

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No. ICC-01/14-01/18

Date: 15 May 2019

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***

**Confidential, *ex parte*, only available to the Prosecutor and the Victims and
Witnesses Unit**

Order for Additional Information

Order 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 Alfred Yekatom

Counsel for Patrice-Edouard Ngaissona

Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparations**

The Office of Public Counsel for Victims

**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 order for additional information, pursuant to regulation 28 of the Regulations of the Court (the 'Regulations'), regarding the Prosecutor's requests for the non-disclosure of witnesses' identities and non-standard redactions dated 29 March 2019 and 18 April 2019.¹

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 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').⁷
4. On 20 February 2019, the Chamber joined the cases against Yekatom and Ngaïssona.⁸
5. On 29 March 2019, the Prosecutor submitted 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)"', seeking authorisation to

¹ 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 (with 6 confidential, *ex parte*, annexes; a confidential redacted version is also available, *see* ICC-01/14-01/18-162-Conf-Red); Prosecution's Request for the Non-Disclosure of Witness Identities and Non-Standard Redactions, 18 April 2019, ICC-01/14-01/18-179-Conf-Exp (with 2 confidential, *ex parte*, annexes).

² Warrant of Arrest for Alfred Yekatom, ICC-01/14-01/18-1-US-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 Warrant of Arrest for Patrice-Edouard Ngaïssona, ICC-01/14-01/18-89-US-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 (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.

withhold the identities of six witnesses and to apply non-standard redactions to the statements of four other witnesses (the 'First Request for Non-Disclosure').⁹

6. 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.¹⁰

7. On 8 April 2019, the Yekatom Defence and the Ngaïssona Defence (collectively the 'Defence') jointly submitted the 'Réponse de M. Alfred Rombhot Yekatom et de M. Patrice-Edouard Ngaïssona à la «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»'.¹¹

8. On 18 April 2019, the Prosecutor submitted the 'Prosecution's Request for the Non-Disclosure of Witness Identities and Non-Standard Redactions', seeking authorisation to withhold the identities of eleven witnesses and apply non-standard redactions to the statements and transcripts of interviews of two other witnesses (the 'Second Request for Non-Disclosure').¹²

9. On 15 May 2019, the Chamber issued the 'Decision on the "Prosecution's Request to Postpone the Confirmation Hearing and all Related Disclosure Deadlines"', scheduling the confirmation of charges hearing to 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.

10. The Chamber notes articles 57(3)(c), 61, 67 and 68(1) of the Rome Statute (the 'Statute'), rules 76, 77 and 81 of the Rules of Procedure and Evidence (the 'Rules') and regulation 28 of the Regulations.

11. The Chamber recalls that '[t]he overriding principle is that full disclosure should be made. It must always be borne in mind that the authorisation of non-

⁹ First Request for Non-Disclosure, ICC-01/14-01/18-162-Conf-Exp.

¹⁰ ICC-01/14-01/18-163.

¹¹ ICC-01/14-01/18-165-Conf.

¹² First Request for Non-Disclosure, ICC-01/14-01/18-162-Conf-Exp.

disclosure of information is the exception to this general rule'.¹³ Where restrictions to disclosure are necessary, pursuant to rule 81(2) and (4) of the Rules, to protect the safety and well-being of victims and witnesses or to prevent prejudice to the Prosecutor's further or ongoing investigations, the Prosecutor must establish that there is an objectively identifiable risk to the safety of the protected person concerned or that disclosure of the information may prejudice further or ongoing investigations.¹⁴ The Chamber stresses that the burden is on the Prosecutor to satisfy the Chamber that requests for non-disclosure are fully justified. Should the Prosecutor fail to do so, such requests will have to be rejected. Save for the standard redaction categories,¹⁵ the Chamber assesses each request for non-disclosure on a case-by-case basis, with due regard to the competing interests at stake.¹⁶ It is therefore imperative for the Prosecutor to submit proper, detailed justifications for each paragraph of a witness statement or transcript of interview that she proposes to withhold from the Defence. Further, the Chamber recalls 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'.¹⁷

12. Having reviewed the Prosecutor's First Request for Non-Disclosure, the Chamber finds that the Prosecutor has failed to meet her obligation to provide precise and detailed justification in support of her request. Firstly, the justification provided, even when read together with Annex A to the First Request for Non-Disclosure, is

¹³ Appeals Chamber, *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. 70; *see also* Appeals Chamber, *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 and 39.

¹⁴ Appeals Chamber, *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 67, 71, 97.

¹⁵ First Decision on Disclosure, ICC-01/14-01/18-64-Red, paras 23-32.

¹⁶ Appeals Chamber, *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 and 39.

¹⁷ Appeals Chamber, *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.

overly general in nature. Annex A provides justifications that are no more than one paragraph in length per witness.¹⁸

13. Secondly, at times, the Prosecutor does not provide any justification at all. For instance, while the Prosecutor's First Request for Non-Disclosure is formulated pursuant to rule 81(2) of the Rules to prevent prejudice to the ongoing investigation concerning crimes allegedly committed by the Seleka, the Chamber notes that the Prosecutor is also seeking the non-disclosure of information related to the Anti-Balaka, for which no justification has been provided. To the extent that the Prosecutor may consider such information to be irrelevant to the case against Yekatom and Ngaïssona and related to events that fall outside of the time frame relevant to the case,¹⁹ the Chamber recalls that such considerations do not establish a prejudice to further or ongoing investigations or an objectively identifiable risk to victims and witnesses that would justify restrictions on disclosure. Rather, these are factors for the Chamber to take into account when balancing the various interests at stake, once it has been established that such prejudice or risk could arise from the disclosure of the information to the Defence.²⁰

14. Thirdly, the Chamber is not satisfied that the Prosecutor has provided sufficient justification for withholding from the Defence information relating to (i) crimes allegedly committed by the Seleka within the time frame relevant to the case against Yekatom and Ngaïssona; and (ii) the Seleka's internal organisation.

15. Therefore, the Chamber is of the view that further information and more precise and detailed justification is required as follows:

- P-1277: CAR-OTP-2039-0419, paras 31-61, 67-92, 97-114, 118-122;
- P-1297: CAR-OTP-2039-0167, paras 74-78, 90-92;
- P-0787: CAR-OTP-2036-0410, paras 34, 67, 90-91, 93-94, 116-118;
- P-0664: CAR-OTP-2023-1339, paras 169-182;
- P-0234: CAR-OTP-2005-5407, paras 34-36, 47, 84, 92-93, 108;

¹⁸ Annex A to the First Request for Non-Disclosure, ICC-01/14-01/18-162-Conf-Exp-AnxA.

¹⁹ First Request for Non-Disclosure, ICC-01/14-01/18-162-Conf-Exp, para. 7.

²⁰ Appeals Chamber, *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. 72.

- P-0510: CAR-OTP-2017-0835, paras 54 (Exhibits 5-7, 11, 13) and 56;
- P-0567: CAR-OTP-2059-0084, paras 105-109, 114-116;
- P-0646: CAR-OTP-2059-0084, paras 18-25, 48, 124, 129-130, 184 (f); and
- P-0291: CAR-OTP-2024-0036, paras 71-90, 100-110.

16. Turning to the Second Request for Non-Disclosure, the Chamber orders the Prosecutor to provide detailed justification for the non-disclosure of information to the Defence for all witness statements and transcripts of interviews concerned, following the principles and directions given by the Chamber in paragraphs 11-14 above.

FOR THESE REASONS, THE CHAMBER HEREBY

ORDERS the Prosecutor to provide additional information in support of the First Request for Non-Disclosure as specified in paragraph 15 of this decision, no later than Friday, 24 May 2019; and

ORDERS the Prosecutor to provide additional information in support of the Second Request for Non-Disclosure as specified in paragraph 16 of this decision, no later than Friday, 31 May 2019.

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 Wednesday, 15 May 2019

At The Hague, The Netherlands