

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: **English**

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

Date: **1 April 2020**

**TRIAL CHAMBER V**

**Before:** Judge Bertram Schmitt, Presiding Judge  
Judge Péter Kovács  
Judge Chang-ho Chung

**SITUATION IN THE CENTRAL AFRICAN REPUBLIC II  
IN THE CASE OF *THE PROSECUTOR v.*  
*ALFRED ROMBHOT YEKATOM & PATRICE-EDOUARD NGAÏSSONA***

**Public with Public Redacted Annexes A and B**

**Public redacted version of Joint Defence Response to Request for Non-Disclosure of Witness Identities, 29 July 2019, ICC-01/14-01/18-257-Conf**

**Source:** Defence for Mr. Alfred Rombhot Yekatom  
Defence for Mr. Patrice-Edouard Ngaïssona

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

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Section**

Further to Prosecution Request for Non-Disclosure of Witness Identities dated 5 July 2019 (“the Request”), Messrs. Alfred Rombhot Yekatom and Patrice-Edouard Ngaïssona (“the Defence”) hereby submit this:

**Joint Defence Response to  
Request for Non-Disclosure of Witness Identities.<sup>1</sup>**

1. The *Prosecution Request for Non-Disclosure of Witness Identities* (5 July 2019) (“the Request”)<sup>2</sup> should be dismissed *in limine* if the Prosecution has not been diligent in identifying, interviewing, or protecting Witnesses [REDACTED]. Even if the Prosecution has been diligent, the rights of Mr. Yekatom and Mr. Ngaïssona to a fair and impartial trial may outweigh the Prosecution’s need for the anonymous evidence at the confirmation hearing. The lack of information provided to the Defence on these issues requires heightened vigilance from the Chamber in protecting Mr. Yekatom and Mr. Ngaïssona’s rights to a fair confirmation hearing.

**RELEVANT PROCEDURAL HISTORY**

2. On 30 October 2018, the Prosecution applied for warrants of arrest for Alfred Yekatom<sup>3</sup> and Patrice-Edouard Ngaïssona.<sup>4</sup> The warrant for Mr. Yekatom was issued on 11 November 2018,<sup>5</sup> and the warrant for Mr. Ngaïssona was issued on 7 December 2018.<sup>6</sup>

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<sup>1</sup> This response and its annexes are filed on a confidential basis corresponding to the classification of the Request. The Defence does not oppose to their reclassification as public.

<sup>2</sup> [ICC-01/14-01/18-237-Conf-Red.](#)

<sup>3</sup> [ICC-01/14-01/18-1-Red](#), para. 2.

<sup>4</sup> [ICC-01/14-01/18-89-Red](#), para. 2.

<sup>5</sup> [ICC-01/14-01/18-1-Red.](#)

<sup>6</sup> [ICC-01/14-01/18-89-Red.](#)

3. Mr. Yekatom was arrested in the Central African Republic on 29 October 2018 and arrived at the Detention Centre on 18 November 2018.<sup>7</sup> At his initial appearance on 23 November 2018, the Pre-Trial Chamber set the confirmation hearing for 30 April 2019.<sup>8</sup>
4. Mr. Ngaissona was arrested in France on 12 December 2018 and arrived at the Detention Unit on 23 January 2019.<sup>9</sup> At his initial appearance on 25 January 2019, the Pre-Trial Chamber set his confirmation hearing for 18 June 2019.<sup>10</sup>
5. On 20 February 2019, the Pre-Trial Chamber joined the cases and postponed Mr. Yekatom's confirmation hearing, setting the joint confirmation hearing for 18 June 2019.<sup>11</sup>
6. On 15 May 2019, over Defence objections, the Pre-Trial Chamber postponed the confirmation hearing until 19 September 2019 to "allow the Court and the Prosecutor to properly discharge their protective obligations" and gave the Prosecution until 7 June 2019 to submit all applications for non-disclosure of witness identities.<sup>12</sup> The Pre-Trial Chamber later extended this deadline, during a status conference held on a confidential *ex parte* basis, in the presence of the Prosecutor and the Victim and Witness Unit, until 5 July 2019.<sup>13</sup>
7. On 31 May 2019, the Prosecution notified the Chamber, in an *ex parte* filing,<sup>14</sup> that it would not be requesting the non-disclosure of Witness [REDACTED]'s

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<sup>7</sup> [ICC-01/14-01/18-15](#), para. 4.

<sup>8</sup> [ICC-01/14-01/18-T-1](#).

<sup>9</sup> [ICC-01/14-01/18-99-Corr](#), para. 4.

<sup>10</sup> [ICC-01/14-01/18-T-2](#).

<sup>11</sup> [ICC-01/14-01/18-87](#), p. 11.

<sup>12</sup> [ICC-01/14-01/18-199](#), para. 37.

<sup>13</sup> [ICC-01/14-01/18-237-Conf-Red](#), fn. 3. *See also* Annex A, email from Associate Legal Officer on behalf of Pre-Trial Chamber II entitled "Notification on variation of time limit" sent on 29 May 2019 at 14:58.

<sup>14</sup> [ICC-01/14-01/18-201-Conf](#).

identity as the witness was “expected to be cleared for disclosure in a timely manner”.<sup>15</sup>

8. On 5 July 2019, the Prosecution filed the Request on a confidential, *ex parte* basis, seeking to withhold disclosure of the identities of Witnesses [REDACTED] and to rely on anonymous summaries of their statements at the confirmation hearing. A confidential redacted version was filed on 23 July 2019 and made available to the Defence for the first time on that day.<sup>16</sup>
9. On the next day, the Defence requested disclosure of the proposed summaries.<sup>17</sup> The Prosecution opposed this request,<sup>18</sup> and on 26 July 2019, the Chamber denied it.<sup>19</sup> Although the Chamber indicated in this decision that “it does not require additional submissions to adopt its decision on the Prosecutor’s Request”,<sup>20</sup> the Defence believes that the Chamber may benefit from these submissions.

## **ARGUMENT**

### **I. The Request should be denied if there has been a lack of diligence**

10. The 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. The hearing was scheduled for April, then postponed until June, and then postponed again until September.
11. The “continued volatility and unpredictability of the security situation in the Central African Republic”<sup>21</sup> cannot be a valid excuse for failing to anticipate that

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<sup>15</sup> [ICC-01/14-01/18-249-Conf-Red](#), para. 19, referring to the request for non-disclosure made on 18 April 2019 in [ICC-01/14-01/18-179-Conf-Red](#).

<sup>16</sup> [ICC-01/14-01/18-237-Conf-Red](#).

<sup>17</sup> [ICC-01/14-01/18-254-Conf](#).

<sup>18</sup> [ICC-01/14-01/18-255-Conf](#).

<sup>19</sup> [ICC-01/14-01/18-256-Conf](#).

<sup>20</sup> [ICC-01/14-01/18-256-Conf](#), para. 20.

<sup>21</sup> [ICC-01/14-01/18-237-Conf-Red](#), para. 5.

witnesses would need to be identified, contacted, and protected in sufficient time to disclose their identities in advance of the confirmation hearing. The Prosecution already used that excuse on several occasions in its previous requests.<sup>22</sup>

12. In the *Al Hassan* case, the Prosecution has cited the “serious and dire” security situation in Mali.<sup>23</sup> In the *Katanga* case, the Prosecution cited the “precarious” security situation in DRC.<sup>24</sup> In the *Kenya* situation, the Prosecution cited the “current tense” security situation in Kenya.<sup>25</sup> Indeed, a volatile security situation is to be anticipated in every post-conflict society, and had to be expected in the Central African Republic when the Prosecution decided to apply for the arrest warrants in this case in October 2018.
13. The Prosecution has not shared with the Defence the reasons for the delay in identifying, interviewing, and protecting the two witnesses who are the subject of the Request. The Defence is unable to ascertain whether that information is contained in the redacted sections of the Request. The Chamber should obtain, and closely scrutinize, information from the Prosecution as to the reasons for the delay bearing in mind that in December 2018, the Prosecution estimates was that it will be able to provide updated IRA’s for *all witnesses* by the *end of January 2019*.<sup>26</sup>
14. The issue is not whether the witnesses should be protected, but whether the Prosecution should be allowed to profit from its own inability to timely identify,

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<sup>22</sup> [ICC-01/14-01/18-40-Conf](#), para. 4(h)(i); [ICC-01/14-01/18-130-Conf-Red](#), pp. 5-6; [ICC-01/14-01/18-131-Conf-Red](#), paras. 10-16; [ICC-01/14-01/18-186-Conf-Red-Corr](#), paras. 12, 13, 16, 36.

<sup>23</sup> *Prosecutor v Al Hassan*, Public redacted version of the “Prosecution’s Request for authorisation to withhold the identity of Witnesses MLI-OTP-P-0553 and MLI-OTP-P-0574 upon whose evidence the Prosecution will rely at the confirmation hearing”, 25 September 2018, ICC-01/12-01/18-135-Conf-Exp, [ICC-01/12-01/18-135-Red2](#), 29 November 2018, para. 21.

<sup>24</sup> *Prosecution v Katanga & Ngudjolo*, Prosecution’s Document in Support of Appeal against the First Decision on Redaction of Witness Statements, [ICC-01/04-01/07-215-Anx](#), 20 February 2008, para. 8.

<sup>25</sup> *Situation in Kenya*, Prosecutor’s Request for Reclassification, [ICC-01/09-51](#), 11 March 2011, para. 18.

<sup>26</sup> [ICC-01/14-01/18-40-Conf](#), para 4(h)(i).

interview, or protect the witnesses by being able to use the witnesses' evidence at the confirmation hearing without disclosing their identities to the Defence.<sup>27</sup>

15. A decision not to allow the use of anonymous summaries at the confirmation hearing will not require that the witnesses' identities be disclosed prematurely. Rather, it will preclude the Prosecution from relying on the witnesses' anonymous evidence at the confirmation hearing. Nothing would 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.
16. Evidence has been excluded at this Court where a party was less than diligent in obtaining it. This has been applied to both the Defence (failure to timely offer evidence of age of child soldiers,<sup>28</sup> identity of bodyguards<sup>29</sup>) and the Prosecution (failure to include the defence in expert mission,<sup>30</sup> to place documents on exhibit list,<sup>31</sup> and to timely seek to amend the charges<sup>32</sup>). Even a suspect is expected to act with diligence and can attract criminal liability for failing to do so.<sup>33</sup>
17. Therefore, if the Chamber determines that the Prosecution failed to act with diligence in identifying, interviewing, or protecting Witnesses [REDACTED], it

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<sup>27</sup> It appears that one of the witnesses was not interviewed until 28 June 2019. See [ICC-01/14-01/18-237-Conf-Red](#), para. 13.

<sup>28</sup> *Prosecutor v Lubanga*, Public redacted Judgment on the Appeal of Thomas Lubanga Dyilo against his Conviction, [ICC-01/04-01/06-3121-Red](#), 1 December 2014, paras. 78-79.

<sup>29</sup> *Id.*, para. 92.

<sup>30</sup> *Prosecutor v Katanga & Ngudjolo*, Decision on the Disclosure of Evidentiary Material Relating to the Prosecutor's Site Visit to Bogoro on 28, 29, and 31 March 2009 (ICC-01/04-01/07-1305,1345,1360,1401,1412 and 1456), [ICC-01/04-01/07-1515](#), 7 October 2009, paras. 69, 74-75.

<sup>31</sup> *Prosecutor v Bemba et al.*, Decision on Prosecution's Fifth Request for Admission of Evidence from the Bar Table, [ICC-01/05-01/13-1524](#), 14 December 2015, para. 6.

<sup>32</sup> *Prosecutor v Ruto & Sang*, Decision on Prosecution's Request to Amend the Updated Document Containing the Charges pursuant to Article 61(9) of the Statute, [ICC-01/09-01/11-859](#), 16 August 2013, para. 41.

<sup>33</sup> *Prosecutor v Lubanga*, Decision on the Confirmation of Charges, [ICC-01/04-01/06-803](#), 29 January 2007, paras. 358-59; *Prosecutor v Katanga & Ngudjolo*, Decision on the Confirmation of Charges, [ICC-01/04-01/07-717](#), 30 September 2008, para. 252.

should refuse to allow the anonymous summaries to be used at the confirmation hearing.

## II. The Request should be denied if warranted by the balancing test

18. The overriding principle at this Court is that *full* disclosure should be made and that non-disclosure is the *exception* to the rule.<sup>34</sup> Evidence from an anonymous witness is the most severe form of non-disclosure. Not knowing the identity of a witness prevents the other party from effectively challenging the reliability of the witness' evidence at the confirmation hearing, 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.
19. When considering permitting the Prosecution to use an anonymous summary at the confirmation hearing, the Appeals Chamber has required that Pre-Trial Chambers to "take into account all relevant factors, and [...] carefully appraise the Prosecutor's request".<sup>35</sup>
20. The Appeals Chamber has enumerated the factors to be considered:
  - a. whether disclosure of the witness' identity, to the Defence, rather than the public at large, would pose an objectively justifiable risk to the safety of the witness;<sup>36</sup>
  - b. whether a less restrictive measure than the complete non-disclosure of the witnesses' identities is available and feasible;<sup>37</sup> and
  - c. whether the information may be of assistance to the case of the suspect or affect the credibility of the case of the Prosecutor.<sup>38</sup>

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<sup>34</sup> [ICC-01/14-01/18-169](#), para. 16.

<sup>35</sup> *Prosecutor v Lubanga*, 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", [ICC-01/04-01/06-568](#), 13 October 2006, para. 36.

<sup>36</sup> *Prosecutor v 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", [ICC-01/04-01/07-475](#), 13 May 2008, para. 71.

<sup>37</sup> *Id.*, para. 72.

<sup>38</sup> *Id.*



21. If non-disclosure would result in the hearing to confirm the charges, viewed as a whole, to be unfair to the suspect, the requested redactions should not be authorized.<sup>39</sup>
22. The Appeals Chamber has also held that “prior to ruling on the application for redactions, the Pre-Trial Chamber should give the Defence the greatest possible opportunity to make submissions on the issues involved, necessarily without revealing to the Defence the information which the Prosecutor alleges should be protected”.<sup>40</sup>
23. Unfortunately, the *ex parte* status conference held on 29 May 2019,<sup>41</sup> the *ex parte* classification of its transcript despite a re-classification request by the Defence,<sup>42</sup> the redactions to the Request, as well as the failure to provide the Defence with access to the anonymous summaries, prevent the Defence from assisting the Chamber in its application of this test to the facts concerning Witnesses [REDACTED]. The Defence simply does not have any information about the safety of the witnesses or the nature of the information the witnesses provide. The Defence can only point out that Witness [REDACTED] was interviewed as a suspect,<sup>43</sup> and therefore greater scrutiny must be given to this witness’ credibility.<sup>44</sup>

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<sup>39</sup> *Prosecutor v 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”, [ICC-01/04-01/07-475](#), 13 May 2008, para. 72.

<sup>40</sup> *Id.*, para. 73.

<sup>41</sup> Annex A, email from Associate Legal Officer on behalf of Pre-Trial Chamber II entitled “Notification on variation of time limit” sent on 29 May 2019 at 14:58.

<sup>42</sup> Annex B, email chain entitled “Request on behalf of Me Stéphane Bourgon Ad.E. to the Honourable Judges of Pre Trial Chamber II”.

<sup>43</sup> [ICC-01/14-01/18-237-Conf-Red](#), para. 13.

<sup>44</sup> *Prosecutor v Bemba et al.*, Public Redacted Judgment on the Appeals of Mr. Jean Pierre Bemba Gombo, Mr. Aime Kilolo Musamba, Mr. Jean-Jacques Mangenda, Mr. Fidele Babala Wandu and Mr. Narcisse Arido against the decision of Trial Chamber VII entitled “Judgment pursuant to Article 74 of the Statute”, [ICC-01/05-01/13-2275-Red](#), 8 March 2018, para. 1531.

24. Therefore, the Defence requests that Chamber apply the test for non-disclosure of witness identities bearing in mind the principles set forth above and with full respect for the rights of Mr. Yekatom and Mr. Ngaïssona. The Request should be denied if the rights of Mr. Yekatom and Mr. Ngaïssona to a fair and impartial trial outweigh the Prosecution's need for the anonymous evidence at the confirmation hearing.

### CONCLUSION

25. For any and all of the above reasons, the Request should be carefully scrutinized and rejected if the Prosecution has not established its due diligence in failing to identify, interview, or protect the witnesses or that, on balance, exceptional circumstances exist to allow the use of the anonymous summaries at the confirmation hearing.

**RESPECTFULLY SUBMITTED ON THIS 1<sup>ST</sup> DAY OF APRIL 2020,**



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