detention Section

**Victims Participation
and Reparations Section**

Other

PRE-TRIAL CHAMBER II of the International Criminal Court issues this decision on the ‘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)”’ (the ‘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 by the authorities of the Central African Republic on 17 November 2018.³

2. On 23 November 2018, Yekatom made his initial appearance before the Chamber, at which time the Chamber set the confirmation of charges hearing to commence on 30 April 2019.⁴

3. On 7 December 2018, the Chamber issued a ‘Warrant of Arrest for Patrice-Edouard Ngaïssona’,⁵ who was surrendered to the Court by the authorities of the French Republic on 23 January 2019.⁶

4. On 23 January 2019, the Single Judge, acting on behalf of the Chamber,⁷ issued the ‘Decision on Disclosure and Related Matters’ (the ‘First Decision on Disclosure’), establishing the principles governing the disclosure of evidence between the parties in the case of *The Prosecutor v. Alfred Yekatom* and directing the parties to submit discrete applications to the Chamber for the non-disclosure of witnesses’ identities before the commencement of trial or for the non-disclosure of entire items of evidence.⁸

¹ 29 March 2019, ICC-01/14-01/18-162-Conf-Exp (with 6 confidential, *ex parte*, annexes; a confidential redacted version is also available, see ICC-01/14-01/18-162-Conf-Red).

² ICC-01/14-01/18-1-Conf-Exp (a public redacted version is also available, see [ICC-01/14-01/18-1-Red](#)).

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 [Transcript of Hearing](#), ICC-01/14-01/18-T-1-ENG, p. 8, lines 20-25.

⁵ ICC-01/14-01/18-89-Conf-Exp (a public redacted version is also available, see [ICC-01/14-01/18-89-Red](#)).

⁶ 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.

⁷ Decision designating a Single Judge, 6 December 2018, [ICC-01/14-01/18-27](#).

⁸ ICC-01/14-01/18-64-Conf, para. 32 (a public redacted version is also available, see [ICC-01/14-01/18-64-Red](#)).

5. On 25 January 2019, Ngaïssona made his initial appearance before the Chamber, at which time the Chamber set the confirmation of charges hearing to commence on 18 June 2019.⁹

6. On 20 February 2019, the Chamber joined the cases against Yekatom and Ngaïssona and decided to retain the date of 18 June 2019 for the commencement of the confirmation of charges hearing in the joint case.¹⁰

7. On 14 March 2019, the Chamber issued the ‘Decision setting a deadline for the submission of applications prior to the Confirmation Hearing’, ordering 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 2019.¹¹

8. On 29 March 2019, the Prosecutor submitted the Request.¹²

9. On 4 April 2019, the Chamber issued the ‘Second Decision on Disclosure and Related Matters’ (the ‘Second Decision on Disclosure’), thereby deciding, *inter alia*, that the First Decision on Disclosure was applicable to the joint case, as modified by the Second Decision on Disclosure.¹³

10. On 8 April 2019, the Yekatom Defence and the Ngaïssona Defence (collectively the ‘Defence’) submitted a joint response to the Request (the ‘Response’).¹⁴

11. On 15 May 2019, upon request by the Prosecutor,¹⁵ the Chamber postponed the commencement of the confirmation of charges hearing until 19 September 2019.¹⁶

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

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, para. 18, p. 11.

¹¹ [ICC-01/14-01/18-148](#).

¹² ICC-01/14-01/18-162-Conf-Exp.

¹³ [ICC-01/14-01/18-163](#).

¹⁴ Response from Mr Alfred Rombhot Yekatom and Mr Patrice-Edouard Ngaïssona to the ‘Confidential Redacted version of “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)”’, 29 March 2019, ICC-01/14-01/18-162-Conf-Exp’, ICC-01/14-01/18-165-Conf-tENG (a public redacted version is also available, see [ICC-01/14-01/18-165-Red](#)).

¹⁵ Prosecution’s Request to Postpone the Confirmation Hearing and all Related Disclosure Deadlines, 1 May 2019, ICC-01/14-01/18-186-Conf-Exp (with one confidential, *ex parte*, annex; a confidential redacted version is also available; see ICC-01/14-01/18-186-Conf-Red).

¹⁶ [Decision on the ‘Prosecution’s Request to Postpone the Confirmation Hearing and all Related Disclosure Deadlines’](#), ICC-01/14-01/18-199, para. 39, p. 17.

12. On the same day, the Chamber issued the ‘Order for Additional Information’, ordering the Prosecutor, *inter alia*, to provide additional information in support of the Request, including more precise and detailed justifications.¹⁷

13. On 24 May 2019, the Chamber received the ‘Prosecution’s Response to “Order for Additional Information (ICC-01/14-01/18-201-Conf-Exp)”’ (the ‘Additional Information Submission’).¹⁸

II. The Prosecutor’s Request

14. In the Request, the Prosecutor seeks authorisation to: (i) withhold the identities and portions of the statements of six witnesses; and (ii) apply non-standard redactions to the statements of another four witnesses.

15. Specifically, the Prosecutor requests authorisation to withhold the identities and portions of the statements of [REDACTED], pursuant to rule 81(2) of the Rules of Procedure and Evidence (the ‘Rules’). The Prosecutor indicates that the six witnesses are [REDACTED]. According to the Prosecutor, there is a risk that disclosing the identities of these witnesses will reveal the ‘direction and targets of the Seleka [i]nvestigation’. The Prosecutor clarifies that she does not intend to rely upon any of the six witnesses for the confirmation of charges hearing, but that they provide ‘potentially exculpatory or disclosable information under rule 77’. In order to avoid prejudice to the investigation into crimes allegedly committed by the Seleka, she proposes to disclose to the Defence only those excerpts of the witness statements which are potentially exculpatory or disclosable under rule 77 of the Rules.

16. Further, the Prosecutor seeks authorisation to apply non-standard redactions to the statements of [REDACTED], pursuant to rule 81(2) of the Rules. The Prosecutor submits that the four witnesses provide incriminating evidence and that she intends to rely upon them for the confirmation of charges hearing. Discrete portions of their statements, however, refer to information relevant to the Seleka investigation, the disclosure of which may prejudice the ongoing investigation. In order to mitigate the risks to the investigation, the Prosecutor requests authorisation to redact those portions of the statements.

¹⁷ ICC-01/14-01/18-201-Conf-Exp.

¹⁸ ICC-01/14-01/18-209-Conf-Exp (with 10 confidential, *ex parte*, annexes).

17. In the Additional Information Submission, the Prosecutor makes a number of modifications to her initial Request, as follows: (i) she withdraws the request to withhold the identity of witness [REDACTED], requesting instead authorisation to apply non-standard redactions to his statement; (ii) she submits that the request for anonymity for the remaining five witnesses is made pursuant to rule 81(4) of the Rules; (iii) she seeks – in the alternative, should the Chamber decline to authorise the disclosure of excerpts – authorisation to apply non-standard redactions to the statements of the five witnesses, pursuant to rules 81(2) and 81(4) of the Rules; (iv) she withdraws her request for redactions in relation to the statement of witness [REDACTED] as she no longer intends to rely upon him for the confirmation of charges hearing; and (v) she withdraws several discrete requests for non-disclosure in relation to portions of the statements of all witnesses concerned.

III. Applicable law

18. The Chamber notes articles 21(1) and (3), 61 and 67 of the Rome Statute (the ‘Statute’), rules 76, 77, 81 and 121 of the Rules and article 8 of the Code of Professional Conduct for counsel.

19. Pursuant to articles 61(3)(b) and 67(2) of the Statute and rules 76 and 121 of the Rules, the evidence – incriminating and/or exculpatory – must be disclosed to the Defence within a reasonable time before the confirmation of charges hearing, so that the Defence is properly informed thereof in order to be able to, *inter alia*, object to the charges and challenge the evidence presented by the Prosecutor in accordance with article 61(6) of the Statute.¹⁹ The Chamber recalls that ‘[t]he overriding principle is that full disclosure should be made’ and non-disclosure is the exception, subject to prior authorisation from the Chamber pursuant to rule 81 of the Rules.²⁰

¹⁹ See also Pre-Trial Chamber II, *The Prosecutor v. William Samoei Ruto et al.*, Redacted First Decision on the Prosecutor’s Requests for Redactions and Related Requests, 29 June 2011, ICC-01/09-01/11-145-Conf-Red, para. 21.

²⁰ Appeals Chamber, *The 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, paras 60-61, 70; see also Appeals Chamber, *The Prosecutor v. Thomas Lubanga Dyilo*, [Judgment on the Prosecutor’s appeal against the decision of Pre-Trial Chamber I entitled ‘Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81 \(2\) and \(4\) of the Rules of Procedure and Evidence’](#), 13 October 2006, ICC-01/04-01/06-568, para. 39.

20. Rule 81(2) and (4) of the Rules envisages that restrictions on disclosure may become necessary with a view to protecting the Prosecutor's further or ongoing investigations or the safety of witnesses, victims, members of their families and other persons at risk on account of the activities of the Court. For the reasons provided below,²¹ the Chamber will hereafter focus only on the criteria that must be applied when considering the non-disclosure of information pursuant to rule 81(2) of the Rules.

21. Rule 81(2) of the Rules allows the Prosecutor to seek authorisation from the Chamber, on an *ex parte* basis, to withhold information from the Defence, the disclosure of which may 'prejudice further or ongoing investigations'. When considering whether to authorise the non-disclosure of information pursuant to rule 81(2) of the Rules, the Chamber will apply the following criteria, as set out by the Appeals Chamber:

- a) there is an *objectively justifiable risk of prejudice* to further or ongoing investigations which arises from disclosing the particular information to the Defence, as opposed to the general public. In this regard, the Chamber will consider, *inter alia*, whether the risk of prejudice could be overcome by ruling that the information should be kept confidential between the parties;
- b) the non-disclosure of information could overcome or reduce the risk and it is *necessary*, in that it is the least intrusive measure available to the Prosecutor to safeguard the investigation; and
- c) the non-disclosure of information is *proportionate*, in that it is not prejudicial to or inconsistent with the rights of the suspect and a fair and impartial trial. In carrying out this assessment, the Chamber will enquire as to whether the information concerned is relevant to the Defence. If the information is not, this is likely to be a significant factor in determining whether the interest of safeguarding the investigation outweighs the interests of the Defence. If, on the other hand, the information is relevant to the Defence, the Chamber will take particular care when balancing the different interests at stake, especially if the

²¹ See below paras 32-34.

information is potentially exculpatory or material to the preparation of the Defence.²²

22. Each discrete request for non-disclosure will be assessed on a case-by-case basis,²³ with due regard to the competing interests at stake, so as to ensure that the proceedings are fair and expeditious and that they are conducted with full respect to the rights of the Defence.²⁴

23. Information withheld from the Defence must remain under review and, should circumstances change, may be subsequently disclosed. The Prosecutor has an obligation to promptly bring to the attention of the Chamber any new facts which may warrant a variation of the Chamber's ruling in compliance with her obligations under the Statute and the Rules.²⁵

IV. Determination of the Chamber

24. Before turning to its assessment of the Prosecutor's Request, the Chamber shall address certain submissions of the Defence and make certain remarks.

25. The Defence objects to the Request and argues that, if granted, it would deprive the suspects of the ability to exercise their rights under article 61(6) of the Statute to contest the charges and/or the evidence and to present evidence at the confirmation of

²² Appeals Chamber, *The Prosecutor v. Germain Katanga*, [Judgment on the appeal of Mr Germain Katanga 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-01/04-01/07-476, paras 57, 59-63; [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, paras 71-73, 98-99; *The Prosecutor v. Thomas Lubanga Dyilo*, [Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled 'First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81'](#), 14 December 2006, ICC-01/04-01/06-773, paras 21, 33-34; *see also* Pre-Trial Chamber II, *The Prosecutor v. William Samoei Ruto et al.*, Redacted First Decision on the Prosecutor's Requests for Redactions and Related Requests, 29 June 2011, ICC-01/09-01/11-145-Conf-Red, paras 27-30.

²³ Redactions to information falling under the standard redaction categories follows the procedure established by the Chamber in the [First Decision on Disclosure](#), ICC-01/14-01/18-64-Red, paras 23-31.

²⁴ Appeals Chamber, *The Prosecutor v. Thomas Lubanga Dyilo*, [Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled 'Decision Establishing General Principles Governing Applications to Restrict Disclosure pursuant to Rule 81\(2\) and \(4\) of the Rules of Procedure and Evidence'](#), 13 October 2006, ICC-01/04-01/06-568, paras 36-37.

²⁵ Appeals Chamber, *The Prosecutor v. Germain Katanga*, [Judgment on the appeal of Mr Germain Katanga 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-01/04-01/07-476, para. 64; Pre-Trial Chamber II, *The Prosecutor v. William Samoei Ruto et al.*, Redacted First Decision on the Prosecutor's Requests for Redactions and Related Requests, 29 June 2011, ICC-01/09-01/11-145-Conf-Red, para. 24.

charges hearing.²⁶ The Defence highlights that ‘[t]o deprive a suspect of evidence that is potentially exculpatory or material to the preparation of his or her defence does that person undeniable prejudice’.

26. The Chamber accepts that, as with every request for non-disclosure, there is an inherent tension between protecting the Prosecutor’s investigation and/or the witnesses, victims and other persons at risk on account of the activities of the Court, on the one hand, and the interests of the Defence to have full disclosure of the information, on the other hand. This does not mean however that the Prosecutor may not be permitted to withhold information from the Defence, at this stage of the proceedings. Rule 81(2) and (4) of the Rules expressly provides for this possibility, which extends also to information that is potentially exculpatory or material to the preparation of the Defence.²⁷ Further, the right of the Defence to challenge and present evidence, pursuant to article 61(6) of the Statute, must be viewed in the context of the present stage of the proceedings. The Chamber recalls that the purpose of the confirmation of charges hearing is to determine whether there is sufficient evidence to commit the suspects for trial. As a result, the Prosecutor is only required to support each charge with ‘sufficient evidence to establish substantial grounds to believe that the person committed the crime charged’ and may rely on documentary evidence, summary evidence and anonymous statements (article 61(5) of the Statute and rule 81(4) of the Rules).

27. In the case at hand, the Chamber considers that, to the extent that the Request is granted, the risk of prejudice to the Prosecutor’s investigation and, incidentally, to the witnesses outweighs the interests of the Defence. The Chamber has considered each discrete request for non-disclosure on a case-by-case basis, bearing in mind its principal responsibility to balance the different interests at stake. In order to ensure that non-disclosure is not inconsistent with the rights of the Defence, the Chamber has made sure that the Defence will have disclosed all portions of the statements which are potentially exculpatory or material to its preparation. The Chamber further refers the Defence to its more detailed assessment below.

²⁶ Defence Response, ICC-01/14-01/18-165-Conf-tENG, paras 1-3, 15-20, 36-38, 43.

²⁷ Appeals Chamber, *The Prosecutor v. Germain Katanga*, [Judgment on the appeal of Mr Germain Katanga 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-01/04-01/07-476, para. 57.

28. Turning to the next issue, the Chamber notes the Defence's submission that 'rule 81(2) of the Rules must be understood as adverting to the investigation against Mr Yekatom and Mr Ngaïssona' and not 'any current or future Prosecution investigation'.²⁸ The Chamber is not persuaded by the arguments of the Defence. Nothing in the text of rule 81(2) of the Rules suggests such a limitation. A plain reading of the rule reveals in fact quite the contrary, as the phrase 'further or ongoing investigations' must be understood to refer to both current and future investigations. To read the text of rule 81(2) of the Rules in such a way as to limit its application to the investigation against the suspects in the case at hand (*i.e.* the 'ongoing' investigation), would render the term 'further' in the text essentially devoid of meaning.

29. The Defence also submits that it rests with the Prosecutor to justify in concrete terms each request for non-disclosure and that no burden of proof falls on the Defence. This is especially the case given that it is not in a position to contest the grounds for non-disclosure in an effective manner.²⁹ The Chamber agrees that the burden is on the Prosecutor to provide the necessary information for the Chamber to conduct the analysis required. It is with this principle in mind that on 15 May 2019 the Chamber ordered the Prosecutor to provide additional information and more precise and detailed justifications in support of the Request. The Defence may contest the grounds for non-disclosure, if it so wishes, but it is not obliged to do so. This idea is supported by the text of rule 81(2) of the Rules, which provides that the Prosecutor's application for non-disclosure 'shall be heard on an *ex parte* basis by the Chamber'.

30. Turning to the Prosecutor's Request, the Chamber is satisfied that, following the Additional Information Submission, the Prosecutor has met her obligation to provide detailed and precise justifications in support of the Request. The Chamber will consider the Request, as modified by the Additional Information Submission, in sections A and B below.

31. Lastly, the present decision refers to the existence of documents and, to a limited extent, to their content, which have been submitted and are currently treated as

²⁸ Defence Response, ICC-01/14-01/18-165-Conf-tENG, paras 33-35.

²⁹ Defence Response, ICC-01/14-01/18-165-Conf-tENG, paras 4-5, 21-28.

confidential, *ex parte*, Prosecutor and Victims and Witnesses Unit only. Taking into account the fairness of the proceedings *vis-à-vis* the Defence, this decision is shared with the Defence, albeit in a confidential redacted form. To this end, the Chamber considers that the references made in the present decision are required by the principle of judicial reasoning. References to confidential *ex parte* filings have been kept to a minimum and have been made without endangering the interests concerned and defeating the very purpose of the classification of the filings.

A. The Prosecutor's request for authorisation to withhold the identity of witnesses

32. The Chamber notes that in the Request, the Prosecutor relies on rule 81(2) of the Rules in order to request authorisation to withhold the identities of the witnesses, while in the Additional Information Submission, she invokes rule 81(4) of the Rules.³⁰ For the reasons that follow, the Chamber considers that the appropriate legal basis is rule 81(2) of the Rules.

33. Firstly, the Chamber observes that the Prosecutor's primary justification for requesting anonymity is the risk of prejudice to the ongoing Seleka investigation. In the Prosecutor's own words, the 'proposed restrictions on disclosure [...] are necessary' as 'there is a heightened risk that disclosing [the witnesses'] identities will also disclose elements of the [Seleka investigation]'.³¹ Having reviewed also the 'analysis of the witnesses' circumstances' provided by the Prosecutor in annex A to the Additional Information Submission, the Chamber notes that the Prosecutor submits, for example, in relation to [REDACTED].³²

34. Secondly, the Chamber finds that the individuals concerned are 'potential prosecution witnesses' in the context of the investigation concerning the Seleka. The Chamber notes the Prosecutor's submission that she does not intend to rely upon any of these individuals at the confirmation of charges hearing [REDACTED].³³ There is a possibility therefore that the Prosecutor will decide to rely upon these individuals at

³⁰ Request, ICC-01/14-01/18-162-Conf-Exp, para. 1; Additional Information Submission, ICC-01/14-01/18-209-Conf-Exp, paras 25, 31, 37, 43, 54.

³¹ Request, ICC-01/14-01/18-162-Conf-Exp, paras 5, 11; *see also* Additional Information Submission, ICC-01/14-01/18-209-Conf-Exp, para. 11.

³² Annex A to the Additional Information Submission, ICC-01/14-01/18-209-Conf-Exp-AnxA, p. 6.

³³ Request, ICC-01/14-01/18-162-Conf-Exp, paras 1, 10-11.

further stages of the proceedings. For these reasons, the Chamber is of the view that the appropriate legal basis for requesting the non-disclosure of their identities is rule 81(2) of the Rules.³⁴

35. The Chamber will now turn to the Prosecutor's request to disclose excerpts of the statements of the five potential witnesses. In disclosing excerpts, the Prosecutor proposes to extract only those portions of the statements which are potentially exculpatory or material to the preparation of the Defence, within the meaning of article 67(2) of the Statute and rule 77 of the Rules. The Defence submits that this request should be dismissed as the Prosecutor 'is duty-bound to disclose documents in their entirety, not just in part'.³⁵

36. The point at issue is the extent of the Prosecutor's disclosure obligation, *i.e.* whether once the Prosecutor has identified that a document contains disclosable information, she is under an obligation to disclose to the Defence the document in its entirety or only those portions which contain the 'relevant information'.³⁶ The Chamber recalls the Appeals Chamber's pronouncement that once it is established that a document must be disclosed to the Defence pursuant to article 67(2) of the Statute or rule 77 of the Rules, 'the disclosure obligation extends to *the entire document* and not only to the "relevant" portions of information contained within such a document'.³⁷ Should the Prosecutor wish to withhold from the Defence portions of the document, she must demonstrate that there is a risk of prejudice to the investigation or a risk to the safety of witnesses, victims or others, arising from the disclosure of that information to the Defence. The mere fact that the information is irrelevant to the Defence is insufficient to justify its non-disclosure.

37. This is not to say that the disclosure of excerpts is not *per se* permissible. The Prosecutor may well be authorised to disclose excerpts if she can demonstrate that all

³⁴ Appeals Chamber, *The Prosecutor v. Germain Katanga*, [Judgment on the appeal of Mr Germain Katanga 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-01/04-01/07-476; *see also*, Pre-Trial Chamber II, *The Prosecutor v. Bosco Ntaganda*, [Redacted Seventh Decision on the Prosecutor's Requests for Redactions](#), 3 July 2014, ICC-01/04-02/06-248-Red2, paras 15-16, 21-22.

³⁵ Defence Response, ICC-01/14-01/18-165-Conf-tENG, paras 10, 44.

³⁶ Additional Information Submission, ICC-01/14-01/18-209-Conf-Exp, para. 6.

³⁷ Appeals Chamber, *The Prosecutor v. Thomas Lubanga Dyilo*, [Decision on the Prosecutor's request for non-disclosure in relation to document 'OTP/DRC/COD-190/JCCD-pt'](#), 27 May 2013, ICC-01/04-01/06-3031, para. 12 (emphasis added); *see also* Pre-Trial Chamber II, Order for Additional Information, 15 May 2019, ICC-01/14-01/18-201-Conf-Exp, para. 11.

remaining portions of the document concerned fall under rules 81(2) or 81(4) of the Rules. In the Chamber's view, the disclosure of excerpts and the application of redactions are but different ways of implementing what is one and the same measure – the non-disclosure of information. In the case at hand, the Chamber considers that the Prosecutor may opt for one measure or the other, as she deems appropriate, subject to the Chamber's authorisation, as provided below.

1. [REDACTED]

38. The Prosecutor submits that [REDACTED].³⁸ [REDACTED]. In order to mitigate the risks to [REDACTED] and to the ongoing investigation, the Prosecutor requests that (i) the identity of [REDACTED], as well as any identifying information, and (ii) any information relating to the Seleka investigation be withheld from the Defence.

39. The Chamber considers that the non-disclosure of [REDACTED] identity is justified, pursuant to rule 81(2) of the Rules. The Chamber finds that there is an objectively justifiable risk of prejudice to the Prosecutor's ongoing Seleka investigation should [REDACTED] identity be disclosed. The Chamber notes that [REDACTED]. Should his name be disclosed, there is a danger that he could be threatened, intimidated or interfered with in a manner that could render him unable to cooperate further with the Prosecutor.

40. The Chamber is satisfied that the risk arises from the disclosure of the information to the Defence. The Chamber pays heed to the fact that the situation on the ground remains volatile [REDACTED].³⁹ Information disclosed to the Defence may be passed on by the suspects in this case or by Defence sources on the ground, whether intentionally or inadvertently [REDACTED]. While the Defence may not desire or intend to affect such an outcome,⁴⁰ the risk of prejudice to the ongoing investigation persists given the possibility of leaks or inadvertent disclosure.

41. The Chamber also finds that the non-disclosure of [REDACTED] identity is necessary. Less intrusive measures – such as redactions to information related to the

³⁸ Annex A to the Additional Information Submission, ICC-01/14-01/18-209-Conf-Ex-AnxA, p. 8; Annex A to the Request, ICC-01/14-01/18-162-Conf-Exp-AnxA, p. 5.

³⁹ Additional Information Submission, ICC-01/14-01/18-209-Conf-Exp, para. 11.

⁴⁰ Defence Response, ICC-01/14-01/18-165-Conf-tENG, paras 5, 29.

Seleka investigation – would be insufficient considering that revealing [REDACTED] identity would implicitly reveal the direction and targets of the Seleka investigation.

42. The Chamber further finds that the non-disclosure of [REDACTED] identity is not prejudicial to or inconsistent with the rights of the Defence. The Chamber considers that withholding [REDACTED] identity is proportionate taking into account that: (i) [REDACTED] his statement contains, for the most part, information related to the Seleka investigation, which is not relevant to the Defence in this case; (ii) to the extent that the statement contains portions which are potentially exculpatory or material to the preparation of the Defence, such portions shall be disclosed to the Defence; (iii) said portions are limited and self-contained; and (iv) the confirmation of charges hearing is limited in scope.

43. Further, the Chamber considers that the non-disclosure of information relating to the Seleka investigation contained in the statement of [REDACTED] is independently justified pursuant to rule 81(2) of the Rules. Having reviewed the statement and the Prosecutor's proposals for non-disclosure,⁴¹ the Chamber observes that the information concerned reveals the direction and targets of the Prosecutor's ongoing investigation. For the same reasons as above, the Chamber considers that there is a risk of prejudice to the Seleka investigation arising from the disclosure of this information to the Defence. Non-disclosure is necessary and not prejudicial to or inconsistent with the rights of the Defence as the information relates to [REDACTED] irrelevant to the case.

44. In light of the foregoing, the Chamber authorises the withholding from the Defence, pursuant to rule 81(2) of the Rules, of (i) the identity of [REDACTED], as well as any identifying information, and (ii) any information relating to the Seleka investigation. As a consequence, the Prosecutor is permitted to withhold from the Defence paragraphs 13-244 and 260-270 of [REDACTED] statement, as well as annexes 1-4 and 6-16 to the statement, as proposed by the Prosecutor. The Chamber observes that the Prosecutor has not requested the non-disclosure of paragraphs 258-259 and annex 5 to the statement.⁴² The Chamber considers this to be an oversight as the paragraphs and the annex contain information which the Prosecutor seeks to

⁴¹ Additional Information Submission, ICC-01/14-01/18-209-Conf-Exp, paras 49-54.

⁴² Additional Information Submission, ICC-01/14-01/18-209-Conf-Exp, para. 54, p. 34.

withhold in other parts of the statement (*i.e.* in paragraphs 260-270 and annexes 1-4 and 6-16). The Chamber therefore authorises the Prosecutor to withhold paragraphs 258-259 and annex 5 from the Defence. The Chamber further directs the Prosecutor to apply redactions to the portions of [REDACTED] statement that will be disclosed in order to ensure the protection of any information that is identifying in nature. The authorisation also extends to any translations of [REDACTED] statement and the metadata linked to the evidence concerned.

2. [REDACTED]

45. The Prosecutor submits that [REDACTED].⁴³ [REDACTED]. In order to mitigate the risks to [REDACTED] and to the ongoing investigation, the Prosecutor requests that (i) his identity, as well as any identifying information, and (ii) any information relating to the Seleka investigation be withheld from the Defence.

46. The Chamber considers that the non-disclosure of [REDACTED] identity is justified, pursuant to rule 81(2) of the Rules. The Chamber finds that there is an objectively justifiable risk of prejudice to the Prosecutor's ongoing Seleka investigation should [REDACTED] identity be disclosed. The Chamber notes that [REDACTED]. Should his name be disclosed, there is a danger that he could be threatened, intimidated or interfered with in a manner that could render him unable to cooperate further with the Prosecutor.

47. The Chamber is satisfied that the risk arises from the disclosure of the information to the Defence and that anonymity is necessary and not prejudicial to or inconsistent with the rights of the Defence, for the same reasons as provided in relation to [REDACTED].

48. Further, the Chamber considers that the non-disclosure of information relating to the Seleka investigation contained in the statement of [REDACTED] is independently justified, pursuant to rule 81(2) of the Rules. Having reviewed the statement and the Prosecutor's proposals for non-disclosure,⁴⁴ the Chamber observes that the information concerned reveals the direction and targets of the Prosecutor's ongoing investigation. For the same reasons as above, the Chamber considers that

⁴³ Annex A to the Request, ICC-01/14-01/18-162-Conf-Exp-AnxA, p. 6; Annex A to the Additional Information Submission, ICC-01/14-01/18-209-Conf-Exp-AnxA, p. 7.

⁴⁴ Additional Information Submission, ICC-01/14-01/18-209-Conf-Exp, paras 38-43.

there is a risk of prejudice to the Seleka investigation arising from the disclosure of this information to the Defence. Non-disclosure is necessary and not prejudicial to or inconsistent with the rights of the Defence as the information relates to [REDACTED] irrelevant to the case.

49. In light of the foregoing, the Chamber authorises the withholding from the Defence, pursuant to rule 81(2) of the Rules, of (i) the identity of [REDACTED], as well as any identifying information, and (ii) any information relating to the Seleka investigation. As a consequence, the Prosecutor is permitted to withhold from the Defence paragraphs 12-166 and 169-170 of [REDACTED] statement and annexes 1-5 attached to the statement, as proposed by the Prosecutor. The Chamber notes that the Prosecutor further requests the non-disclosure of part of the table on page CAR-OTP-2023-1359.⁴⁵ The Chamber considers that, for the sake of consistency, non-disclosure of the entirety of the table is justified as it refers to the annexes to the statement, which the Prosecutor seeks to withhold from the Defence. Therefore, the Chamber authorises the Prosecutor to withhold from the Defence the table on page CAR-OTP-2023-1359 in its entirety. The Chamber also notes that, according to the Prosecutor, [REDACTED] statement also includes a sixth annex,⁴⁶ which however has not been submitted to the Chamber for review. According to the statement of [REDACTED], annex 6 is [REDACTED], an event which [REDACTED] recounts in paragraphs 174-179 of the statement. The Chamber has authorised the Prosecutor not to disclose these paragraphs and, for the same reasons, finds that the non-disclosure of annex 6 to the statement is also justified. The Chamber further directs the Prosecutor to apply redactions to the portions of [REDACTED] statement that will be disclosed in order to ensure the protection of any information that is identifying in nature. The authorisation also extends to any translations of the statement and the metadata linked to the evidence concerned.

⁴⁵ Annex E to the Additional Information Submission, ICC-01/14-01/18-209-Conf-Exp-AnxE, p. 22.

⁴⁶ Additional Information Submission, ICC-01/14-01/18-209-Conf-Exp, para. 41.

3. [REDACTED]

50. The Prosecutor submits that [REDACTED].⁴⁷ [REDACTED]. She therefore requests that (i) the identity of [REDACTED], as well as any identifying information, and (ii) any information relating to the Seleka investigation be withheld from the Defence.

51. The Chamber considers that the non-disclosure of [REDACTED] identity is justified, pursuant to rule 81(2) of the Rules. The Chamber finds that there is an objectively justifiable risk of prejudice to the Prosecutor's ongoing Seleka investigation should [REDACTED] identity be disclosed. [REDACTED]. Should his name be disclosed, there is a danger that not only he, but also other individuals [REDACTED] could be threatened, intimidated or interfered with in a manner that could render them unable to cooperate (further) with the Prosecutor.

52. The Chamber is satisfied that the risk arises from the disclosure of the information to the Defence and that anonymity is necessary and not prejudicial to or inconsistent with the rights of the Defence, for the same reasons as provided in relation to [REDACTED].

53. Further, the Chamber considers that the non-disclosure of information relating to the Seleka investigation contained in the statement of [REDACTED] is independently justified, pursuant to rule 81(2) of the Rules. Having reviewed the statement and the Prosecutor's proposals for non-disclosure,⁴⁸ the Chamber observes that the information concerned reveals the direction and targets of the Prosecutor's ongoing investigation. For the same reasons as above, the Chamber considers that there is a risk of prejudice to the Seleka investigation arising from the disclosure of this information to the Defence. Non-disclosure is necessary and not prejudicial to or inconsistent with the rights of the Defence as the information relates to [REDACTED] irrelevant to the case.

54. In light of the foregoing, the Chamber authorises the withholding from the Defence, pursuant to rule 81(2) of the Rules, of (i) the identity of [REDACTED], as well as any identifying information, and (ii) any information relating to the Seleka

⁴⁷ Annex A to the Request, ICC-01/14-01/18-162-Conf-Exp-AnxA, p. 10; Annex A to the Additional Information Submission, ICC-01/14-01/18-209-Conf-Exp-AnxA, p. 6.

⁴⁸ Additional Information Submission, ICC-01/14-01/18-209-Conf-Exp, paras 32-37.

investigation. As a consequence, the Prosecutor is permitted to withhold from the Defence the following parts of [REDACTED] statement: paragraphs 11-13, 17-18, 23, 26-89, 92, 95-109; the list of annexes on page CAR-OTP-2036-0436; and annexes 1-3 to the statement, as proposed by the Prosecutor. The Chamber observes that the Prosecutor does not seek to withhold from the Defence paragraphs 21-22, 119-121 in their entirety, but only specific information which is identifying. The Chamber is of the view that said paragraphs are identifying because of the events described and authorises the Prosecutor to withhold them from the Defence *in their entirety*. The Chamber further directs the Prosecutor to apply redactions to the remaining portions of [REDACTED] statement that will be disclosed in order to ensure the protection of any information that is identifying in nature. The authorisation also extends to any translations of [REDACTED] statement and the metadata linked to the evidence concerned.

4. [REDACTED]

55. The Prosecutor submits that [REDACTED].⁴⁹ [REDACTED]. The Prosecutor requests therefore that (i) his identity, as well as any identifying information, and (ii) any information relating to the Seleka investigation be withheld from the Defence.

56. The Chamber considers that the non-disclosure of [REDACTED] identity is justified, pursuant to rule 81(2) of the Rules. The Chamber finds that there is an objectively justifiable risk of prejudice to the Prosecutor's ongoing Seleka investigation should [REDACTED] identity be disclosed. The Chamber notes that [REDACTED]. Should his name be disclosed, there is a danger that he could be threatened, intimidated or interfered with in a manner that could render him unable to cooperate further with the Prosecutor.

57. The Chamber is satisfied that the risk arises from the disclosure of the information to the Defence and that anonymity is necessary and not prejudicial to or inconsistent with the rights of the Defence, for the same reasons as provided in relation to [REDACTED].

⁴⁹ Additional Information Submission, ICC-01/14-01/18-209-Conf-Exp, para. 21 and Annex A to the Additional Information Submission, ICC-01/14-01/18-209-Conf-Exp-AnxA, p. 3; Annex A to the Request, ICC-01/14-01/18-162-Conf-Exp-AnxA, p. 3.

58. The Chamber now turns to the Prosecutor's request for the non-disclosure of information relating to the Seleka investigation contained in the statement of [REDACTED]. After having reviewed the statement and the Prosecutor's proposals for non-disclosure,⁵⁰ the Chamber considers that the request is justified, pursuant to rule 81(2) of the Rules, in part, to the extent that the information relates to [REDACTED] irrelevant to the case. To the extent that the information relates to [REDACTED] the Chamber rejects the Prosecutor's request for non-disclosure. In the Chamber's view, this information is material to the preparation of the Defence and particular care needs to be taken when balancing the different interests at stake. In its assessment, the Chamber has been guided by the following considerations: (i) the information is general in nature [REDACTED]; (ii) the fact as such that the Prosecutor is conducting an investigation into crimes allegedly committed by the Seleka is already publicly known;⁵¹ and (iii) the information does not reveal the identity of [REDACTED], except for a few clauses which may be redacted.

59. In light of the foregoing, the Chamber authorises the withholding from the Defence, pursuant to rule 81(2) of the Rules, of (i) the identity of [REDACTED], as well as any identifying information, and (ii) subject to paragraph 58 above, any information relating to the Seleka investigation. As a consequence, the Prosecutor is permitted to withhold from the Defence the following parts of [REDACTED] statement: paragraphs 11-14, 19-30, 37-38, 62, 104-114 and annexes 1-7 to the statement, as proposed by the Prosecutor. The Chamber observes that the Prosecutor does not seek to withhold from the Defence paragraphs 41-60, 71-75 and 122 (including the part following paragraph 122, regarding the annexes to the statement) in their entirety, but only specific information which is identifying. The Chamber is of the view that said paragraphs are identifying because of the events described and authorises the Prosecutor to withhold them from the Defence *in their entirety*. The remaining discrete requests for non-disclosure are rejected. For the sake of clarity, the Chamber indicates that the following parts of [REDACTED] statement *shall* be disclosed to the Defence: paragraphs 15-18, 31-36, 39-40, 61, 63-70, 76-103, 115-121. The Chamber further directs the Prosecutor to apply redactions to the portions of

⁵⁰ Additional Information Submission, ICC-01/14-01/18-209-Conf-Exp, paras 21-25.

⁵¹ Prosecutor, [Article 53\(1\) Report, Situation in the Central African Republic II](#), 24 September 2014.

[REDACTED] statement that will be disclosed in order to ensure the protection of any information that is identifying in nature. In this regard, the Chamber notes that the Prosecutor omits, at times, to propose redactions to identifying information [REDACTED].⁵² The Chamber calls upon the Prosecutor to exercise due diligence and special care when applying redactions before disclosing the statement of [REDACTED] to the Defence. Lastly, the authorisation also extends to any translations of [REDACTED] statement and the metadata linked to the evidence concerned.

5. [REDACTED]

60. The Prosecutor submits that [REDACTED].⁵³ [REDACTED]. The Prosecutor requests therefore that (i) his identity, as well as any identifying information, and (ii) any information relating to the Seleka investigation be withheld from the Defence.

61. The Chamber considers that the non-disclosure of [REDACTED] identity is justified, pursuant to rule 81(2) of the Rules. The Chamber finds that there is an objectively justifiable risk of prejudice to the Prosecutor's ongoing Seleka investigation should [REDACTED] identity be disclosed. The Chamber notes that [REDACTED]. Should his name be disclosed, there is a danger that he could be threatened, intimidated or interfered with in a manner that could render him unable to cooperate further with the Prosecutor.

62. The Chamber is satisfied that the risk arises from the disclosure of the information to the Defence and that anonymity is necessary and not prejudicial to or inconsistent with the rights of the Defence, for the same reasons as provided in relation to [REDACTED].

63. Further, the Chamber considers that the non-disclosure of information relating to the Seleka investigation contained in the statement of [REDACTED] is independently justified, pursuant to rule 81(2) of the Rules. Having reviewed the

⁵² The Chamber refers, by way of example only, to paragraphs 69-70 (the references to [REDACTED]), paragraph 82 (the phrase [REDACTED]) and paragraph 101 (the phrase [REDACTED]), which may be identifying considering [REDACTED].

⁵³ Additional Information Submission, ICC-01/14-01/18-209-Conf-Exp, para. 26 and Annex A to the Additional Information Submission, ICC-01/14-01/18-209-Conf-Exp-AnxA, pp. 4-5; Annex A to the Request, ICC-01/14-01/18-162-Conf-Exp-AnxA, p. 9.

statement and the Prosecutor's proposals for non-disclosure,⁵⁴ the Chamber observes that the information concerned reveals the direction and targets of the Prosecutor's ongoing investigation. For the same reasons as above, the Chamber considers that there is a risk of prejudice to the Seleka investigation arising from the disclosure of this information to the Defence. Non-disclosure is necessary and not prejudicial to or inconsistent with the rights of the Defence as the information relates to [REDACTED] irrelevant to the case.

64. In light of the foregoing, the Chamber authorises the withholding from the Defence, pursuant to rule 81(2) of the Rules, of (i) the identity of [REDACTED], as well as any identifying information, and (ii) any information relating to the Seleka investigation. As a consequence, the Prosecutor is permitted to withhold from the Defence the following parts of [REDACTED] statement: paragraphs 11-18, 23-60, 68, 78-79, 93-94, 86-97; and annexes 1-4 to the statement, as proposed by the Prosecutor. The Chamber observes that the Prosecutor does not seek to withhold from the Defence paragraphs 86-92 and the part following paragraph 97, regarding the annexes to the statement.⁵⁵ The Chamber is of the view however that said paragraphs are identifying and authorises the Prosecutor to withhold them from the Defence. For the sake of clarity, the Chamber indicates that the following parts of [REDACTED] statement *shall* be disclosed to the Defence: paragraphs 19-22, 61-67, 69-77 [REDACTED], 80-85, 95-97. The Chamber further directs the Prosecutor to apply redactions to the portions of [REDACTED] statement that will be disclosed in order to ensure the protection of any information that is identifying in nature. The authorisation also extends to any translations of [REDACTED] statement and the metadata linked to the evidence concerned.

65. Before turning to the next part of the Request, the Chamber stresses that should circumstances change or new facts arise which may warrant the disclosure of the identities of the above-mentioned potential witnesses to the Defence, the Prosecutor has an obligation to promptly bring this to the attention of the Chamber, in compliance with her obligations under the Statute and the Rules.

⁵⁴ Additional Information Submission, ICC-01/14-01/18-209-Conf-Exp, paras 26-31.

⁵⁵ Additional Information Submission, ICC-01/14-01/18-209-Conf-Exp, para. 31, p. 16.

B. The Prosecutor's request for authorisation to apply non-standard redactions

66. The Chamber has reviewed the statements of the four witnesses concerned and the Prosecutor's proposals for non-disclosure and considers that the request for non-disclosure is justified, pursuant to rule 81(2) of the Rules, in part, to the extent that the information relates to [REDACTED] irrelevant to the case. In this regard, the Chamber finds that disclosing information which reveals the direction and targets of the Seleka investigation may prejudice the Prosecutor's ongoing investigation and that non-disclosure is necessary and not prejudicial to or inconsistent with the rights of the Defence.

67. The Chamber rejects the Prosecutor's request for non-disclosure to the extent that the information relates to the structure and capabilities of the Seleka. In the Chamber's view, this information is material to the preparation of the Defence, especially with regard to the alleged crimes under article 8 of the Statute, and particular care needs to be taken when balancing the different interests at stake. In its assessment, the Chamber has been guided by the following considerations: (i) the information is general in nature [REDACTED]; and (ii) the fact as such that the Prosecutor is conducting an investigation into crimes allegedly committed by the Seleka is already publicly known.⁵⁶

68. The Chamber's findings, granting or rejecting the requested redactions, are provided in detail below.

1. [REDACTED]

- Paragraphs 34-36: the Chamber **grants** authorisation to redact the statement, pursuant to rule 81(2) of the Rules, as proposed by the Prosecutor, except for the first two sentences of paragraph 34 [REDACTED], for which the request to redact is **rejected**. The Chamber notes that the Prosecutor does not seek to redact similar information in paragraph 47 of the statement;

⁵⁶ Prosecutor, [Article 53\(1\) Report, Situation in the Central African Republic II](#), 24 September 2014.

- Paragraphs 48-55, 73-74, 87-88, 98-110: the Chamber **grants** authorisation to redact the statement, pursuant to rule 81(2) of the Rules, as proposed by the Prosecutor.

2. [REDACTED]

- Paragraphs 71-99, 112-114, 133 (the reference to annex 5) and annex 5 to the statement: the Chamber **grants** authorisation to redact the statement, pursuant to rule 81(2) of the Rules, as proposed by the Prosecutor.

3. [REDACTED]

- Paragraphs 40-64, 80, 83, 100-109, 113-116, 160, 175 and annex 2 to the statement: the Chamber **grants** authorisation to redact, pursuant to rule 81(2) of the Rules.
- Paragraphs 110-111: the Chamber notes that the Prosecutor does not request authorisation to redact these paragraphs, although the line of questioning could reveal the direction and targets of the Seleka investigation and the Prosecutor does seek to redact the same information in other parts of the statement. The Chamber considers this to be an oversight and authorises the Prosecutor to withhold paragraphs 110-111 from the Defence, pursuant to rule 81(2) of the Rules.

4. [REDACTED]

- Paragraphs 26-45, 48-123, 125-128, 132-156, 176, 177, 179, 182-183, 188 and annexes 1, 2a, 2b and 7 to the statement: the Chamber **grants** authorisation to redact the statement, pursuant to rule 81(2) of the Rules, as proposed by the Prosecutor.
- Paragraph 184(f): the Chamber notes that the Prosecutor has withdrawn her request to redact this paragraph. However, the paragraph contains a reference that could reveal the direction and targets of the Seleka investigation [REDACTED]. The Chamber considers that this is an oversight and authorises the Prosecutor to withhold this portion of the statement from the Defence, together with the corresponding annex, pursuant to rule 81(2) of the Rules.

- Paragraphs 48, 124, 129-131: the Chamber **rejects** the Prosecutor's request for redactions, as the paragraphs concerned relate to the structure and capabilities of the Seleka.

FOR THESE REASONS, THE CHAMBER HEREBY

GRANTS the Prosecutor's request to withhold the identities of [REDACTED];

PARTIALLY GRANTS the Prosecutor's requests for non-disclosure of portions of the statements of [REDACTED], as specified in paragraphs 44, 49, 54, 59, 64 and 68 of this decision;

ORDERS the Prosecutor to disclose to the Defence the material which is the object of this decision within five days of notification of the present decision;

ORDERS the Prosecutor to continually assess the risk of prejudice to further or ongoing investigations and immediately inform the Chamber of any changes to the current situation which may warrant a variation of the present ruling; and

ORDERS the Defence to keep the information disclosed confidential and to ensure that it is not passed on to third parties or the public.

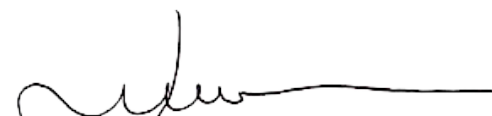
Done in both English and French, the English version being authoritative.



Judge Antoine Kesia-Mbe Mindua
 Presiding Judge



Judge Tomoko Akane



Judge Rosario Salvatore Aitala

Dated this Monday, 3 February 2020

At The Hague, The Netherlands