



Original: English

No. ICC-01/14-01/18

Date: 17 July 2019

Date of public redacted version: 3 February 2020

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

Second Decision on the Prosecutor's Request for the Non-Disclosure of Witness
Identities and Non-Standard Redactions

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 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 Request for the Non-Disclosure of Witness Identities and Non-Standard Redactions’ (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 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 18 April 2019, ICC-01/14-01/18-179-Conf-Exp (with two confidential, *ex parte*, annexes). A confidential redacted version is also available, *see* ICC-01/14-01/18-179-Conf-Red).

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

⁵ 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](#)).

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.¹⁰

7. 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.¹¹

8. On 18 April 2019, the Prosecutor submitted the Request, seeking authorisation to withhold certain witness identities and apply non-standard redactions to the statements and transcripts of interviews of other witnesses.¹²

9. On 15 May 2019, upon a request by the Prosecutor, the Chamber postponed the commencement of the confirmation of charges hearing until 19 September 2019.¹³

10. On the same day, the Chamber issued the ‘Order for Additional Information’, in which it ordered the Prosecutor to ‘provide detailed justification for the non-disclosure of information to the Defence for all witness statements and transcripts of interviews concerned’.¹⁴

11. On 31 May 2019, the Prosecutor submitted the ‘Prosecution’s Second Response to “Order for Additional Information (ICC-01/14-01/18-201-Conf-Exp)”’ (the ‘Prosecutor’s Additional Submission’), in which she provided additional information and modified aspects of the Request.¹⁵

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](#).

¹¹ ICC-01/14-01/18-163.

¹² ICC-01/14-01/18-179-Conf-Exp.

¹³ [Decision on the ‘Prosecution’s Request to Postpone the Confirmation Hearing and all Related Disclosure Deadlines’](#), ICC-01/14-01/18-199.

¹⁴ ICC-01/14-01/18-201-Conf, para. 16.

¹⁵ ICC-01/14-01/18-217-Conf-Exp.

12. On 26 June 2019, the Defence filed a joint response to the Request (the ‘Defence Response’).¹⁶

13. 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’.¹⁷

II. Applicable law

14. The Chamber notes article 67 of the Rome Statute (the ‘Statute’), rules 76, 77, 81 and 121 of the Rules of Procedure and Evidence (the ‘Rules’) and article 8 of the Code of Professional Conduct for counsel.

15. 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.¹⁸

16. 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’. The Chamber recalls the criteria to be considered by the Chamber in considering whether to authorise the non-disclosure of information pursuant to rule 81(2) of the Rules, as set out in the ‘First Decision on the Prosecutor’s Request for Authorisation to Withhold the Identities of Witnesses and Apply for Non-Standard Redactions’.¹⁹

III. Submissions

A. The Request

17. In the Request, the Prosecutor sought to withhold the identities of 11 witnesses: [REDACTED] (the ‘11 witnesses’). In support of her Request, the Prosecutor

¹⁶ Joint Response to the “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”, ICC-01/14-01/18-230-Conf.

¹⁷ ICC-01/14-01/18-232-Conf-Exp. A confidential redacted version is also available, *see* ICC-01/14-01/18-232-Conf-Red).

¹⁸ 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.

¹⁹ 28 June 2019, ICC-01/14-01/18-232-Conf-Red, paras 21-23.

submitted that [REDACTED]. The Prosecutor also requested to submit excerpts of the disclosable portions of the statements for the 11 witnesses.

18. As regards two other witnesses, [REDACTED] the Prosecutor requested authorisation to submit redacted versions of the statements and/or transcripts for these witnesses pursuant to rule 81(2). The Prosecutor assessed [REDACTED] as providing incriminatory evidence which she intended to rely on for the purposes of the confirmation of charges hearing, however, the Prosecutor requested to redact a substantial component of the witness's evidence as it relates purely to the Seleka investigation. The Prosecutor assessed [REDACTED] as providing rule 77 evidence, and requested redaction of the components of his statement that were relevant only to the Seleka investigation.

B. The Prosecutor's Additional Submission

19. In the Prosecutor's Additional Submission, the Prosecutor rescinded the request to withhold the identities of the 11 witnesses. The Prosecutor indicated that: (i) since the time of the Request, the Prosecution's Protection Strategies Unit indicated that the identities of six of the witnesses [REDACTED] could be disclosed; and (ii) the remaining five witnesses are expected to be cleared for disclosure in a timely manner.

20. The Prosecutor maintains its request to apply non-standard redactions, pursuant to rule 81(2) of the Rules, to the information provided by [REDACTED] that relates to the Seleka investigation, and submits that certain information provided by these witnesses would reveal the direction and targets of the Seleka investigation. The Prosecutor submits that given the highly confidential and sensitive nature of the ongoing investigative activities, any form of disclosure of this material, including to the Defence, has the potential to prejudice the Seleka investigation through the risk of leaks or inadvertent disclosure through channels outside of the Prosecutor's control. [REDACTED].

21. The Prosecutor additionally argues that disclosing redacted statements will not prejudice the suspects or impede the fairness of the confirmation process, as the proposed redactions do not affect the disclosure of article 67(2) or rule 77 information.

22. The Prosecutor modified its original position regarding [REDACTED], arguing that (i) the witness's statement [REDACTED]; (ii) this aforementioned general

proposition is readily established by other evidence available to the Defence; (iii) the information the witness provides [REDACTED] and neither issue is material to the preparation of the Defence; and (iv) [REDACTED].

C. The Defence Response

23. The Defence opposes the Request, and argues that the high volume of redacted content therein ‘preclude[s] the Defence from responding to the merits of the Prosecution Request’ and that the Defence has not been ‘provided with a genuine opportunity to make informed observations’.

24. The Defence further argues, *inter alia*, that:

- (i) The provision of excerpts is insufficient - to prepare for the confirmation hearing, the Defence requires access to all information and evidence provided by witnesses who have provided article 67(2) exculpatory evidence or rule 77 evidence material to the preparation of the Defence;
- (ii) Given the number of witnesses for which the Prosecutor has requested to withhold identities and apply non-standard redactions, if the Request is granted, this would prejudice the Defence and ‘infringe on the fundamental rights’ of Yekatom and Ngaïssona;
- (iii) Prejudice to the Defence is ‘exacerbated by the fact that no timeframe is given’ as to when the witnesses’ identities will be revealed, or the non-standard redactions lifted;
- (iv) The Defence must be allowed to explore evidence which is exculpatory or material for the preparation of the Defence, including that which the Prosecutor has decided *not* to rely on for the confirmation hearing; and
- (v) Less intrusive and more expeditious measures are available than those proposed by the Prosecutor, such as ‘imposing strict deadlines on the Prosecution to fulfil its disclosure obligations in full with a view to ensuring that the Defence is able to prepare for the confirmation hearing’.

25. In the alternative, should the Chamber grant the Request, the Defence submits that the Prosecutor should be directed to ‘disclose identity redacted statements in full - not summaries - until [she] is in a position to disclose complete statements or screenings’, including identities, by 18 August 2019 at the latest. The Defence also asks that the Chamber ‘impose strict deadlines on the Prosecution to fulfil its

disclosure obligations in full with a view to ensuring that the Defence is able to prepare for the confirmation hearing’.

IV. Analysis

The Defence Arguments

26. At the outset, the Chamber notes the Defence argument that to allow for non-standard redactions could result in prejudice to the Defence. While mindful of the disclosure requirements provided under article 67(2) and rule 77, the Chamber recalls that rule 81(2) and (4) explicitly provides for the possibility that the Prosecutor may withhold information from the Defence, subject to the Chamber’s authorisation. This extends to material that is potentially exculpatory or material to the preparation of the Defence.²⁰ A balance must be struck between the need to protect the witnesses, victims, and the Prosecutor’s further or ongoing investigations on the one hand, while also remaining mindful of the rights of the Defence and the Prosecutor’s disclosure obligations. This balance must be struck on a case-by-case basis, for each request for non-disclosure. The Chamber has considered this with due regard to the interests at stake, taking into account the rights of the Defence. A detailed case-by-case analysis is set out below.

The Prosecutor’s Request to Withhold the Identities of the 11 Witnesses

27. The Chamber notes that the Prosecutor has withdrawn its request to withhold the identities of the 11 witnesses, and as such, this portion of the Request will not be addressed further herein.

The Prosecutor’s revised request regarding [REDACTED]

28. The Chamber notes that the Prosecutor has varied its submission as regards [REDACTED]. Specifically, the Prosecutor initially submitted that [REDACTED] provided rule 77 evidence, did not request to withhold the witness’s identity, and requested redactions to the witness’s statement. In the Prosecutor’s Additional Submission, the Prosecutor now argues that [REDACTED] does *not* provide

²⁰ 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; Pre-Trial Chamber II, *First Decision on the Prosecutor’s Request for Authorisation to Withhold the Identities of Witnesses and Apply Non-Standard Redactions*, 28 June 2019, ICC-01/14-01/18-232-Conf-Red, para. 26.

information that is material to the preparation of the Defence, and that divulging any information outlined by the witness, including his identity, would [REDACTED]. In support of her revised submissions, the Prosecutor argues, *inter alia*, that: (i) the information provided by this witness [REDACTED] is not material to the preparation of the Defence regarding the prospective charges or the scope of this case; and (ii) [REDACTED] is readily available to the Defence.

29. At the outset, the Chamber notes articles 54(1)(a) and (c), 61(3)(b) and 67(2) of the Statute, and rules 76 and 77 of the Rules and recalls that it is among the Prosecutor's responsibilities, as the impartial organ of justice in charge of investigations, analysing the evidence gathered during the investigations – both incriminating and exonerating – and identifying those items of evidence which are relevant to the case and which, accordingly, should be disclosed to the Defence.

30. Regarding [REDACTED] statement, the Chamber notes that it relates almost entirely to the ongoing Seleka investigation. [REDACTED].

31. Therefore, the Chamber finds that [REDACTED] statement does not fall under rule 77 of the Rules or article 67(2) of the Statute for the purposes of the present case. Accordingly, the Prosecutor does not have to disclose the witness's identity or statement to the Defence.

The Prosecutor's request to apply non-standard redactions to the statements/materials of [REDACTED]

32. [REDACTED].

33. [REDACTED].

34. [REDACTED].

35. In regard to the request for non-standard redactions for [REDACTED], the Chamber has reviewed the proposals for these witnesses, as well as the corresponding statements and materials. The Chamber is satisfied that the Prosecutor has provided sufficiently detailed and precise justifications for the redactions requested in the Prosecutor's Additional Submission, and finds that the request for non-disclosure of certain portions of the material is justified, pursuant to rule 81(2) of the Rules. In particular, the Chamber finds that non-disclosure of certain information is justified so as to avoid prejudice to the Prosecutor's ongoing investigation relating to the Seleka,

and that disclosure would reveal the direction and targets of the investigation. The Chamber is satisfied that the risk would arise from the disclosure of the information to the Defence. In this respect, the Chamber notes that the situation in the region remains volatile [REDACTED]. Whether intentionally or inadvertently, information disclosed to the Defence may be passed on [REDACTED]. While the Defence may not intend for such an outcome, the risk of prejudice to the ongoing investigation nevertheless remains given the possibility of leaks or inadvertent disclosure. The Chamber further notes that the non-disclosure of such information is necessary, as no less intrusive measures are available. Furthermore, the Chamber finds that the non-disclosure of this information is not prejudicial to or inconsistent with the rights of the Defence, as the redacted portions relate to the Seleka investigation, and are not relevant to the case against Yekatom and Ngaïssona. Furthermore, portions of the statements and transcripts that are potentially exculpatory or material to the preparation of the Defence shall be disclosed to the Defence.

36. The Chamber finds that, in this instance, the risk of prejudice to the Prosecutor's investigation and the witnesses involved warrants granting the Request in part. This conclusion has been reached by the Chamber bearing in mind the need to balance all interests at stake, and after considering each request on a case-by-case basis. In order to safeguard the rights of the Defence, the Chamber has ensured that all portions of the statements that are potentially exculpatory or material to the preparation of the Defence shall be disclosed to the Defence.

37. The Chamber's findings regarding the redactions requested for [REDACTED] are outlined in detail below. The Chamber notes that for those sections for which it has granted authorisation for non-standard redactions, such authorisation extends to translations, audio and video material, and metadata linked to the evidence concerned.

38. Pursuant to rule 81(2) of the Rules, the Chamber **grants** authorisation to the Prosecutor to redact the below paragraphs or parts of each respective statement or interview transcript, to the extent proposed by the Prosecutor in the Request and the Prosecutor's Additional Submission:

[REDACTED]

CAR-OTP-2102-1138: Lines 24-34, 37-100, 143-146, 153-176, 178-959, 963-1151.

CAR-OTP-2102-1171: Lines 17-107.²¹

CAR-OTP-2102-1176: Lines 27-687.

CAR-OTP-2102-1196: Lines 9-106, 108, 119, 140-1121.

CAR-OTP-2102-1229: Lines 9-1233.

CAR-OTP-2102-1298: Lines 230-239, 256-290.

CAR-OTP-2102-1312: Lines 530, 532.

CAR-OTP-2102-1431: Lines 30-1301

CAR-OTP-2102-1470: Lines 10-1174.

CAR-OTP-2102-1529: Lines 257-263, 282-283, 377-388.

CAR-OTP-2083-0084: Redaction of this drawing in its entirety.

CAR-OTP-2083-0085: Redaction of this photo in its entirety.

[REDACTED]

CAR-OTP-2042-4731: Paragraphs 16-79, and Annexes 1, 2, and 3 to the witness statement.

[REDACTED]

CAR-OTP-2104-0239: As redacted at Annex B to the Request: CAR-OTP-2104-0242 to CAR-OTP-2104-0244, CAR-OTP-2104-0245 to CAR-OTP-2104-0247.

²¹ The Chamber notes that the Prosecutor has requested redactions to CAR-OTP-2083-0080, lines 17-107, which correspond to the audio recording of [REDACTED] interview [REDACTED] (*see* the Prosecutor's Additional Submission, para. 21 and Annex B to the Request). The Chamber grants authorisation to redact the requested section based on the corresponding transcript, CAR-OTP-2102-1171. This authorisation extends to the audio recording itself.

FOR THESE REASONS, THE CHAMBER HEREBY

FINDS that [REDACTED] statement does not fall under rule 77 of the Rules or article 67(2) of the Statute for the purposes of this case, and accordingly, that the Prosecutor does not have to disclose the witness's identity or statement to the Defence;

GRANTS the Prosecutor's requests for the non-disclosure of portions of the statements of witnesses [REDACTED], as outlined in the present decision;

ORDERS the Prosecutor to disclose to the Defence the relevant material which forms the subject matter of this decision within five days of notification of the present decision;

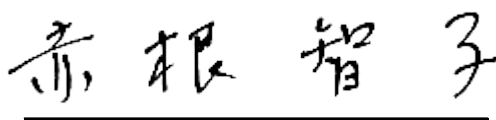
ORDERS the Prosecutor to continue to assess, on an ongoing basis, the risk of prejudice to further or ongoing investigations and immediately inform the Chamber of any changes to the situation which may warrant a variation of the present ruling; and

ORDERS the Defence to ensure that the information disclosed remains confidential and 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