

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No.: **ICC-01/14-01/18**

Date: **8 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 *PROSECUTOR v. ALFRED YEKATOM AND PATRICE-
EDOUARD NGAÏSSONA***

Public Redaction Document

URGENT

with Confidential, *EX PARTE*, available only to the Prosecution and VWU, Annex

**Public Redacted version of "Prosecution's Request to Postpone the Confirmation
Hearing and all Related Disclosure Deadlines", 2 May 2019, ICC-01/14-01/18-186-
Conf-Exp**

Source: Office of the Prosecutor

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

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I. INTRODUCTION

1. The Office of the Prosecutor (“Prosecution”) requests the postponement of the confirmation of charges hearing and the attendant disclosure deadlines in accordance with rule 121(7) of the Rules of Procedure and Evidence (“Request”). Having done all that it can to see through a confirmation process in this case before the judicial recess, regrettably, the Prosecution is not in a position to affirm its present capacity to do so. While this may yet be achievable, and the Prosecution continues to work towards this end, it considers that the surest course would be for Pre-Trial Chamber II (“Chamber”) to schedule the Confirmation Hearing in September 2019.

2. Several factors require and justify the Request. The Prosecution is unable fully to meet the 17 May 2019 disclosure deadline despite its best efforts. Additional time is needed to complete the review of its evidence collection [REDACTED] in accordance with the Chamber’s Redactions Protocol. While the Prosecution does not know how much time may be required [REDACTED] the Chamber may also wish to assess this independently. Significantly, additional time is necessary for the Prosecution to ensure the proper implementation of unique pseudonyms for, *inter alia*, innocent third parties across its evidence collection, which the Chamber considers in the Defence’s interests. As previously noted, this process has taken much longer than anticipated given the volume and nature of the evidence collected.

3. That said, whether a Confirmation Hearing can take place prior to the summer recess, or more likely following the judicial recess in September 2019, will also depend on whether the Chamber requires the disclosure of *all* witnesses identities or statements and/or any specific measures it may adopt to expedite the disclosure process — this is presently unclear.

4. The requested postponement does not amount to “inexcusable delay” per article 60(4) of the Statute — instead, it is reasonable and justified, albeit unfortunate. Further, a postponement would not cause the Suspects to be detained for an unreasonable pre-trial period or otherwise unfairly prejudice their rights to a fair and expeditious process. To the extent it is, at least in part, predicated on ensuring witness safety and security, this is in the interests not only of the Court itself, but all participants and Parties, including the Defence. Even if the Confirmation Hearing were postponed to year’s end – which is not foreseen – it would still fall well-within the period permitted by other Chambers of the Court in similar, if not less challenging, circumstances. Nevertheless, the Prosecution intends to mitigate the potential prejudice of a postponement: (1) if the Chamber considers it necessary, it aims to file the Document Containing the Charges (“DCC”) by 17 May 2019 or as soon thereafter as practicable; (2) this will be followed by the Prosecution’s Pre-Confirmation Brief; and (3) the Prosecution will continue to disclose information on a rolling basis in view of any new Confirmation Hearing date.

5. Altogether, while the Prosecution regrets having to seek an extension at this time, the circumstances necessitate the Request. If granted, this will best ensure the integrity, fairness, and overall efficiency of the confirmation process in this joint case and importantly, any eventual trial, should charges be confirmed.

II. CONFIDENTIALITY

6. The Request and its annex are filed “Confidential, *EX PARTE*, available only to the Prosecution and the VWU” because they contain sensitive information pertaining to witness security. The Request also contains confidential information about the Prosecution’s on-going investigation. A confidential redacted version of the Request will be filed contemporaneously.

III. SUBMISSIONS

A. A postponement of the Confirmation Hearing and the attendant disclosure deadlines is necessary and justified

7. Postponement of the Confirmation Hearing is necessary for the Prosecution to complete disclosure of the evidence on which it will rely. Additional time is required to ensure the proper implementation of: (1) [REDACTED], following the Prosecution's completion of the review of all information in its possession; and (2) the requirements of the Redactions Protocol¹ in relation to the assignment of unique pseudonyms, *inter alia*, for innocent third parties.² While the Prosecution initially believed that these matters could be discharged within the originally scheduled confirmation date, unfortunately, at this stage, it is clear that neither undertaking can be reasonably completed by 17 May 2019 given the complexity of the matters at issue, the size of the case, and the Prosecution's limited resources.

a. *Additional time is needed [REDACTED]*

8. [REDACTED].

9. The Prosecution has substantially completed its review of all information in its possession to identify those witnesses whose evidence requires disclosure as necessary for confirmation, or pursuant to rule 77 or article 67(2). Notwithstanding having begun its review well before the Suspects' arrests, the review process is only now approaching completion. As the Prosecution has previously expounded on the reasons for the extensive time required for its review, it will not repeat this here.³ However in sum, these principally concern the massive volume of information collected during the investigation and limited Prosecution resources. Pending

¹ See ICC-01/14-01/18-64-Conf, paras. 23-32.

² See ICC-01/14-01/18-153, paras. 2, 6-12 (noting the Redactions Protocol's requirement to implement unique pseudonyms for any person whose identity is redacted).

³ [REDACTED].

completion of its review, the Prosecution is not able to finalise its list of witnesses needed for confirmation, or concretely identify how many witnesses might necessitate disclosure under rule 77 or article 67(2). This has affected the Prosecution's ability to identify a *fixed* and *reliable* group of witnesses requiring assessment [REDACTED].

10. As context, as the investigation in this case began focusing on specific targets and events, the Prosecution implemented a concurrent review of information collected specifically to identify what may be disclosable should the Suspects be arrested.⁴ [REDACTED]. It is due to that advance work that the Prosecution was able to disclose a significant amount of material immediately upon the Chamber's adoption of a Disclosure Protocol,⁵ and expects to disclose all material supporting the Suspects' arrests by 17 May 2019. However, even then, the immense volume of information collected and the unexpected speed at which the Suspects were arrested has made the completion of disclosure review at this stage virtually impossible [REDACTED].⁶ [REDACTED]

11. Although the Prosecution has now neared completion of the process of determining the materials requiring disclosure, it considers that it is unable to [REDACTED] in time to meet the pre-confirmation disclosure deadline. [REDACTED]

12. [REDACTED],⁷ this process has proven difficult and time-consuming in the circumstances of this particular case. [REDACTED].⁸ [REDACTED].⁹ [REDACTED].¹⁰ [REDACTED].¹¹ [REDACTED].

⁴ [REDACTED].

⁵ See ICC-01/14-01/18-159.

⁶ See e.g., [Chambers Practice Manual](#), p.8 (recognising, "[a]lso, it may *typically occur* again that a person would be arrested and surrendered to the Court long time after the issuance of the warrant of arrest").

⁷ [REDACTED].

⁸ [REDACTED]; ICC-01/14-01/18-170-Conf-Red, pp. 5-6.

13. [REDACTED]¹² [REDACTED].¹³ [REDACTED].¹⁴ [REDACTED].¹⁵

14. [REDACTED].¹⁶ [REDACTED].¹⁷ [REDACTED].

15. [REDACTED]

16. [REDACTED]

17. [REDACTED].¹⁸

18. [REDACTED]

b. Additional time is needed to implement the Chamber's Redactions Protocol

19. The Prosecution requires additional time to implement, *inter alia*, unique pseudonyms concerning redactions to the identities of all innocent third parties in accordance with the Decision on Disclosure and Related Matters ("Decision"). Although the Prosecution has done its best to expeditiously implement the pseudonyms, it has determined that the work necessary to do so will require additional time before it can be completed. As the Prosecution has previously detailed the work required to assign and apply unique pseudonyms for individuals under categories A.2, A.3, A.6, B.2, and B.3 of the Redactions Protocol in its variance request,¹⁹ it will not repeat its submissions. However, as noted, the process has proven onerous and time-consuming in this case.

⁹ [REDACTED]. [REDACTED].

¹⁰ [REDACTED].

¹¹ [REDACTED].

¹² [REDACTED].

¹³ [REDACTED].

¹⁴ [REDACTED].

¹⁵ [REDACTED].

¹⁶ [REDACTED].

¹⁷ [REDACTED].

¹⁸ See Annex.

¹⁹ See ICC-01/14-01/18-153, paras. 6-12.

20. While the *application* of redactions (as distinguished from the exercise of *identifying* redactions) may appear as simple or straightforward, it is in fact a highly labour intensive and painstakingly detailed process. Secondary and often tertiary quality control reviews are necessary to ensure that it is done correctly. Applying unique pseudonyms implicates further and necessary layers of checks and controls to ensure proper and accurate implementation, for potentially thousands of individuals comprising the disclosed collection in this case.

21. The process as applied in smaller or more discrete cases may be more easily managed. However, the exercise is significantly more difficult where the case involves [REDACTED], crimes committed in numerous locations and across a significant time-frame, and where the relevant evidentiary pool [REDACTED].

22. Given the above, and the current pace of review – which is substantial – the Prosecution does not believe it can accurately and reliably implement the necessary redactions, including the application and quality control of unique pseudonyms, in respect of all disclosable information by 17 May 2019, particularly given other concurrent activities in preparation for the confirmation process (*i.e.*, the DCC and the Pre-Confirmation Brief). For this reason, additional time is needed.

B. The length of the postponement also depends on the Chamber's disposition of disclosure related matters

23. Although the Prosecution hoped to undertake a Confirmation Hearing prior to the judicial recess, an objective assessment of the prevailing situation necessitates this Request. While regrettable, the surest course is for the Chamber to postpone the Confirmation Hearing into September 2019 – *all things being equal*.

24. Still, there remains one significant variable which will have an impact on the feasibility of the requested postponement — that is, what the Chamber requires of the Prosecution [REDACTED]

25. Should the Chamber require full disclosure of the identities of all witnesses on whom the Prosecution intends to rely for confirmation, as well as all witness statements containing exculpatory and rule 77 information, then the Confirmation Hearing would need to be postponed even further, and later into the year. This estimate is based on the Prosecution's current pace in implementing the relevant security assessments and applying standard redactions.

26. However, there are alternatives available to the Chamber, which may substantially mitigate, even possibly eliminate, such additional delay. As noted previously, each bears its own costs in terms of the resources, work, and time required:

- The Chamber could permit the Prosecution's disclosure of extracts or excerpts of witness statements [REDACTED]. This process is the least labour- and time-intensive of the options presented and also the one bearing the least [REDACTED];
- The Chamber could permit the Prosecution to disclose all statements as "attorney-eyes only".²⁰ [REDACTED]. This option is more labour-intensive than the first, since it still requires implementing all standard redactions pursuant to the Redactions Protocol. It also carries more risk because of the potential for the unintentional divulgence within the Defence team of restricted identifying information to the Suspects or others; or

²⁰ Notably, article 8(4) of the Code of Professional Conduct for counsel anticipates these possibilities, noting that the Chamber can order the conditions and scope of information Counsel is permitted to disclose, particularly in relation to the identity of protected victims and witnesses, or information concerning their identities and whereabouts.

- The Chamber could direct the Prosecution to disclose anonymised summaries of all witnesses whose identities cannot be disclosed for the time-being. The process of drafting and preparing these summaries renders this the most time-consuming and labour-intensive of the options presented.

27. Each of these alternatives are well-within the Chamber's broad authority to ensure the protection and safety of witnesses under article 68(1), which authorises the Chamber to "take appropriate measures to protect the safety, physical and psychological well-being dignity and privacy of victims and witnesses" that is not "prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial." Rule 76(4) similarly provides that pre-trial disclosure relating to Prosecution witnesses is subject *inter alia* "to the protection and privacy of victims and witnesses."

28. The Chamber is not constrained in the measures it may take to effectively balance the implementation of necessary security measures, the relative burdens to the Parties, and the fair and expeditious conduct of proceedings, whether through directing the disclosure of information solely to the Suspects' Counsel or the provision of pertinent excerpts or extracts of witness statements to the Defence. The overriding consideration is the overall fairness of the proceedings.

29. While, for each of the alternatives, the concerned witnesses' identities and full statements would be released to the Suspects [REDACTED], which alternative the Chamber ultimately adopts will naturally affect the extent of any further potential need for postponement.

C. The requested postponement is not unreasonable and does not unfairly prejudice the Suspects

30. The necessity for the Request is regrettable, however is it not “inexcusable” within the meaning of article 60(4), nor would granting it undermine the Suspects’ rights to a fair and expeditious trial. Such a conclusion is not an automatic, or even presumptive, result of postponing a confirmation process, but instead, squarely depends on the circumstances of each case.

31. Here, the postponement is sought to enable the Prosecution to complete its disclosure review, [REDACTED] in the manner the Chamber has specifically directed in an effective and meaningful way. The Prosecution’s discharge of these statutory, judicial, and prescriptive obligations, as necessary to effect disclosure in this case, is not unreasonable and cannot be objectively construed as causing *unfair* prejudice to the Defence.

32. Consideration of the safety and security of witnesses comprises an express qualification to disclosure under rule 76(4) and further, is an important interest shared in by the Court and all Participants and Parties, including the Defence. Similarly, having found that the implementation of unique pseudonyms is important for “the rights of the defence”,²¹ to give the Chamber’s Decision on the ‘Prosecution’s Request to Vary the Decision on Disclosure and Related Matters’ effect and meaning, the Prosecution considers that care and proper implementation of the requirement is necessary. To do less would defeat its purpose. However, this comes at a high cost to Prosecution resources and the efficiency of the proceedings and consequentially, time.

33. As noted, the Prosecution undertakes to mitigate prejudice to the Suspects resulting from the requested postponement. The Prosecution aims to file the DCC by

²¹ ICC-01/14-01/18-169, para. 19.

17 May 2019 or as soon as practicable thereafter, if so directed. Its Pre-Confirmation Brief will follow. In the interim, the Prosecution will continue to provide disclosure on a monthly basis in advance of any new deadline for disclosure. Together, this will assist the Defence's preparation and mitigate concerns regarding the time necessary for the Suspects properly to evaluate the evidence against them.²²

34. Finally, the requested postponement would still allow the Confirmation Hearing to be held within the same time-frame provided in other cases before the Court. YEKATOM's initial appearance was on 23 November 2018 and NGAISSONA's on 25 January 2019. Even if the Confirmation Hearing in this case was held immediately before the winter judicial recess, 12 December 2019, the period between YEKATOM's initial appearance and such hearing (384 days) would be less than in the *Gbagbo* and *Al Hassan* cases. If the Chamber permitted a delay until immediately after the summer judicial recess, 13 August 2019, the period between YEKATOM's initial appearance and the Confirmation Hearing (263 days) would be less than in the *Gbagbo*, *Ntaganda*, *Ongwen*, and *Al Hassan* cases. It would also be within the median period normally required for the commencement of confirmation proceedings at the Court.

²² See ICC-01/14-01/18-143-Conf, para. 28.

Figure 1**Duration Between Initial Appearance and Confirmation Hearing**

Case	Date of Initial Appearance	Date of Confirmation Hearing (day of opening)	Difference in Days (months)
Lubanga	20 March 2006	9 November 2006	234 days (7 months, 20 days)
Katanga	22 October 2007	27 June 2008	249 days (8 months, 5 days)
Ngudjolo Chui	11 February 2008		137 days (4 months, 16 days)
Bemba	4 July 2008	12 January 2009	192 days (6 months, 8 days)
Abu Garda	18 May 2009	19 October 2009	154 days (5 months, 1 day)
Banda	17 June 2010	8 December 2010	174 days (5 months, 21 days)
Mbarushimana	28 January 2011	16 September 2011	231 days (7 months, 19 days)
Ruto and Sang	7 April 2011	1 September 2011	147 days (4 months, 25 days)
Kenyatta	8 April 2011	21 September 2011	166 days (5 months, 13 days)
Gbagbo	5 December 2011	19 February 2013	442 days (14 months, 14 days)
Ntaganda	26 March 2013	10 February 2014	321 days (10 months, 15 days)
Kilolo	27 November 2013	30 July 2014 ²³	245 days (8 months, 3 days)
Babala	27 November 2013		237 (7 months, 25 days)
Mangenda	5 December 2013		132 days (4 months, 10 days)
Arido	20 March 2014		186 days (6 months, 2 days)
Blé Goudé	27 March 2014	29 September 2014	186 days (6 months, 2 days)
Ongwen	26 January 2015	21 January 2016	360 days (11 months, 26 days)

²³ No Confirmation Hearing was held. In lieu of a hearing, all Parties lodged written submissions on 30 July 2014: ICC-01/05-01/13-749, para. 6.

Case	Date of Initial Appearance	Date of Confirmation Hearing (day of opening)	Difference in Days (months)
Al Mahdi	30 September 2015	1 March 2016	153 days (5 months, 1 day)
Al Hassan	4 April 2018	8 July 2019	460 days (15 months, 4 days)

35. The requested postponement would result in the Confirmation Hearing being held beyond the four to six months recommended in the Chamber's Practice Manual²⁴ or that provided in some other cases referenced above. However, as recognised by the Court's Chambers, the *appropriate period* "depends on the circumstances of each particular case ... sometimes more time may be necessary in order to ensure that the pre-trial proceedings fully execute their mandate in the procedural architecture of the Court".²⁵ Here, the circumstances present justify the additional time requested.

36. This case is larger in terms of alleged crimes than any case arising from the conflict in the Democratic Republic of the Congo or Kenya. [REDACTED] more witnesses to protect, more information that requires review, and thus more work to be done in advance of the confirmation process. Complicating matters, as noted above, [REDACTED]

Altogether, even if comparisons were to be had with other cases, those comparisons would alone fully justify the requested postponement.

²⁴ See [Chambers Practice Manual](#), pp. 6-7.

²⁵ [Chambers Practice Manual](#), p. 8.

IV. RELIEF SOUGHT

37. For all of the above reasons, the Prosecution respectfully requests that the Confirmation Hearing and all attendant disclosure deadlines be postponed into September 2019, as requested.



Fatou Bensouda, Prosecutor

Dated this 8th day of May 2019
At The Hague, The Netherlands