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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***

Public

Decision on the 'Prosecution's Request to Postpone
the Confirmation Hearing and all Related Disclosure Deadlines'

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

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PRE-TRIAL CHAMBER II of the International Criminal Court issues this decision on the ‘Prosecution’s Request to Postpone the Confirmation Hearing and all Related Disclosure Deadlines’.

I. PROCEDURAL HISTORY

1. On 11 November 2018, the Chamber issued the ‘Warrant of Arrest for Alfred Yekatom’,¹ who was surrendered to the Court by the authorities of the Central African Republic (‘CAR’) on 17 November 2018.

2. On 7 December 2018, the Chamber issued the ‘Warrant of Arrest for Patrice-Edouard Ngaïssona’,² who was surrendered to the Court by the authorities of the French Republic on 23 January 2019.

3. On 20 February 2019, the Chamber issued the ‘Decision on the joinder of the cases against Alfred Yekatom and Patrice-Edouard Ngaïssona and other related matters’, thereby joining the cases against Yekatom and Ngaïssona.³ The Chamber scheduled the confirmation hearing in the joint case to commence on 18 June 2019.⁴

4. On 14 March 2019, the Chamber issued the ‘Decision setting a deadline for the submission of applications prior to the Confirmation Hearing’, thereby ordering the Prosecutor to submit any applications for the authorisation of the non-disclosure of witnesses’ identities and/or the non-disclosure of entire items of evidence by 29 March 2019 at the latest (the ‘29 March 2019 Deadline’).⁵

5. On 4 April 2019, the Chamber issued the ‘Second Decision on Disclosure and Related Matters’ (the ‘Second Disclosure Decision’), thereby, *inter alia*, ordering the Prosecutor to disclose a list of evidence she intends to present at the confirmation hearing within the meaning of rule 121(3) of the Rules of Procedure and Evidence (the ‘Rules’), all evidence within the meaning of article 67(2) of the Rome Statute

¹ ICC-01/14-01/18-1-Conf-Exp. A public redacted version is also available, *see* [ICC-01/14-01/18-1-Red.](#)

² ICC-01/14-01/18-89-Conf-Exp. A public redacted version is also available, *see* [ICC-01/14-01/18-89-Red.](#)

³ [ICC-01/14-01/18-87](#); [ICC-01/14-01/18-121](#).

⁴ [ICC-01/14-01/18-87](#), para. 18; [ICC-01/14-01/18-121](#), para. 18.

⁵ [ICC-01/14-01/18-148](#).

(the ‘Statute’) in her possession or control and all material referred to in rule 77 of the Rules in her possession or control by 17 May 2019.⁶

6. On 10 April 2019, the Chamber issued the ‘Decision on the Prosecutor’s Request for an Extension of Time to Apply for the Non-Disclosure of Witness Identities’ (the ‘Decision on Extension of Time’), thereby extending the 29 March 2019 Deadline to 18 April 2019.⁷

7. On 1 May 2019, the Chamber received the ‘Prosecution’s Request to Postpone the Confirmation Hearing and all Related Disclosure Deadlines’ (the ‘Prosecutor’s Postponement Request’).⁸

8. On 3 May 2019, the Chamber ordered the Prosecutor to file a public redacted version of the Prosecutor’s Postponement Request by 8 May 2019, at 16:00 hours, at the latest, and ordered the Yekatom Defence and the Ngaïssona Defence to file their responses to the Prosecutor’s Postponement Request, together with any public redacted versions of said responses, by the same deadline.⁹

9. On 8 May 2019, the Chamber received the public redacted version of the Prosecutor’s Postponement Request,¹⁰ the ‘Rectificatif de la « Réponse de M. Alfred Rombhot Yekatom à la « Confidential 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 » », 8 mai 2019’ (the ‘Yekatom Defence Response’),¹¹ and the ‘Defence Response to the “Confidential Redacted version of “Prosecution’s Request to Postpone the Confirmation Hearing and all Related

⁶ [ICC-01/14-01/18-163](#), p. 16.

⁷ [ICC-01/14-01/18-168](#), para. 21.

⁸ ICC-01/14-01/18-186-Conf-Exp. A confidential redacted version is also available, *see* ICC-01/14-01/18-186-Conf-Red.

⁹ Email from the Chamber to the Prosecutor, Counsel for Yekatom and Counsel for Ngaïssona dated 3 May 2019 at 13:01 hours.

¹⁰ [ICC-01/14-01/18-193](#).

¹¹ ICC-01/14-01/18-194-Conf-Corr with one public annex. A public redacted version is also available, *see* [ICC-01/14-01/18-194-Red](#). The Chamber notes that, following the submission of the first version of the Yekatom Defence Response on 8 May 2019 at 16:00 hours, another version was submitted on 8 May 2019 at 16:38 hours and a corrected version on 9 May 2019 at 11:39 hours. The Chamber reminds the Defence for Yekatom that the final version of a submission must be filed before the expiry of the applicable deadline. However, in the circumstances of this case and in the exercise of its discretion, the Chamber decides to accept the Yekatom Defence Response.

Disclosure Deadlines”, 2 May 2019, ICC-01/14-01/18-186-Conf-Exp” (ICC-01/14-01/18-186-Conf-Red)’ (the ‘Ngaïssona Defence Response’)¹².

II. SUBMISSIONS

10. The present decision refers to information contained in the confidential redacted version of the Prosecutor’s Postponement Request. The Chamber considers that such references are required by the principles of publicity and judicial reasoning. However, such references have been kept to a minimum and are made without endangering the interests concerned and defeating the very purpose of redactions.

A. The Prosecutor

11. The Prosecutor submits that additional time is required to take the safety and security of witnesses into consideration.¹³ In this regard, the Prosecutor avers that, ‘[n]otwithstanding having begun [the] review [of the information in her possession] well before the Suspects’ arrests, the review process is only now approaching completion’.¹⁴ According to the Prosecutor, this is primarily due to ‘the massive volume of information collected during the investigation and limited Prosecution resources’.¹⁵ The Prosecutor adds that the need to take the safety and security of witnesses into consideration ‘has proven difficult and time-consuming’.¹⁶

12. The Prosecutor further argues that additional time is required ‘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’.¹⁷ According to the Prosecutor, ‘[w]hile 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’ requiring ‘[s]econdary and often tertiary quality control reviews’.¹⁸

13. On this basis, the Prosecutor submits that ‘the surest course is for the Chamber to postpone the Confirmation Hearing into September 2019 – *all things being*

¹² ICC-01/14-01/18-192-Conf. A public redacted version is also available, *see* [ICC-01/14-01/18-192-Red](#).

¹³ Prosecutor’s Postponement Request, ICC-01/14-01/18-186-Conf-Red, para. 7.

¹⁴ [Prosecutor’s Postponement Request](#), ICC-01/14-01/18-193, para. 9.

¹⁵ [Prosecutor’s Postponement Request](#), ICC-01/14-01/18-193, para. 9.

¹⁶ Prosecutor’s Postponement Request, ICC-01/14-01/18-186-Conf-Red, para. 12.

¹⁷ [Prosecutor’s Postponement Request](#), ICC-01/14-01/18-193, para. 19.

¹⁸ [Prosecutor’s Postponement Request](#), ICC-01/14-01/18-193, paras 20-21 (emphasis in original).

equal'.¹⁹ However, the Prosecutor submits that, '[s]hould 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'.²⁰ The Prosecutor also proposes three alternatives to 'mitigate, even possibly eliminate, such additional delay', namely: (i) permitting the 'disclosure of extracts or excerpts of witness statements'; (ii) permitting the Prosecutor to 'disclose all statements as "attorney-eyes only"'; or (iii) disclosing 'anonymised summaries of all witnesses whose identities cannot be disclosed for the time-being'.²¹

14. In addition, the Prosecutor avers that the Prosecutor's Postponement Request is 'not "inexcusable" within the meaning of article 60(4), nor would granting it undermine the Suspects' rights to a fair and expeditious trial'.²² This is because, in the view of the Prosecutor, 'the postponement is sought to enable the Prosecution to complete its disclosure review', take into consideration the safety and security of witnesses, and implement redactions as directed by the Chamber.²³ The Prosecutor further 'undertakes to mitigate prejudice to the Suspects' by aiming to file the Document Containing the Charges (the 'DCC') by 17 May 2019 or as soon as practicable thereafter, which will be followed by a 'Pre-Confirmation Brief', while continuing 'to provide disclosure on a monthly basis in advance of any new deadline for disclosure'.²⁴ Finally, the Prosecutor asserts that 'the requested postponement would still allow the Confirmation Hearing to be held within the same time-frame provided in other cases before the Court'.²⁵ While the Prosecutor concedes that '[t]he requested postponement would result in the Confirmation Hearing being held beyond the four to six months recommended in the Chamber's Practice Manual or that provided in some other cases', she maintains that the additional time requested is justified.²⁶ This is, *inter alia*, because, according to the Prosecutor, '[t]his case is larger in terms of alleged crimes than any case arising from the conflict in the

¹⁹ [Prosecutor's Postponement Request](#), ICC-01/14-01/18-193, para. 23.

²⁰ [Prosecutor's Postponement Request](#), ICC-01/14-01/18-193, para. 25.

²¹ [Prosecutor's Postponement Request](#), ICC-01/14-01/18-193, para. 26.

²² [Prosecutor's Postponement Request](#), ICC-01/14-01/18-193, para. 30.

²³ Prosecutor's Postponement Request, ICC-01/14-01/18-186-Conf-Red, para. 31.

²⁴ [Prosecutor's Postponement Request](#), ICC-01/14-01/18-193, para. 33.

²⁵ [Prosecutor's Postponement Request](#), ICC-01/14-01/18-193, para. 34.

²⁶ [Prosecutor's Postponement Request](#), ICC-01/14-01/18-193, para. 35.

Democratic Republic of the Congo or Kenya’, which means that there are ‘more witnesses to protect, more information that requires review, and thus more work to be done in advance of the confirmation process’.²⁷

B. The Defence for Yekatom

15. The Defence for Yekatom submits that the Prosecutor’s Postponement Request must be rejected.²⁸

16. According to the Defence for Yekatom, the confirmation hearing must be held on 18 June 2019 since the Prosecutor concedes that it is still possible to do so.²⁹

17. The Defence for Yekatom argues that, in view of the importance of the confirmation hearing, the Prosecutor must be ordered to submit a version of the Prosecutor’s Postponement Request containing fewer redactions in order to allow the Defence for Yekatom to provide meaningful submissions.³⁰

18. Furthermore, the Defence for Yekatom takes the view that Yekatom must not suffer prejudice as a result of the lack of preparation by the Prosecutor and, therefore, the argument of the Prosecutor regarding the speed at which he was arrested is unfounded.³¹ The Defence for Yekatom adds that a further postponement of the confirmation hearing would result in extending the detention of Yekatom, which would prejudice the suspect and impact upon his ability to prepare for this hearing.³²

19. The Defence for Yekatom further avers that, in view of the fact that the investigation in the situation in CAR II commenced five years ago, there is reason to believe that the Prosecutor has had sufficient time to complete her investigation.³³ The Defence for Yekatom is also of the view that the Prosecutor’s argument that she lacks resources is surprising in view of the differences in the means available to the Prosecutor as compared to the Defence.³⁴ It also asserts that the fact that the Prosecutor has realised that she is not in a position to respect the deadlines 14 days before the expiry of the deadline for the disclosure of the evidence is inexcusable and

²⁷ [Prosecutor’s Postponement Request](#), ICC-01/14-01/18-193, para. 36.

²⁸ [Yekatom Defence Response](#), ICC-01/14-01/18-194-Red, para. 1.

²⁹ [Yekatom Defence Response](#), ICC-01/14-01/18-194-Red, para. 21.

³⁰ [Yekatom Defence Response](#), ICC-01/14-01/18-194-Red, paras 2, 22-23.

³¹ [Yekatom Defence Response](#), ICC-01/14-01/18-194-Red, para. 24.

³² [Yekatom Defence Response](#), ICC-01/14-01/18-194-Red, para. 25.

³³ [Yekatom Defence Response](#), ICC-01/14-01/18-194-Red, para. 28.

³⁴ [Yekatom Defence Response](#), ICC-01/14-01/18-194-Red, para. 29.

unreasonable.³⁵ With regard to the argument of the Prosecutor concerning her list of witnesses, the Defence for Yekatom avers that the Prosecutor has already indicated that she does not intend to call witnesses, the joinder of the cases against Yekatom and Ngaissona does not justify the inability to put together a list of witnesses, and the investigation of the Prosecutor must largely be completed at this stage.³⁶ The Defence for Yekatom adds that it is not acceptable for the Prosecutor to argue that she is unable to identify the number of witnesses for whom disclosure of evidence is required since the Prosecutor is obliged to disclose exculpatory material immediately after having identified it and, in addition, the Prosecutor herself admitted that she was reviewing the material to identify what would have to be disclosed in case of the suspect's arrest.³⁷ The Defence for Yekatom is also of the view that the Prosecutor has had sufficient time to put protective measures in place and to take the security situation in the CAR into account.³⁸ Finally, in relation to the Prosecutor's argument concerning the assignment of unique pseudonyms, the Defence for Yekatom asserts that the Prosecutor cannot claim that she is not ready to do so in view of the assurances she provided herself; this process is not as fastidious as claimed by the Prosecutor; the number of more than 1000 unique pseudonyms is surprising considering that, to date, the Defence has identified merely 164 such pseudonyms; the Redaction Protocol has been in force since 2016; and the Prosecutor has indicated that she has already reviewed 94% of the material in her possession.³⁹

20. In addition, the Defence for Yekatom submits that the three alternatives proposed by the Prosecutor are unacceptable as they would transform the Defence from an active participant in pre-trial proceedings to a mere observer.⁴⁰

21. The Defence for Yekatom also argues that the Prosecutor's comparison with other cases is irrelevant as the circumstances of each case must be assessed

³⁵ [Yekatom Defence Response](#), ICC-01/14-01/18-194-Red, para. 30.

³⁶ [Yekatom Defence Response](#), ICC-01/14-01/18-194-Red, paras 33-35.

³⁷ [Yekatom Defence Response](#), ICC-01/14-01/18-194-Red, paras 37-38.

³⁸ [Yekatom Defence Response](#), ICC-01/14-01/18-194-Red, paras 40-42.

³⁹ [Yekatom Defence Response](#), ICC-01/14-01/18-194-Red, paras 43-50.

⁴⁰ [Yekatom Defence Response](#), ICC-01/14-01/18-194-Red, para. 55.

separately.⁴¹ According to the Defence for Yekatom, in this case, the delay is not only inexcusable but imputable directly to the Prosecutor.⁴²

22. Finally, the Defence for Yekatom requests that, in the event that the Chamber decides to postpone the confirmation hearing, the Chamber set fixed deadlines for the submission of the DCC and the pre-confirmation brief, as well as the disclosure of evidence.⁴³

C. The Defence for Ngaïssona

23. The Defence for Ngaïssona ‘strongly opposes the Prosecution’s request for postponement of the confirmation of charges hearings [sic]’⁴⁴ and requests that the Chamber reject the Prosecutor’s Postponement Request.⁴⁵

24. The Defence for Ngaïssona submits that the Prosecutor’s Postponement Request could and should have been submitted earlier considering that ‘the Chamber from the beginning of the proceedings has set clear deadlines [...]’.⁴⁶ In addition, the Defence for Ngaïssona avers that ‘[t]he Prosecution now argues that it is unclear whether the Chamber requires full disclosure of all witnesses’ identities or statements containing exculpatory and rule 77 information [...]’,⁴⁷ which is ‘at the very least surprising as the requirements of the Chamber regarding the non-disclosure of witnesses’ identities or statements has been clear from the outset [...]’.⁴⁸ Moreover, in the view of the Defence for Ngaïssona, the Prosecutor ‘also fails to substantiate why the implementation of witness protection activities would be of such exceptional nature in this case so as to justify additional delay’,⁴⁹ since: (i) ‘[t]he fact that the assessment and implementation of adequate security measures for witnesses [...] requires time, could have been anticipated by the Prosecution’;⁵⁰ (ii) the Prosecutor’s reference to the volume of the information collected ‘could clearly have been foreseen since the

⁴¹ [Yekatom Defence Response](#), ICC-01/14-01/18-194-Red, paras 57-58.

⁴² [Yekatom Defence Response](#), ICC-01/14-01/18-194-Red, para. 59.

⁴³ [Yekatom Defence Response](#), ICC-01/14-01/18-194-Red, para. 66.

⁴⁴ [Ngaïssona Defence Response](#), ICC-01/14-01/18-192-Red, para. 6.

⁴⁵ [Ngaïssona Defence Response](#), ICC-01/14-01/18-192-Red, para. 66.

⁴⁶ [Ngaïssona Defence Response](#), ICC-01/14-01/18-192-Red, para. 15. *See also* [Ngaïssona Defence Response](#), ICC-01/14-01/18-192-Red, paras 16-20.

⁴⁷ [Ngaïssona Defence Response](#), ICC-01/14-01/18-192-Red, para. 21.

⁴⁸ [Ngaïssona Defence Response](#), ICC-01/14-01/18-192-Red, para. 22. *See also* [Ngaïssona Defence Response](#), ICC-01/14-01/18-192-Red, paras 22-25.

⁴⁹ [Ngaïssona Defence Response](#), ICC-01/14-01/18-192-Red, para. 27.

⁵⁰ [Ngaïssona Defence Response](#), ICC-01/14-01/18-192-Red, para. 28.

Prosecution concedes that this case is “larger” than other cases’;⁵¹ (iii) ‘[t]he arrest [of Ngaïssona] cannot be used as an excuse for the request for additional delay since it is the reason why the whole disclosure process is launched in the first place’;⁵² and (iv) ‘[t]he identification of additional witnesses [...] cannot work as a valid justification for postponement either’ since ‘[t]he Prosecutor’s investigation should largely be completed prior to the confirmation hearing [...]’.⁵³

25. The Defence for Ngaïssona adds that, ‘assuming the Chamber would [...] determine that the Prosecution is not prevented by [sic] principle from withholding the identities of witnesses in the present case, discrete applications for authorisation would in any event need to be submitted to the Chamber [...]’.⁵⁴ The Defence for Ngaïssona further argues that, ‘assuming one of the alternatives [proposed by the Prosecutor] would be envisaged, the Prosecution suggests that it would not completely eliminate the risk of further postponement, which then renders the whole alternative scenario meaningless and disproportionate [...]’.⁵⁵

26. With regard to the Prosecutor’s arguments related to the need to apply unique pseudonyms, the Defence for Ngaïssona is of the view that, ‘while the Prosecution asserts that “the application of redactions [...] is in fact a highly labour intensive and painstakingly detailed process”, it has failed to substantiate this assertion’.⁵⁶ The Defence for Ngaïssona also ‘reiterates that it cannot make fully informed submissions when important parts of the Request are redacted, especially when said redactions relate to the “relevant evidentiary pool”’.⁵⁷ It, finally, ‘submits that by filing the Request in a very untimely manner, the Prosecution has lacked the necessary diligence expected from parties to a criminal trial [...]’.⁵⁸

27. In addition, the Defence for Ngaïssona asserts that the Prosecutor’s Postponement Request is unduly prejudicial as: (i) the Prosecutor ‘has not addressed the unreasonable and prejudicial character of the [Prosecutor’s Postponement

⁵¹ [Ngaïssona Defence Response](#), ICC-01/14-01/18-192-Red, para. 29.

⁵² [Ngaïssona Defence Response](#), ICC-01/14-01/18-192-Red, para. 30.

⁵³ [Ngaïssona Defence Response](#), ICC-01/14-01/18-192-Red, para. 31.

⁵⁴ [Ngaïssona Defence Response](#), ICC-01/14-01/18-192-Red, para. 35.

⁵⁵ [Ngaïssona Defence Response](#), ICC-01/14-01/18-192-Red, para. 37.

⁵⁶ [Ngaïssona Defence Response](#), ICC-01/14-01/18-192-Red, para. 41.

⁵⁷ [Ngaïssona Defence Response](#), ICC-01/14-01/18-192-Red, para. 44.

⁵⁸ [Ngaïssona Defence Response](#), ICC-01/14-01/18-192-Red, para. 46.

Request] for the Defence and for the interest of justice’;⁵⁹ (ii) the Prosecutor ‘cannot use the consideration of protection and privacy of witnesses [...] as a motive to consider that the requested postponement would not prejudice the Defence’;⁶⁰ (iii) the Prosecutor ‘does not provide any clear indication as to when the DCC and the Pre-Confirmation Brief will effectively be filed’;⁶¹ (iv) ‘[t]he potentially inexcusable character of the [Prosecutor’s Postponement Request] can only be assessed in the context of a debate on interim release’, which the Prosecutor ‘cannot speculatively anticipate [...]’;⁶² and (v) the Prosecutor’s Postponement Request affects Ngaiissona’s ‘fundamental and statutory right to an expeditious trial and as a consequence, a limited pre-trial detention’.⁶³ Furthermore, according to the Defence for Ngaiissona, the Prosecutor is requesting a postponement exceeding the target date contained in the Chambers Practice Manual without paying attention to the fact that the aim of this Manual is to improve the Chambers’ practices and without demonstrating that the circumstances of this case justify a postponement.⁶⁴ Finally, the Defence for Ngaiissona submits that the Prosecutor’s comparison with other cases is inapposite since they are distinguishable from the present case as for instance: (i) both the Defence and the Prosecutor requested additional time in the Al Hassan Case; (ii) the Ongwen Case and the Ntaganda Case were inactive for extended periods of time; and (iii) issues of translation arose in the latter cases.⁶⁵

III. ANALYSIS

A. Preliminary matter

28. The Chamber considers that, contrary to the request submitted by the Defence for Yekatom and the corresponding argument raised by the Defence for Ngaiissona,⁶⁶ it is not necessary to order the Prosecutor to provide a version of the Prosecutor’s Postponement Request containing fewer redactions. The Chamber is of the view that,

⁵⁹ [Ngaiissona Defence Response](#), ICC-01/14-01/18-192-Red, para. 49.

⁶⁰ [Ngaiissona Defence Response](#), ICC-01/14-01/18-192-Red, para. 50.

⁶¹ [Ngaiissona Defence Response](#), ICC-01/14-01/18-192-Red, para. 51.

⁶² [Ngaiissona Defence Response](#), ICC-01/14-01/18-192-Red, para. 52.

⁶³ [Ngaiissona Defence Response](#), ICC-01/14-01/18-192-Red, para. 53.

⁶⁴ [Ngaiissona Defence Response](#), ICC-01/14-01/18-192-Red, paras 56-57.

⁶⁵ [Ngaiissona Defence Response](#), ICC-01/14-01/18-192-Red, paras 58-65.

⁶⁶ [Yekatom Defence Response](#), ICC-01/14-01/18-194-Red, paras 2, 22-23; [Ngaiissona Defence Response](#), ICC-01/14-01/18-192-Red, para. 44.

in light of the extensive submissions provided by the parties, it has received all the information required to rule on the Prosecutor's Postponement Request.

B. The Prosecutor's request to postpone the confirmation hearing

29. The Chamber notes articles 60(4), 61(1) and 67 of the Statute and rule 121(7) of the Rules.

30. The Chamber recalls that rule 121(7) of the Rules provides that it may, either on its own motion or upon the request of the Prosecutor or the suspect, decide to postpone the date of the confirmation hearing. In assessing a request brought pursuant to this rule, the Chamber 'must ensure the overall fairness and expeditiousness of proceedings bearing in mind the competing interests at stake'.⁶⁷ Such an assessment must be made on the basis of the submissions of the parties and of the circumstances of each case.⁶⁸

31. At the outset, the Chamber underlines that a postponement of the confirmation hearing is a serious measure, in light of its important implications on the competing interests of the parties to the proceedings and, more specifically, on the fundamental rights of the suspects. Particularly, when adjudicating such requests the Chamber must be mindful of two fundamental principles: (i) a suspect must appear promptly and without delay before a Pre-Trial Chamber in order to defend himself or herself in the context of a confirmation hearing, and (ii) pre-trial detention must be strictly limited to what is necessary. In light of the adverse effect of a postponement on the duration of a suspect's pre-trial detention, a decision of postponement can only be taken on an exceptional basis. This is all the more critical when, as in these proceedings, the request for postponement is opposed by the Defence.

32. Furthermore, the Chamber recalls that it is the Prosecution's responsibility to file a request for the issuance of a warrant of arrest only when it is ready to do so, which includes being prepared to honour its statutory disclosure obligations in a timely fashion on the basis of realistic estimates. Hence, the Chamber emphasises that

⁶⁷ Pre-Trial Chamber II, *The Prosecutor v. Bosco Ntaganda*, [Decision on the 'Prosecution's Urgent Request to Postpone the Date of the Confirmation Hearing' and Setting a New Calendar for the Disclosure of Evidence Between the Parties](#), 17 June 2013, ICC-01/04-02/06-73, para. 13; Pre-Trial Chamber II, *The Prosecutor v. Dominic Ongwen*, [Decision Postponing the Date of the Confirmation of Charges Hearing](#), 6 March 2015, ICC-02/04-01/15-206, para. 25 (the 'Ongwen Postponement Decision').

⁶⁸ [Ongwen Postponement Decision](#), ICC-02/04-01/15-206, para. 25.

merely organisational and technical difficulties within the Office of the Prosecutor do not represent a sufficient justification for a postponement of time limits.⁶⁹

33. By the same token, the Chamber recalls that the protection of ‘the safety, physical and psychological well-being, dignity and privacy of victims and witnesses’ is of paramount concern to the Court as a whole, pursuant to article 68(1) of the Statute. Accordingly, it may be envisaged that the need to ensure the effective protection of victims and witnesses might result in compelling reasons adequately underpinning a postponement decision.

34. In this regard, the Chamber is especially mindful of the fact that it has previously acknowledged that the security situation in the CAR continues to be precarious.⁷⁰ This means that the Prosecution is, in general, confronted with significant challenges in discharging its disclosure obligations. The Chamber considers that the Prosecutor’s obligation to take the safety and security of witnesses into consideration cannot be assessed in the abstract on the basis of the passage of time.⁷¹ Instead, it requires an ongoing assessment on the basis of specific and up-to-date factors. The Chamber is also of the view that, in the context of the situation in the CAR, the arrest of persons for whom a warrant of arrest has been issued by the Court necessarily impacts upon the protection of witnesses and must, therefore, be taken into due account.⁷²

35. The Chamber considers that the argument presented by the Defence for Ngaïssona that the voluminous nature of the supporting material could have been anticipated by the Prosecutor is unconvincing.⁷³ The issue under consideration is not whether the Prosecutor anticipated that the supporting material would be voluminous, but rather whether this factor might *per se* weigh in favour of postponing the confirmation hearing in the specific circumstances of this case.

⁶⁹ [Prosecutor’s Postponement Request](#), ICC-01/14-01/18-193, para. 9.

⁷⁰ *See for instance* [Warrant of Arrest for Alfred Yekatom](#), ICC-01/14-01/18-1-Red, para. 22; [Warrant of Arrest for Patrice-Edouard Ngaïssona](#), ICC-01/14-01/18-89-Red, para. 22.

⁷¹ [Yekatom Defence Response](#), ICC-01/14-01/18-194-Red, paras 28, 32-35, 40-42; [Ngaïssona Defence Response](#), ICC-01/14-01/18-192-Red, para. 28.

⁷² [Yekatom Defence Response](#), ICC-01/14-01/18-194-Red, para. 24; [Ngaïssona Defence Response](#), ICC-01/14-01/18-192-Red, para. 30.

⁷³ [Ngaïssona Defence Response](#), ICC-01/14-01/18-192-Red, para. 29.

36. Further, the Chamber considers that the Prosecutor's obligation to apply unique pseudonyms for innocent third parties might indeed qualify as one among those challenges that she has to confront in discharging disclosure obligations. The Chamber accepts that this is a resource-intensive exercise in view of the scope of the crimes imputed against Yekatom and Ngaïssona, as well as the voluminous nature of the supporting material. Additionally, as this exercise must be carried out with precision and care in light of the importance of the pseudonyms for the protection of the persons concerned and the rights of the suspects,⁷⁴ the need to internally review the application of unique pseudonyms constitutes a measure which is not only reasonable, but also necessary, notwithstanding its time-consuming nature.

37. In light of the fact that postponing the confirmation hearing causes prejudice to the suspects, the Chamber agrees that it would have been preferable for the Prosecutor to have filed the request for postponement earlier.⁷⁵ However, the Chamber attaches significant weight to the fact that the Prosecutor requests a relatively limited postponement of the confirmation hearing, i.e. until September 2019. Thus, contrary to the submissions by the Defence for Yekatom and the Defence for Ngaïssona,⁷⁶ the Chamber considers that the delay is necessary in view of the abovementioned and that, to the extent that the delay is limited to what is strictly necessary for the purposes of allowing the Court and the Prosecutor to properly discharge their protective obligations, the need for a postponement outweighs the prejudice that the suspects may incur.

38. The Chamber notes that the Prosecutor believes that it is unclear 'whether the Chamber requires the disclosure of *all* witnesses identities or statements'⁷⁷, adding that, '[s]hould 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 [...]'.⁷⁸ However, this assertion is

⁷⁴ See also Pre-Trial Chamber II, *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaïssona, Decision on the 'Prosecution's Request to Vary the Decision on Disclosure and Related Matters (ICC-01/14-01/18-64-Red)*', 10 April 2019, ICC-01/14-01/18-169, paras 14-20.

⁷⁵ See also [Second Disclosure Decision](#), ICC-01/14-01/18-163, para. 28.

⁷⁶ [Yekatom Defence Response](#), ICC-01/14-01/18-194-Red, paras 25, 57-61; [Ngaïssona Defence Response](#), ICC-01/14-01/18-192-Red, paras 48-54.

⁷⁷ [Prosecutor's Postponement Request](#), ICC-01/14-01/18-193, para. 3 (emphasis in original).

⁷⁸ [Prosecutor's Postponement Request](#), ICC-01/14-01/18-193, para. 25.

misguided. The Chamber reminds the Prosecution that, under the Statute, it is obliged to disclose evidence in accordance with the Chamber's decisions. These decisions are unequivocal given that the Chamber ordered the Prosecutor to: (i) disclose 'a list of evidence she intends to present at the confirmation of charges hearing', 'all evidence within the meaning of article 67(2) of the Statute' and 'all material referred to in rule 77 of the Rules';⁷⁹ and (ii) 'provide any and all applications for non-disclosure of witness identities and/or for non-disclosure of entire items of evidence'⁸⁰. It is for the Prosecutor to decide whether she wishes to rely on a number of specific witnesses for the confirmation hearing, seek to ensure the protection of witnesses in cooperation with the Victims and Witnesses Unit, submit applications for the authorisation of the non-disclosure of witnesses' identities and/or the non-disclosure of entire items of evidence, and/or adopt other measures in conformity with her rights and obligations under the Statute. Crucially, the Chamber stresses that, in doing so, the Prosecutor bears the responsibility to prepare a DCC on the basis of the available evidence at the relevant time, while bearing in mind the limited scope and nature of the confirmation proceedings during which, unlike at trial, she must 'establish substantial grounds to believe that the person committed the crime charged' pursuant to article 61(5) of the Statute.

39. In view of the foregoing, taking into account the overall fairness and expeditiousness of the proceedings, the Chamber considers that the Prosecutor's Postponement Request must be granted on an exceptional basis and, accordingly, decides that the confirmation hearing in the present case shall commence on 19 September 2019. This entails that the corresponding deadlines must be postponed as well. Accordingly, the Chamber orders the Prosecutor to: (i) submit the DCC, together with the list of evidence she intends to present at the confirmation hearing, and disclose all evidence within the meaning of article 67(2) of the Statute and all material within the meaning of rule 77 of the Rules by 19 August 2019 at the latest; and (ii) 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

⁷⁹ [Second Disclosure Decision](#), ICC-01/14-01/18-163, p. 16.

⁸⁰ [Decision on Extension of Time](#), ICC-01/14-01/18-168, para. 21.

7 June 2019 at the latest. The Chamber emphasises that any further postponement of the confirmation hearing, barring any unforeseen circumstance, will not be accepted.

C. The ‘Pre-Confirmation Brief’ and the structure of the DCC

40. The Chamber notes that the Prosecutor indicates that, following the DCC, she will submit a ‘Pre-Confirmation Brief’.⁸¹ In this regard, the Chamber notes that Pre-Trial Chamber I has asked the Prosecutor to provide ‘a single document’ in the Al Hassan Case.⁸² The Single Judge of Pre-Trial Chamber I subsequently explained that submitting a single document avoids repetition across multiple documents and the reader having to compare and draw together the contents of different documents in order to obtain a clear picture of the charges and the supporting evidence.⁸³ The Chamber agrees that a single document is conducive to the efficiency of the proceedings and ensures more clarity for the suspects and the Chamber. Therefore, the Chamber orders the Prosecutor to refrain from submitting a ‘Pre-Confirmation Brief’ and to submit only a DCC.

41. Having found that only a DCC is to be submitted in the present case, the Chamber finds it appropriate to specify what is required of the Prosecutor in relation to the structure of the DCC. In this regard, the Chamber notes the corresponding jurisprudence of Pre-Trial Chamber I, which reads as follows in the relevant part:

29. [...] the Chamber asks that the Prosecutor provide a single document [...] in which each statement of fact has a footnote referring specifically, by means of hyperlinks, to the supporting evidence [...]. The Chamber underscores the importance of identifying, where applicable, within the evidence, including audio or video material, the relevant excerpts by precise references (e.g. by page or paragraph number). [...] [T]he Chamber would like all references to the evidence to be contained in the DCC and not in a separate document. Lastly, legal considerations, as opposed to a purely fact-based analysis, must inform the DCC’s structure, which must differentiate clearly between war crimes and crimes against

⁸¹ [Prosecutor’s Postponement Request](#), ICC-01/14-01/18-193, para. 33.

⁸² Pre-Trial Chamber I, *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, [Decision on the Defence Request concerning the Time Limit for the Prosecutor to File the Document Containing a Detailed Description of the Charges](#), 5 October 2018, ICC-01/12-01/18-143-tENG, para. 29 (the ‘Al Hassan Decision concerning the Time Limit’). *See also* Pre-Trial Chamber I, *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, [Décision relative à la « Requête de l’Accusation sollicitant l’augmentation du nombre de pages autorisées pour le dépôt du Document contenant les charges »](#), 18 April 2019, ICC-01/12-01/18-310, para. 24 (the ‘Al Hassan Decision concerning the Page Limit’).

⁸³ [Al Hassan Decision concerning the Page Limit](#), ICC-01/12-01/18-310, para. 25.

humanity, and, under each such head, differentiate clearly between the various crimes charged and between the various modes of responsibility.

30. The Chamber further notes that the Prosecutor must be sufficiently specific and exhaustive in her presentation and description of the events relating to the crimes alleged, so that the Chamber can be equally specific and exhaustive in its decision on the confirmation of the charges. The Chamber recalls in this connection that the “charges”, which may ultimately be confirmed and delimit the scope of the trial, consist of, among other ingredients, “facts”, as described in regulation 52 of the Regulations of the Court, which include, among other particulars, the time and place of the alleged crimes and provide a sufficient legal and factual basis to bring the person charged to trial. Accordingly, the Chamber emphasizes the need for the Prosecutor to be as specific and exhaustive as possible in respect of those facts in her DCC. Nonetheless, the Chamber is of the view that the degree of specificity expected from the Prosecutor in her description of the facts depends on the nature of the crimes in question and the circumstances of the case brought by the Prosecutor before the Chamber. Where crimes such as torture or rape are concerned, the Prosecutor must describe the criminal acts in issue, stating the date and place of the acts, along with the number of victims, or at the very least a clear estimate of that number, and their identities as far as at all possible. However, where by their nature the crimes are directed against a group or collectivity of people, as in the case of the crime of persecution, a like degree of specificity cannot be expected of the Prosecutor’s description of the facts; nonetheless, the Prosecutor must endeavour to pinpoint as much as possible places, times and approximate numbers of victims and to provide the necessary particulars to make out the elements of the crimes.⁸⁴

42. The Chamber concurs with Pre-Trial Chamber I in this regard and, thus, orders the Prosecutor to structure the DCC to be submitted in this case in accordance with the principles set forth in the preceding paragraph.

FOR THESE REASONS, THE CHAMBER HEREBY

- a) **GRANTS** the Prosecutor’s Postponement Request in light of the need to ensure the protection of victims and witnesses, as specified in paragraphs 33 to 37 of the present decision;
- b) **DECIDES** that the confirmation hearing will commence on 19 September 2019;


⁸⁴ [Al Hassan Decision concerning the Time Limit](#), ICC-01/12-01/18-143-tENG, paras 29-30 (footnotes omitted).

- c) **ORDERS** 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;
- d) **ORDERS** the Prosecutor to refrain from submitting a 'Pre-Confirmation Brief' and to structure the DCC in accordance with paragraph 41 of the present decision; and
- e) **ORDERS** the Prosecutor to submit the DCC, together with a list of evidence she intends to present at the confirmation hearing, and to disclose all evidence within the meaning of article 67(2) of the Statute and all material referred to in rule 77 of the Rules by 19 August 2019 at the latest.

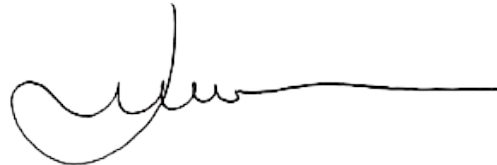
Done in both English and French, the English version being authoritative.



**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