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Date: 31 July 2019

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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

Decision on the Prosecutor's Request to Use
Anonymised Summaries of Witness Statements

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

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PRE-TRIAL CHAMBER II of the International Criminal Court issues this Decision on the Prosecutor’s Request to Use Anonymised Summaries of Witness Statements.

I. Procedural History

1. On 30 October 2018, the Prosecutor submitted under seal, *ex parte*, an application for the issuance of warrants of arrest for Patrice-Edouard Ngaïssona and Alfred Yekatom.¹

2. On 11 November 2018, the Chamber issued the ‘Warrant of Arrest for Alfred Yekatom’.² On 17 November 2018, Yekatom was surrendered to the Court by the authorities of the Central African Republic (the ‘CAR’).³

3. On 7 December 2018, the Chamber issued the ‘Warrant of Arrest for Patrice-Edouard Ngaïssona’.⁴ On 23 January 2019, Ngaïssona was surrendered to the Court by the authorities of the French Republic.⁵

4. On 20 February 2019, the Chamber issued the ‘Decision on the joinder of the cases against Alfred Yekatom and Patrice-Edouard Ngaïssona and other related matters’, thereby joining the cases against Yekatom and Ngaïssona.⁶

5. On 15 May 2019, the Chamber issued the ‘Decision on the “Prosecution’s Request to Postpone the Confirmation Hearing and all Related Disclosure Deadlines”’, thereby deciding that the confirmation of charges hearing in the case against Yekatom and Ngaïssona shall commence on 19 September 2019 and ordering the Prosecutor to ‘submit any and all applications for the authorisation of the non-disclosure of witnesses’ identities and/or the non-disclosure of entire items of evidence by 7 June 2019 at the latest’ (the ‘7 June 2019 Deadline’).⁷

¹ ICC-01/14-01/18-2-US-Exp, together with 11 under seal, *ex parte* annexes.

² ICC-01/14-01/18-1-US-Exp. A public redacted version of the warrant of arrest is also available; see [ICC-01/14-01/18-1-Red](#).

³ Registry, Rapport du Greffe sur l’Arrestation et la Remise de M. Alfred Yekatom, ICC-01/14-01/18-17-US-Exp, paras 19-24.

⁴ ICC-01/14-01/18-89-Conf-Exp. A public redacted version of the warrant of arrest is also available; see [ICC-01/14-01/18-89-Red](#).

⁵ Registry, Rapport du Greffe sur la Remise de Patrice-Edouard Ngaïssona, ICC-01/14-01/18-101-US-Exp, paras 5-14.

⁶ [ICC-01/14-01/18-87](#); [ICC-01/14-01/18-121](#).

⁷ [ICC-01/14-01/18-199](#).

6. On 29 May 2019, at a status conference, the Chamber extended the 7 June 2019 Deadline until 5 July 2019.⁸

7. On 5 July 2019, the Chamber received the ‘Prosecution’s Request for the Non-Disclosure of Witness Identities’ (the ‘Prosecutor’s Request’).⁹

8. On 11 July 2019, the Chamber received the ‘Addendum to “Prosecution’s Request for the Non-Disclosure of Witness Identities”, ICC-01/14-01/18-237-Conf-Exp, 5 July 2019’ (the ‘Addendum’).¹⁰

9. On 23 July 2019, the Chamber ordered the Yekatom Defence and the Ngaïssona Defence (collectively, the ‘Defence’) to submit their respective responses to the Prosecutor’s Request by 29 July 2019, 16:00 hours, at the latest.¹¹

10. On 24 July 2019, the Chamber received the ‘Joint Defence Motion for Disclosure of Anonymous Summaries for [REDACTED] and [REDACTED]’ (the ‘Joint Defence Disclosure Request’).¹²

11. On 26 July 2019, the Chamber issued the ‘Decision on the “Joint Defence Motion for Disclosure of Anonymous Summaries for [REDACTED] and [REDACTED]”’, thereby rejecting the Joint Defence Disclosure Request.¹³

12. On 29 July 2019, the Chamber received the ‘Joint Defence Response to Request for Non-Disclosure of Witness Identities’.¹⁴

II. Submissions

A. The Prosecutor

13. The Prosecutor ‘requests authorisation to withhold the identities of two Witnesses [REDACTED] and [REDACTED]’. The Prosecutor indicates that she ‘intends to rely on these Witnesses’ but ‘ongoing security concerns prevent disclosing

⁸ ICC-01/14-01/18-T-003-CONF-EXP-ENG ET, p. 12.

⁹ ICC-01/14-01/18-237-Conf-Exp, together with 2 confidential, *ex parte* annexes. A confidential redacted version was registered on 23 July 2019; see ICC-01/14-01/18-237-Conf-Exp.

¹⁰ ICC-01/14-01/18-244-Conf-Exp, together with 1 confidential, *ex parte* annex.

¹¹ Email from the Chamber to the Lead Counsel for Yekatom and Ngaïssona, dated 23 July 2019, 16:41 hours.

¹² ICC-01/14-01/18-254-Conf.

¹³ ICC-01/14-01/18-256-Conf.

¹⁴ ICC-01/14-01/18-257-Conf.

their identities before confirmation’. Therefore, according to the Prosecutor, ‘[t]he use of anonymised summaries of their respective Witness Statements (“Proposed Summaries”) is necessary to protect their safety and warranted under rule 81(4) of the Rules of Procedure and Evidence’.

14. According to the Prosecutor, ‘the continued volatility and unpredictability of the security situation in CAR as well as the country’s weak infrastructure [REDACTED]’. The Prosecutor adds that [REDACTED]. Furthermore, the Prosecutor submits that [REDACTED], increasing the risk that they may be targeted for their cooperation with the investigation’.

15. [REDACTED].

16. [REDACTED].

17. According to the Prosecutor, ‘[t]he use of summaries is specifically authorised under article 61(5) and does not prejudice or impede the fairness of the confirmation proceedings’. In this regard, the Prosecutor contends that ‘[t]he Proposed Summaries (1) provide the Defence with the necessary information contained in the Witnesses’ statements as relates to the Document Containing the Charges; (2) form only a small portion of the total disclosure the Defence will receive regarding the Prosecution’s case; and (3) are temporary, since the complete statements, including the Witness’ identities, will be disclosed once the Prosecution implements the required security measures’. Moreover, the Prosecutor is of the view that, ‘[a]side from the Proposed Summaries, no other less intrusive and expeditious measures are available to mitigate the risk inherent in disclosing these materials’. Lastly, the Prosecutor argues that other Chambers ‘have endorsed this approach in similar circumstances’.

B. The Defence

18. The Defence submits that the Prosecutor’s Request ‘should be dismissed *in limine* if the Prosecution has not been diligent in identifying, interviewing, or protecting Witnesses [REDACTED] and [REDACTED]’ (the ‘*In Limine* Request’). In this regard, the Defence argues that ‘[t]he Prosecution has known since November 2018 that it would have to present evidence at a confirmation hearing and put protective measures in place for its witnesses in advance of that hearing’. In addition, according to the Defence, ‘[t]he “continued volatility and unpredictability of the security situation in the Central African Republic” cannot be a valid excuse for failing

to anticipate that witnesses would need to be identified, contacted, and protected in sufficient time to disclose their identities in advance of the confirmation hearing’. The Defence also avers that ‘[t]he Prosecution has not shared with the Defence the reasons for the delay in identifying, interviewing, and protecting the two witnesses’ and, therefore, ‘[t]he Chamber should obtain, and closely scrutinize, information from the Prosecution as to the reasons for the delay’. Lastly, the Defence is of the view that a decision not to allow the use of anonymous summaries would not ‘prohibit the Prosecution from calling the witnesses to testify at trial should the charges be confirmed and protective measures be in place at that time’.

19. Furthermore, the Defence asserts ‘that *full* disclosure should be made and that non-disclosure is the *exception* to the rule’. It adds that evidence provided by an anonymous witness ‘prevents the other party from effectively challenging the reliability of the witness’ evidence [...] since it cannot investigate the background of the witness or search for references to the witness in the disclosure material that may contradict the witness’ evidence’. The Defence also points out that, while it ‘does not have any information about the safety of the witnesses or the nature of the information the witnesses provide’, ‘Witness [REDACTED] and therefore greater scrutiny must be given to this witness’ credibility’.

III. Determination by the Chamber

20. The Chamber notes articles 61(5), 67 and 68(1) and (5) of the Rome Statute (the ‘Statute’) and rules 76, 77, 81(4) and 121 of the Rules of Procedure and Evidence (the ‘Rules’).

21. With regard to the issue of anonymity, the Chamber recalls that the Appeals Chamber has considered that such a measure is ‘an exception to the general rule that the identity of such witnesses and their prior statements are to be disclosed’ prior to the confirmation of charges hearing.¹⁵ The Appeals Chamber has further held that, when considering whether to authorise the non-disclosure of the identity of a

¹⁵ 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. 1.

witness pursuant to rule 81(4) of the Rules, the Pre-Trial Chamber must address the following factors: ‘a thorough consideration of the danger that the disclosure of the identity of the person may cause; the necessity of the protective measure, including whether it is the least intrusive measure necessary to protect the person concerned; and the fact that any protective measures taken shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial’.¹⁶

22. In relation to the issue of anonymous summaries, the Chamber recalls that the Appeals Chamber has found that ‘[t]he use of summaries pursuant to article 61 (5) of the Statute leaves the disclosure obligations of the Prosecutor pursuant to article 61 (3) (b) of the Statute and rules 76 et seq. of the Rules of Procedure and Evidence unaffected’ and that ‘[t]he use of summary evidence pursuant to article 68 (5) of the Statute [...] is primarily a witness protection measure’.¹⁷ Furthermore, according to the Appeals Chamber, ‘[a]rticle 68 (5) of the Statute expressly provides that the Prosecutor may submit a summary of evidence instead of the evidence itself for the purpose of any proceedings conducted prior to trial’, which ‘includes the presentation of the summaries at the confirmation hearing pursuant to article 61 (5) of the Statute’.¹⁸ The Appeals Chamber has further considered that ‘the presentation of summaries at the confirmation hearing without disclosure of the identities of the relevant witnesses to the defence [...] is not *per se* prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial’.¹⁹ In the view of the Appeals Chamber, in carrying out this assessment, ‘the Pre-Trial Chamber will have to take into account *inter alia* that the ability of the defence to challenge the evidence presented by the Prosecutor at the confirmation hearing is impaired not only by the

¹⁶ 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, para. 67. See also paragraphs 69 to 73 of the same Judgment.

¹⁷ Appeals Chamber, *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 (the ‘14 December 2006 Judgment’), paras 43-44.

¹⁸ [14 December 2006 Judgment](#), para. 46.

¹⁹ [14 December 2006 Judgment](#), para. 50.

use of anonymous witnesses but also by the use of summaries without disclosure to the defence of the underlying witness statements and other documents’.²⁰

23. Lastly, the Chamber recalls that various Pre-Trial Chambers have held that ‘evidence emanating from anonymous sources or from summaries of witnesses statements’ is to be ‘considered as having a lower probative value than that attached to the statements of witnesses whose identity is known to the Defence and for which a full statement has been made available to it’.²¹ Furthermore, no conclusions may be drawn exclusively on the basis of anonymous hearsay evidence.²²

A. The *In Limine* Request

24. The Defence argues that the Prosecutor’s Request should be dismissed *in limine* ‘if the Prosecution has not been diligent in identifying, interviewing, or protecting Witnesses [REDACTED] and [REDACTED]’. The Chamber notes that, in addition to the volatile and unpredictable security situation in CAR, [REDACTED]. Moreover, [REDACTED]. Accordingly, the Chamber finds that it cannot be said that the Prosecutor has failed to exercise diligence and rejects the *In Limine* Request.

B. [REDACTED]

25. The Chamber notes that the Prosecutor has provided two proposed summaries for [REDACTED]. According to the annexes to the Prosecutor’s Request and the Addendum, these proposed summaries are based on interview notes from a series of interviews with the witness [REDACTED]. The Chamber further observes that the Prosecutor has not provided the underlying documents upon which the summaries are based.

²⁰ [14 December 2006 Judgment](#), para. 51.

²¹ Pre-Trial Chamber II, *The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, [Decision on the Confirmation of Charges Pursuant to Article 61\(7\)\(a\) and \(b\) of the Rome Statute](#), 23 January 2012, ICC-01/09-01/11-373, para.78. *See also for instance* Pre-Trial Chamber II, *The Prosecutor v. Jean-Pierre Bemba Gombo*, [Decision Pursuant to Article 61\(7\)\(a\) and \(b\) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo](#), 15 June 2009, ICC-01/05-01/08-424, para. 50; Pre-Trial Chamber I, *The Prosecutor v. Callixte Mbarushimana*, [Decision on the confirmation of charges](#), 16 December 2011, ICC-01/04-01/10-465-Red, para. 49.

²² *See for instance* Pre-Trial Chamber I, *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, [Decision on the confirmation of charges](#), 30 September 2008, ICC-01/04-01/07-717, para. 160; Pre-Trial Chamber I, *The Prosecutor v. Thomas Lubanga Dyilo*, [Decision on the confirmation of charges](#), 29 January 2007, ICC-01/04-01/06-803-tENG, para. 106.

26. In regard to the usage of anonymous summaries, as noted above, the Chamber must assess the degree to which such summaries may affect the ability of the suspects to challenge the evidence presented by the Prosecutor, especially considering that the witness' identity, the underlying witness statements, and other relevant documents would be withheld from the Defence. The Chamber considers that, in light of the Appeals Chamber's jurisprudence, requests to rely on anonymous summaries must be accompanied by the underlying transcripts and/or witness statements upon which they are based in order to enable the Chamber to safeguard the rights of the suspects. It is only through providing these original documents that the Chamber will be sufficiently equipped to evaluate whether the proposed anonymous summaries are accurate, consistent and complete, thus ensuring that the use of such summaries is not prejudicial to or inconsistent with the rights of the suspects.

27. In the absence of the possibility to exercise judicial oversight, the Chamber finds that to allow for the use of anonymous summaries for [REDACTED] would excessively impair the ability of Yekatom and Ngaïssona to challenge this witness' evidence. Accordingly, the Chamber rejects the Prosecutor's Request in relation to this witness and, as such, the Prosecutor will not be able to rely on the anonymous summary of [REDACTED] interviews for the purposes of the confirmation of charges hearing.

C. [REDACTED]

28. The Chamber considers that the conditions for the non-disclosure of [REDACTED] identity have been fulfilled. First, the Chamber is of the view that there is an objectively justifiable risk to the safety of [REDACTED] arising from the disclosure of [REDACTED] identity to the Defence. This conclusion is based on the following considerations: [REDACTED]. Second, the Chamber finds that the non-disclosure of [REDACTED] identity is necessary. The reason is that [REDACTED]. In addition, alternative measures falling short of anonymity would place [REDACTED] in danger in the CAR in light of the aforementioned risk to his safety. Finally, the Chamber considers that, on balance, the non-disclosure of [REDACTED] identity is not prejudicial to or inconsistent with the rights of the Defence. In this regard, the Chamber has taken into account that: (i) the Defence will have access to the information provided by [REDACTED] by way of a summary of his statements; and (ii) the scope of the confirmation of charges hearing is limited. Therefore, the

Chamber concludes that, so as to protect the safety of [REDACTED], this witness' identity may be withheld pursuant to rule 81(4) of the Rules.

29. The Chamber is also satisfied that the conditions for the use of an anonymous summary of [REDACTED] statements have been met. As detailed above, the disclosure of [REDACTED] identity could gravely endanger this witness. Furthermore, the use of an anonymous summary is not prejudicial to or inconsistent with the rights of the suspects and a fair and impartial trial. First, the summary proposed by the Prosecutor constitutes a limited part of the evidence disclosed to the Defence. Second, the Chamber recalls that the scope of the confirmation of charges hearing is limited. Lastly, having compared the proposed summary against the witness statements provided by [REDACTED], the Chamber is satisfied that, subject to what is set forth below, this summary is accurate, consistent and complete, thereby providing the Defence with the information relevant to the confirmation of charges hearing. Accordingly, the Chamber is of the view that an anonymous summary of [REDACTED] statements may be used pursuant to articles 61(5) and 68(5) of the Statute and rule 81(4) of the Rules.

30. Having said that, the Chamber instructs the Prosecutor to ensure that, without revealing identifying information, the following information is also reflected in the summary of [REDACTED] statements. This information is, namely, potentially exculpatory and/or material to the preparation of the Defence within the meaning of article 67(2) of the Statute and/or rule 77 of the Rules respectively. [REDACTED];²³ [REDACTED];²⁴ [REDACTED].²⁵ [REDACTED].²⁶

²³ CAR-OTP-2064-0822, at 0830, para. 40.

²⁴ CAR-OTP-2064-0822, at 0831, para. 46.

²⁵ CAR-OTP-2064-0822, at 0831, para. 48.

²⁶ CAR-OTP-2069-0003, at 0008, para. 32.

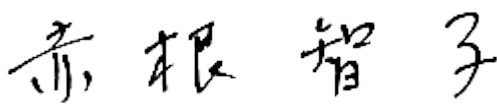
FOR THESE REASONS, THE CHAMBER HEREBY

- a) **REJECTS** the *In Limine* Request;
- b) **REJECTS** the Prosecutor's Request in relation to [REDACTED];
- c) **GRANTS** the Prosecutor's Request in relation to [REDACTED], as specified in this decision; and
- d) **ORDERS** the Prosecutor to amend the proposed summary of [REDACTED] statements as specified in this decision. The Prosecutor is allowed to provide detailed written submissions on these specific amendments, if any, within five days of notification of the present decision.

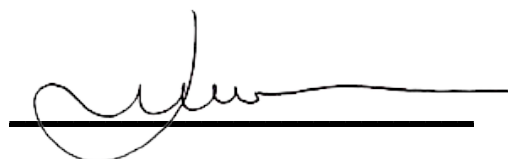
Done in both English and French, the English version being authoritative.



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