

**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
AND PATRICE-EDOUARD NGAÏSSONA**

Public

Public redacted version of “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”, 26 June 2019, ICC-01/14-01/18-230-Conf

Source: Defence of Alfred Rombhot Yekatom
Defence of Patrice-Edouard Ngaïssona

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

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Further to the “Confidential Redacted version of ‘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” filed by the Prosecution on 14 June 2019 (“Prosecution Request”), Counsel representing Mr. Alfred Rombhot Yekatom (“Yekatom Defence” or “Mr. Yekatom”) and Counsel representing Mr. Patrice-Edouard Ngaïssona (“Ngaïssona Defence” or “Mr. Ngaïssona”), (collectively “Joint Defence” or “Messrs. Yekatom and Ngaïssona”) hereby submit this:

**Joint Defence Response to the “Confidential Redacted version of
‘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”
 (“Joint Response to Prosecution Request”)**

SUBMISSIONS

1. The Joint Defence opposes the Prosecution Request seeking to: (i) withhold the identities of nine witnesses [REDACTED], pursuant to Rule 81(4) of the Rules of Procedure and Evidence of the International Criminal Court (“Rules” and “Court”); (ii) withhold the identities of two witnesses [REDACTED] pursuant to Rules 81(2) and 81(4); and (iii) disclose the identity of two witnesses [REDACTED] while applying non-standard redactions to their statements and/or transcripts pursuant to Rule 81(2).¹

2. As a preliminary matter, the Defence notes the extent of the redactions applied to the Prosecution Request as well as the two *ex parte* annexes (A and B), which preclude the Defence from responding to the merits of the Prosecution Request. The issue is not whether the Pre-trial Chamber II (“Chamber”) has received

¹ 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, 14 June 2019, ICC-01/14-01/18-179-Conf-Red.

all the information needed to rule on the Prosecution Request,² but rather, whether Messrs. Yekatom and Ngaïssona are provided with a genuine opportunity to make informed observations, which is not the case.

3. In order to be authorized to withhold the identities of witnesses pursuant to Rule 81(4), the Prosecution must demonstrate the existence of an objectively identifiable risk to the safety of these witnesses if their identity is disclosed to the Defence³ and the Joint Defence must be provided with an opportunity to respond to the Prosecution submissions. In this case, the excessive redactions and *ex parte* annexes prevent the Defence from being informed of – let alone challenging – the grounds that purportedly justify the measures requested. What is more, the Prosecution’s request to withhold the identities of [REDACTED] and [REDACTED] incorporates, by reference, justifications drawn from unidentified prior submissions to which the Defence does not have access.⁴ Similarly, paragraphs 5 to 8 concerning the alleged safety risk of 11 witnesses are redacted to such an extent that it is not possible to identify any information in support thereof. Consequently, the fact that the Joint Defence cannot be meaningfully heard should on its own lead to the rejection of the redaction applications.

4. Notably, drawing from its review of disclosed material as well as from the result of its investigations, the Joint Defence is in a position to offer insight on, *inter alia*, whether the purported prejudice is objectively justifiable. The Chamber’s full access to the Prosecution’s submissions cannot substitute such insight, in the absence

² Prosecution Request, para 28

³ *Al Hassan*, Décision relative aux requêtes du Procureur aux fins d’autorisation de la non-communication de l’identité des témoins P-0100, P-0111, P-0130, P-0576, P-0581, P-0583, P-0589, P-0592, P-0593 et P-0594, 28 January 2019, ICC-01/12-01/18-174-Red2, para 31; *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 71; *Gbagbo & Blé Goudé*, Public Redacted Version of Judgment on the appeal of Mr Laurent Gbagbo against the oral decision on redactions of 29 November 2016, 31 July 2017, ICC-02/11-01/15-915-Red, para 61.

⁴ Prosecution Request, para 10 and fn 3.

of which the Chamber is deprived of the possibility to determine whether it has indeed received sufficient information to rule on the Prosecution Request.

5. Significantly, the Prosecution Request considered in conjunction with the Prosecution's pending application of 29 March 2019,⁵ reveals that the actual number of witnesses for whom the Prosecution seeks exceptions to the disclosure regime adds up to 23, including requests to (i) withhold the identity of nine witnesses pursuant to Rule 81(4); (ii) withhold the identity of six witnesses pursuant to Rule 81(2); (iii) withhold the identity of two witnesses pursuant to Rules 81(2) and 81(4); and (iv) apply non-standard redactions to the statements of six witnesses pursuant to Rule 81(4) without withholding their identities.

6. The number of witnesses involved, in and of itself, is a manifest illustration of the prejudice to the Defence, should the Prosecution requests be granted.

7. The fact that the information obtained by the Prosecution from 22 out of the 23 witnesses⁶ concerned comprises material disclosable under Article 67(2) and/or Rule 77 – disclosure of which constitutes a “core component” of the right to a fair trial⁷ – makes it clear that the Joint Defence will be deprived of highly relevant and probative information if the Prosecution requests are granted. This would in turn significantly undermine the purpose of the confirmation hearing, as the Defence would be precluded from playing the meaningful role envisaged in Article 61(6).

⁵ 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”, 2 April 2019, ICC-01/14-01/18-162-Conf-Red, requesting to withhold the identity of six witnesses pursuant to Rule 81(2) and to reveal the identity of four witnesses while applying non-standard redactions pursuant to Rule 81(2).

⁶ Prosecution Request, para 12 concerning [REDACTED].

⁷ *Katanga & Ngudjolo*, Decision on Article 54(3)(e) Documents Identified as Potentially Exculpatory or Otherwise Material to the Defence's Preparation for the Confirmation Hearing, 20 June 2008, ICC-01/04-01/07-621, para 3. See also, *Lubanga*, Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008, 15 June 2008, ICC-01/04-01/06-1401, paras 77-83.

8. What is more, no time frame is provided let alone suggested for providing the Joint Defence with the identities of these 17 witnesses and/or lifting the non-standard redactions applied to the statements and/or transcripts of the other six witnesses. The sole suggestion in this regard is that the measures “are temporary, since the complete statements or screenings, including identities, that contain the relevant excerpts will be disclosed once the Prosecution implements security measures for the affected witnesses”.⁸

9. Taking into consideration the duration of the Prosecutor’s investigation into the CAR situation, the duration of the Prosecutor’s investigation directed at Messrs. Yekatom and Ngaïssona as well as the time spent into custody by the latter, there is no reason why the Prosecution, working hand in hand with the Victims and Witnesses Unit (“VWU”), under the supervision of the Chamber and in the absence of any Defence involvement,⁹ should not be able to disclose complete statements or screenings, including identities, at the latest on 18 August 2019, i.e., 30 days before the confirmation hearing.

10. It is significant in this regard that for 11 of the 13 witnesses concerned in this request (17 of 23 witnesses overall), the Prosecution does not intend to rely on them for the purposes of the confirmation hearing. Yet, the Prosecution admits that the information provided by these witnesses is either exculpatory and/or material to the preparation of the defence. Its assessment of the exculpatory and material nature of such information speaks volume. To be sure, exploring information obtained by the Prosecution from witnesses who were met by and provided a statement to its investigators, only to be subsequently set aside, is a very important aspect of Defence preparations for the confirmation hearing.

11. It is simply incorrect for the Prosecution to suggest that : (i) withholding the

⁸ Prosecution Response, para 17.

⁹ Email from Pre-Trial Chamber II’s Associate Legal Officer on 29 May 2019 at 14:58.

identities and/or applying non standard redactions to so many witnesses; (ii) depriving the Defence of the opportunity to make informed observations on the need to withhold their identities or apply non-standard redactions to their statements; and (iii) applying standard redactions in all possible instances pursuant to the redaction protocol, does not prejudice the Joint Defence or infringe on the fundamental rights of Messrs. Yekatom and Ngaissona. Such prejudice is exacerbated by the fact that no timeframe is given for the revelation of the 17 witnesses' identity or the lifting of the requested non-standard redactions pertaining to the other six witnesses.

12. Setting aside the Prosecution's meritless suggestion for the Chamber to direct the Prosecution to disclose all statements as "attorney-eyes only"¹⁰ – which illustrates the Prosecution's misunderstanding of the nature of the attorney-client relationship, there are other less intrusive and expeditious measures available such as, for example, 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.

13. The provision of excerpts selected by the Prosecution¹¹ is, however, not an option. Preparing for the confirmation hearing in respect of any witness who provided Article 67(2) exculpatory evidence or Rule 77 evidence material to the preparation of the Defence requires, at a minimum, review of all information/evidence provided by the witness to the Prosecution. Stand-alone excerpts are insufficient in this regard.

14. Nonetheless, directing the Prosecution to disclose identity-redacted statements in full – as opposed to summaries – until the Prosecution is in a position to disclose the complete statements or screenings, including identities, at the latest 30

¹⁰ Prosecution Request, para 18.

¹¹ Prosecution Request, para 13.

days before the confirmation hearing, could be an option.¹²

CONFIDENTIALITY

15. This response is filed on a confidential basis, corresponding to the classification of the Prosecution Request. The Defence does not oppose to its reclassification to public.

RELIEF SOUGHT

16. For the above reasons, the Defence respectfully requests the Chamber to:

REJECT the Prosecution Request; or, in the alternative,

If any of the Prosecution requests are granted:

DIRECT the Prosecution to disclose identity redacted statements in full – not summaries – until the Prosecution is in a position to disclose complete statements or screenings including identities, at the latest 30 days before the confirmation hearing; and

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.

RESPECTFULLY SUBMITTED ON THIS 1st DAY OF APRIL 2020,



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Me Geert-Jan Knoops
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¹² Prosecution Request, para 19.



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