

**Cour
Pénale
Internationale**

**International
Criminal
Court**



Original: English

No. ICC-01/14-01/18

Date: 14 August 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 ‘Prosecution’s Urgent Request for the Non-Disclosure of Witness
Identities’

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

The Office of the Prosecutor

Fatou Bensouda, Prosecutor
James Stewart, Deputy Prosecutor

Counsel for the Defence

Mylène Dimitri
Peter Robinson

Legal Representatives of the Applicants

Geert-Jan Alexander Knoops

Legal Representatives of the Victims

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

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

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

Defence 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 Urgent Request for the Non-Disclosure of Witness Identities’ (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 (‘CAR’) on 17 November 2018.³

2. On 7 December 2018, the Chamber issued a ‘Warrant of Arrest for Patrice-Edouard Ngaïssona’,⁴ who was surrendered to the Court by the authorities of the French Republic on 23 January 2019.⁵

3. On 23 January 2019, the Single Judge, acting on behalf of the Chamber,⁶ 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*.⁷

4. On 20 February 2019, the Chamber joined the cases against Yekatom and Ngaïssona.⁸

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

¹ ICC-01/14-01/18-267-Conf-Exp (with confidential *ex parte* annexes A to O; a confidential redacted version is also available, see ICC-01/14-01/18-267-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 ICC-01/14-01/18-89-Conf-Exp (a public redacted version is also available, see [ICC-01/14-01/18-89-Red](#)).

⁵ 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.

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

⁷ ICC-01/14-01/18-64-Conf, para. 32 (a public redacted version is also available, see [ICC-01/14-01/18-64-Red](#)).

⁸ [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.

⁹ [ICC-01/14-01/18-163](#).

6. On 15 May 2019, upon request by the Prosecutor to postpone the commencement of the confirmation of charges hearing,¹⁰ the Chamber decided that the hearing will commence on 19 September 2019. In line with rule 121(3) of the Rules of Procedure and Evidence (the ‘Rules’), the Chamber ordered the Prosecutor to submit the document containing the charges and the list of evidence which she intends to present at the confirmation hearing by 19 August 2019 at the latest.¹¹

7. On 29 May 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 5 July 2019 at the latest.¹²

8. On 28 June 2019, the Chamber issued the ‘First Decision on the Prosecutor’s Request for Authorisation to Withhold the Identities of Witnesses and Apply Non-Standard Redactions’.¹³

9. On 17 July 2019, the Chamber issued the ‘Second Decision on the Prosecutor’s Request for the Non-Disclosure of Witness Identities and Non-Standard Redactions’.¹⁴

10. On 31 July 2019, the Chamber rendered the ‘Decision on the Prosecutor’s Request to Use Anonymised Summaries of Witness Statements’.¹⁵

11. On 7 August 2019, the Prosecutor submitted the Request, seeking authorisation under rule 81(4) of the Rules to withhold the identity of two witnesses on whom she intends to rely at the confirmation of charges hearing, namely witness [REDACTED] and witness [REDACTED], and to apply non-standard redactions to identifying information in their statements.¹⁶

12. On 13 August 2019, the Chamber received the ‘Joint Defence Response to Prosecution’s “Urgent Request for the Non-Disclosure of Witness Identities” (ICC-

¹⁰ 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).

¹¹ [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 Transcript of hearing, ICC-01/14-01/18-T-003-CONF-EXP-ENG, p. 20, lines 18-24.

¹³ ICC-01/14-01/18-232-Conf-Exp (a confidential redacted version is also available, see ICC-01/14-01/18-232-Conf-Red).

¹⁴ ICC-01/14-01/18-249-Conf-Exp (a confidential redacted version is also available, see ICC-01/14-01/18-249-Conf-Red).

¹⁵ ICC-01/14-01/18-261-Conf-Exp (a confidential redacted version is also available, see ICC-01/14-01/18-261-Conf-Red).

¹⁶ Request, ICC-01/14-01/18-267-Conf-Exp, paras 1-2.

01/14-01/18-267-Conf-Red)’, in which the Defence for Mr Alfred Yekatom and the Defence for Mr Patrice-Edouard Ngaïssona (the ‘Defence’) did not oppose the Request.¹⁷

II. Preliminary remarks

13. The present decision is classified as confidential *ex parte*, as it makes reference to the existence of documents and, to a limited extent, their content, which have been submitted and are currently treated as confidential, *ex parte* Prosecutor and Victims and Witnesses Unit (‘VWU’) only. In line with the previous practice of the Chamber, this decision is shared with the Defence for reasons of fairness, albeit in confidential redacted form. The references to confidential *ex parte* filings, which are required by the principle of judicial reasoning, have been made without endangering the interests concerned and defeating the very purpose of the classification of the filings.

III. Timing of the Request

A. The Prosecutor’s submissions

14. The Chamber notes that the Request was made past the 5 July 2019 deadline set by the Chamber for the submission of all applications for the authorisation of the non-disclosure of witnesses’ identities. In this regard, the Prosecutor submits, in relation to witness [REDACTED] that she ‘reasonably anticipated that the steps necessary to ensure the Witness’s safety would be taken before the filing of the [document containing the charges] on 19 August 2019’, allowing for the disclosure of his identity to the Defence. However, it appears that the process of implementing the required protection measures, [REDACTED], may not be completed by that time [REDACTED].¹⁸

15. In relation to witness [REDACTED], the Prosecutor submits that [REDACTED]. Following the assessment of the Prosecution’s Protection Strategies Unit (‘PSU’), [REDACTED]. At the time of the 5 July 2019 deadline, the Prosecutor did not anticipate the need for [REDACTED] protection measures, which became apparent only after the assessment of the PSU.¹⁹

¹⁷ ICC-01/14-01/18-272-Conf.

¹⁸ Request, ICC-01/14-01/18-267-Conf-Exp, paras 7-8.

¹⁹ Request, ICC-01/14-01/18-267-Conf-Exp, paras 10-11.

B. Applicable law

16. The Chamber notes regulation 35(2) of the Regulations of the Court which provides that:

The Chamber may extend or reduce a time limit if *good cause* is shown and, where appropriate, after having given the participants an opportunity to be heard. After the lapse of a time limit, an extension of time may only be granted if the participant seeking the extension can demonstrate that he or she was *unable to file the application within the time limit for reasons outside his or her control* (emphasis added).

C. Determination of the Chamber

17. Regarding witness [REDACTED], the Chamber finds that the extension of time is warranted. The Chamber observes that the Prosecutor has taken the necessary steps to put in place the required protection measures [REDACTED]. However, due to circumstances outside her control, those measures may not be implemented by 19 August 2019 [REDACTED].

18. The Chamber finds that the extension of time is equally warranted regarding witness [REDACTED]. The Chamber is mindful of the fact that [REDACTED] and that it did not become apparent that the witness required [REDACTED] protection measures until after the deadline had passed.

19. The Chamber also notes that the extension of time would (i) ensure that the disclosure of evidence takes place no later than 19 August 2019; (ii) allow the date of the confirmation of charges hearing to be observed, in line with the right of the suspects to be tried without undue delay; and (iii) ensure, at the same time, the safety and well-being of witnesses.

IV. The Request

A. The Prosecutor's submissions

20. The Prosecutor advances that the current security situation of the two witnesses does not allow for the disclosure of their identities to the Defence. In relation to witness [REDACTED], the Prosecutor submits that [REDACTED].²⁰

²⁰ Request, ICC-01/14-01/18-267-Conf-Exp, paras 6-7.

21. In relation to witness [REDACTED], the Prosecutor submits that [REDACTED].²¹

22. The Prosecutor argues, in relation to both witnesses, that [REDACTED].

B. The Defence's submissions

23. The Defence, while reserving 'its right to ask for an adjournment of the confirmation hearing to address any issue that may arise following the disclosure of [REDACTED] and [REDACTED] statements and the lifting of the redactions to their respective identities', affirms that it does not oppose the Prosecution's Request.²²

C. Applicable law

24. The Chamber notes articles 21(1) and (3), 57(3)(c), 61, 67 and 68(1) of the Rome Statute (the 'Statute'), rules 76, 81 and 121 of the Rules and article 8 of the Code of Professional Conduct for counsel.

25. According to rule 76(1) of the Rules, the Prosecutor shall provide the Defence with the names of the witnesses on whom she intends to rely at the confirmation of charges hearing and copies of any prior statements made by those witnesses. Rule 76(4), together with rule 81(4) of the Rules, provide for an exception and allow for the non-disclosure of a witness' identity, subject to the Chamber's authorisation, where this is necessary to protect the safety and privacy of the witness.²³

26. When considering a request by the Prosecutor pursuant to rule 81(4) of the Rules to authorise the non-disclosure of a witness' identity, the Chamber applies the following criteria set out by the Appeals Chamber:

- a) there is an *objectively justifiable risk* to the safety of the person concerned which arises from disclosing the information to the Defence, as opposed to disclosing it to the general public. 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;

²¹ Request, ICC-01/14-01/18-267-Conf-Exp, paras 9-10.

²² ICC-01/14-01/18-272-Conf, paras 6-7.

²³ 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, paras 34-35.

- b) the non-disclosure of information could overcome or reduce the risk and it is *necessary* in that there is no less intrusive measure, short of non-disclosure, that is available and feasible in the circumstances; and
- c) the non-disclosure of information is *proportionate*, meaning that it is not prejudicial to or inconsistent with the rights of the suspect and a fair and impartial trial.²⁴

27. The danger caused by the disclosure of the witness' identity to the Defence must be assessed with regard to each individual witness, taking into account his/her specific situation.²⁵ As previously held by this Chamber, albeit in a different composition, weight should be given in particular to the following factors: (i) the witness' personal circumstances; (ii) whether there are currently protection or security measures in place for the witness; (iii) the relevant security situation in the area where the witness or his/her family currently reside; (iv) whether the witness or his/her family members have received any threats on account of his/her (perceived) involvement with the Court; (v) whether the witness him/herself has undertaken any activity to endanger his/her personal safety; and (vi) whether the witness consented that his/her identity be disclosed to the Defence (without prejudice to the Chamber's *proprio motu* assessment whether to disclose such identity).²⁶

28. The Chamber assesses each discrete request for non-disclosure on a case-by-case basis,²⁷ with due regard to the competing interests at stake, so as to ensure that

²⁴ 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 71-73; *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 27-29.

²⁵ 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 27-29; *The Prosecutor v. Bosco Ntaganda*, [Redacted First Decision on the Prosecutor's Requests for Redactions and Other Related Requests](#), 1 October 2013, ICC-01/04-02/06-117-Red3, para. 34 (date of the public redacted version, 3 July 2014).

²⁶ Pre-Trial Chamber II, *The Prosecutor v. Bosco Ntaganda*, [Redacted First Decision on the Prosecutor's Requests for Redactions and Other Related Requests](#), 1 October 2013, ICC-01/04-02/06-117-Red3, para. 34 (date of the public redacted version, 3 July 2014).

²⁷ Redactions to information falling under the standard redaction categories follow the procedure established by the Chamber in the [First Decision on Disclosure](#), ICC-01/14-01/18-64-Red, paras 23-31.

the proceedings are fair and expeditious and that they are conducted with full respect to the rights of the Defence.²⁸

D. Determination of the Chamber

29. For the reasons that follow, the Chamber considers that the non-disclosure of [REDACTED] identity is justified, pursuant to rule 81(4) of the Rules. First, the Chamber finds that there is an objectively justifiable risk to the safety of [REDACTED], arising from the disclosure of his 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 Chamber is mindful that the witness' security situation [REDACTED]. Any alternative measure, falling short of anonymity, would therefore place [REDACTED] in danger [REDACTED]. Lastly, the Chamber considers that, on balance, the non-disclosure of [REDACTED] identity is not prejudicial to or inconsistent with the rights of the Defence as: (i) the Defence will have access to the relevant information contained in [REDACTED] statement and will have the possibility to challenge it; and (ii) the scope of the confirmation of charges hearing is limited. In light of the above and pursuant to rule 81(4) of the Rules, the Chamber authorises the Prosecutor to withhold [REDACTED] identity from the Defence and to apply redactions to identifying information contained in his statement and annexes thereof, as proposed in annexes B to O to the Request. The authorisation also extends to any translations of [REDACTED] statement and the metadata linked to the evidence concerned.

30. Turning to [REDACTED], the Chamber considers that the non-disclosure of his identity is justified, pursuant to rule 81(4) of the Rules. First, the Chamber finds that there is an objectively justifiable risk to the safety of [REDACTED], arising from the disclosure of his identity to the Defence, as [REDACTED]. Second, the Chamber finds that the non-disclosure of [REDACTED] identity is necessary as [REDACTED] the required protection measures have not yet been put in place. Lastly, the Chamber considers that, on balance, the non-disclosure of [REDACTED] identity is not prejudicial to or inconsistent with the rights of the Defence as: (i) the Defence will

²⁸ 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.

have access to the relevant information contained in [REDACTED] statement and will have the possibility to challenge it; and (ii) the scope of the confirmation of charges hearing is limited. In light of the above and pursuant to rule 81(4) of the Rules, the Chamber authorises the Prosecutor to withhold [REDACTED] identity from the Defence and to apply redactions to identifying information contained in his statement, as proposed in annex A to the Request. The authorisation also extends to any translations of [REDACTED] statement and the metadata linked to the evidence concerned.

31. Lastly, the Chamber notes the Prosecutor's submission that '[t]he proposed non-standard redactions [...] are temporary, to be lifted [REDACTED] before the confirmation of charges hearing'.²⁹ It is indeed the established jurisprudence of the Court that information withheld from the Defence must be kept under review and may be subsequently disclosed, should circumstances change.³⁰ However, the Chamber recalls that the Prosecutor may not rely at the confirmation of charges hearing on re-disclosed evidence after the lifting of redactions if such evidence has been disclosed to the Defence later than 30 days before the commencement of the hearing. This is to ensure fairness of the proceedings and to meet the requisite that the Defence is put on sufficient notice for its preparation.

²⁹ Request, ICC-01/14-01/18-267-Conf-Exp, para. 12.

³⁰ Pre-Trial Chamber II, *The Prosecutor v. Bosco Ntaganda*, [Redacted First Decision on the Prosecutor's Requests for Redactions and Other Related Requests](#), 1 October 2013, ICC-01/04-02/06-117-Red3, para. 34 and footnote 36 for further references (date of the public redacted version, 3 July 2014).

FOR THESE REASONS, THE CHAMBER HEREBY

GRANTS the non-disclosure of the identity of witnesses [REDACTED] and [REDACTED];

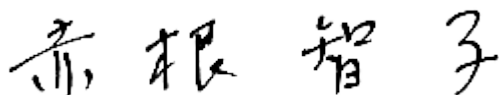
GRANTS the Prosecutor's request for non-standard redactions to the statements of witnesses [REDACTED] and [REDACTED] and related documents, as specified in paragraphs 29 and 30 of the present decision; and

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

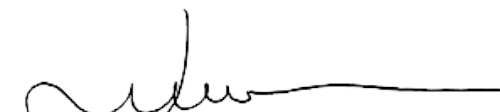
Done in both English and French, the English version being authoritative.



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