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TRIAL CHAMBER V

Before: Judge 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 YEKATOM AND PATRICE-EDOUARD
NGAÏSSONA***

Confidential

**Defence Response to the “Confidential Redacted version of ‘Prosecution’s
Request pursuant to Regulation 35 to vary the Time Limit for Disclosure of
evidence related to trial witnesses listed on the Preliminary Witness List’, 21
August 2020”**

Source: 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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I. INTRODUCTION

1. On 21 August 2020, the Prosecution submitted the “Prosecution’s Request pursuant to Regulation 35 to vary the Time Limit for Disclosure of evidence related to trial witnesses listed on the Preliminary Witness list” (“Request”), indicating that it would not be in a position to meet its disclosure obligations by the 31 August 2020 deadline ordered by Trial Chamber V (“Chamber”).¹ In its Request, the Prosecution seeks to withhold the disclosure of the identity and statements of several witnesses, and to delay the disclosure of other witness-related materials, transcripts and translations.² However, the Prosecution fails to present clear and convincing arguments amounting to ‘good cause’, as required by regulation 35 of the Regulations of the Court (“Regulations”).
2. In its Request, the Prosecution fails to recognise the significant prejudice delayed disclosure and non-disclosure of its evidence would cause to Mr Ngaïssona’s fair trial rights.³ In addition, the Prosecution impermissibly attempts to exploit the regulation 35 regime in order to: (1) introduce an entirely new request to withhold the identity and statement of Witness P-0306 until shortly before his testimony in Court, and (2) to re-litigate matters which have already been adjudicated by the Chamber. The circumvention of the legal requirements for withholding a witness’ identity and statement and for delayed disclosure must be rejected *in limine*.

II. CONFIDENTIALITY

3. The present response is filed confidentially pursuant to regulation 23bis(2) of the Regulations as it contains confidential information relating to Prosecution

¹ ICC-01/14-01/18-628-Conf-Red (hereinafter “Request”).

² See Request, para. 1.

³ For instance, the Prosecution declares that its Request “will *in no way* prejudice the Defence”, Request, para. 1.

witnesses. Given the sensitivity of the information, the Defence intends to provide a public redacted version of the present response upon receipt of an eventual public redacted version of ICC-01/14-01/18-628-Conf-Red.

III. RELEVANT PROCEDURAL HISTORY

4. The Prosecution opened its investigation into crimes committed since 2012 in the Central African Republic six years ago.⁴ It had ample time to conduct investigations, implement protective measures, and organise its evidence in a way that is conducive to the respect of its statutory disclosure obligations.⁵
5. On 22 May 2020, the Single Judge ordered the Prosecution to file a Preliminary Witness List by 15 June 2020, *inter alia* to mitigate the delays caused by the Covid-19 pandemic, while recalling the accused' right to a fair and expeditious trial and to have adequate time to prepare their defence and the Prosecution's ongoing disclosure obligations under the Rome Statute ("Statute") and the Rules of Procedure and Evidence ("Rules").⁶
6. On 9 July 2020, the first status conference was held in Mr Ngaïssona's absence from the courtroom due to the COVID-19 pandemic.⁷
7. On 16 July 2020, the Chamber set the trial date to 9 February 2021 and set the Prosecution's final disclosure deadline for materials related to witnesses listed in its Preliminary Witness List to 31 August 2020.⁸

⁴ Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on opening a second investigation in the Central African Republic, ICC-OTP-20140924-PR1043, 24 September 2014.

⁵ The Prosecution benefitted from a postponement of the confirmation of charges hearing on two occasions (once in relation to its case against Mr Yekatom) which provided the Prosecution with more time to disclose its evidence. The joint confirmation of charges hearing, which was set to 18 June 2019, was later postponed to 19 September 2019 at the Prosecution's request. ICC-01/14-01/18-121; ICC-01/14-01/18-163, para. 26; ICC-01/14-01/18-199, paras 31, 39.

⁸ ICC-01/14-01/18-186-Red2.

⁶ ICC-01/13-01/18-528, paras 4-5.

⁷ ICC-01/14-01/18-T-012-ENG ET.

⁸ ICC-01/14-01/18-589.

8. On 21 August 2020, the Prosecution filed the Request *ex parte*. A confidential redacted version was notified to the Defence on the same day, containing numerous redactions.⁹
9. On 24 August 2020, the Single Judge ordered the shortening of the response deadline to 28 August 2020 pursuant to regulation 34(b) of the Regulations, given that responses to the Prosecution's Request would have been due only after the 31 August 2020 deadline. In its order, the Single Judge recalled the Prosecution's deadline of 31 August to disclose all witness-related material.¹⁰
10. On 25 August 2020, the Defence for Mr Yekatom filed its Response, requesting that the Prosecution Request be granted, while asking that certain measures be put in place certain in order "to mitigate the prejudice to the Defence".¹¹

IV. APPLICABLE LAW

11. Under regulation 35(2) of the Regulations, a chamber may extend or reduce a time limit if good cause is shown. The Appeals Chamber has found that 'good cause' means that the inability of a party to conform to a procedural rule or regulation "must be for sound reasons, such as would objectively provide justification for the inability of a party to comply with his/her obligation."¹²

V. SUBMISSIONS

A. The timing and the excessive redactions applied to the Request undermine Mr Ngaïssona's fair trial rights

⁹ Request, para. 2.

¹⁰ Email from Trial Chamber V to parties and participants, 24 August 2020, at 12:32.

¹¹ ICC-01/14-01/18-629-Conf, para. 32.

¹² *Prosecutor v Lubanga*, "Reasons for the 'Decision of the Appeals Chamber on the request of counsel to Mr. Thomas Lubanga Dyilo for modification of the time limit pursuant to regulation 35 of the Regulations of the Court of 7 February 2007' issued on the 16 February 2007", ICC-01/04-01/06-834 OA8, 21 February 2007, paras 7-9.

12. As a preliminary matter, the Prosecution's timing for filing the Request, a mere ten calendar days before the final deadline for disclosure of witness-related materials, is regrettable. It indicates that the Prosecution was already in violation of its disclosure obligations upon filing the Request despite the Prosecution having been put on notice of its obligations as early as 22 May 2020, when the Chamber reminded it of its ongoing disclosure obligations. The Chamber had stressed that the "disclosure of evidence related to witness listed on the Preliminary Witness List must be affected *immediately*".¹³ The Prosecution failed, however, to alert the Chamber, parties and participants, for instance at the status conference hearing in July, of its intention to request a significant extension of time to meet its obligations with respect to a great number of witness identities, statements, transcripts, and other materials, nor did it allude to its intention to withhold altogether the identity and statements of Witness P-0306 until 45 to 60 days prior to his testimony in Court.¹⁴

13. By filing the Request at the eleventh hour, the Prosecution effectively placed the Defence in a position where it would have had until a few days after the expiry of the deadline to respond to the Request.¹⁵ This would have translated to the Prosecution's request for withholding identities and delayed disclosure being a *fait accompli*, which would have also constituted a violation of the chamber's order.¹⁶ The Single Judge therefore had no choice but to shorten the responses deadline pursuant to regulation 34(b) of the Regulations.¹⁷

¹³ ICC-01/14-01/18-528, para. 5 [emphasis added]; ICC-01/14-01/18-589.

¹⁴ During the status conference hearing, the Prosecution assured the Chamber and parties that witness protection activities were relatively on track and that the OTP was "relatively speaking" "in good shape" and that outstanding witness identities would be disclosed shortly, ICC-01/14-01/18-T-012-ENG ET, page 20, lines 1-13.

¹⁵ Regulation 34(b), Regulations of the Court.

¹⁶ According to regulation 34(b) of the Regulations of the Court, the deadline to file a response to the Request would have been 3 September 2020.

¹⁷ Email from Trial Chamber V to parties and participants, 24 August 2020 at 12:32. The response deadline being on a Friday and the Prosecution's disclosure deadline being on a Monday (31 August), the Prosecution in effect will be in violation of its disclosure obligations, unless the Chamber decides otherwise in the intervening time.

14. Moreover, by filing its Request at this time, the Prosecution exploits regulation 35 in order to relitigate an issue that was already adjudicated in its disfavor. Namely, during the first status conference hearing, the Prosecution proposed that it provide its provisional witness list and the list of evidence 90 days before the start of trial.¹⁸ This proposal was, however refused by the Chamber. It found:

In accordance with the practice at this Court, the Chamber considers that receiving this list *prior* to the disclosure deadline and the reception of the Trial Brief, even if later revised, would facilitate the Defence's preparation for trial, as well as the Chamber's understanding of the Prosecution's upcoming evidence presentations.¹⁹

It is in this context that the Chamber ordered that the Prosecution's provisional witness list and the evidence related to it must be disclosed by 31 August 2020 "at the latest".²⁰

15. Despite this, the Prosecution requests a significant extension of time ranging from two months to potentially years.²¹ For instance, the Prosecution requests delayed disclosure of the identities and statements of Witnesses P-2582, P-2620, P-2671 until 9 November "*subject to prevailing COVID-19 circumstances and Court's [sic] ability to implement necessary measures*".²² The qualifying language used by the Prosecution seems to foreshadow further requests for delays on behalf of the Prosecution, which is clearly unacceptable.²³

16. The extensive delays requested by the Prosecution are a further testament to the fact that it could have foreseen its Request and avoided filing it at the eve

¹⁸ ICC-01/14-01/18-T-012-ENG ET, page 23 lines 21-25 and page 24, lines 1-6.

¹⁹ ICC-01/14-01/18-589, paras 5-6.

²⁰ ICC-01/14-01/18-589, para. 6.

²¹ Except for Witness P-0306, the Prosecution argues that it aims to have everything disclosed by 9 November 2020, "subject to" the prevailing Covid-19 situation, indicating that 9 November is not a firm deadline aimed at. For Witness P-0306, his identity and statement could be disclosed anywhere between in six months (at the start of trial) to one or two years, if he testifies later over the course of the presentation of the Prosecution's case.

²² Request, para. 8.

²³ Request, para. 8.

of the final disclosure deadline. Regrettably, the Prosecution provides no explanation as to why it could not have foreseen to file its Request sooner, nor did it envisage requesting a shortening of the response deadline in the Request, nor did it label the Request as “URGENT”.

17. *Second*, the Chamber has repeated that *ex parte* filings should only be used in exceptional circumstances and should not be used to gain a procedural advantage.²⁴ It further emphasized the importance of the overriding principle of publicity, as guaranteed to the accused pursuant to article 67(1) of the Statute.²⁵ Despite these instructions, the Prosecution has filed an excessively redacted version of its *ex parte* Request to the Defence, impeding the Defence’s ability to present effective and meaningful submissions.²⁶

B. The Prosecution’s request for an extension of time to comply with its obligation to disclose the identities and statements of Witnesses P-2582, P-2620, P-2671 and P-0306 is unjustified

a. The Prosecution has not shown good cause justifying the delayed disclosure of the identities and statements of Witnesses P-2582, P-2620 and P-2671

18. The Prosecution seeks leave to delay the disclosure of the identities and statements of Witnesses P-2582, P-2620, P-2671 by more than two months, with the caveat that this would be “subject to prevailing COVID-19 circumstances and the Court’s ability to implement necessary measures”.²⁷ The Prosecution fails to

²⁴ For instance, see ICC-01/14-01/18-T-012-ENG, page 7, lines 7-9.

²⁵ ICC-01/14-01/18-T-012-ENG, page 6, lines 23-25; see ICC-01/14-01/18-492; ICC-01/14-01/18-232-Red2, para. 19, relying on *Prosecutor v Katanga*, Judgment on the Appeals of the Prosecutor against the decision of Pre-Trial Chamber I entitled ‘First Decision on the Prosecution Request for Authorisation to Redact Witness Statements’, 13 May 2008, ICC-01/04-01/07-475, paras 60-61, 70; *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’, 13 October 2006, ICC-01/04-01/06-568, para. 39.

²⁶ There are a totally of 26 redactions in the Prosecution’s request. See below, paras 23, 32.

²⁷ Request, para. 8.

show good cause for requesting such an extensive and qualified extension of time with respect to Witnesses P-2582, P-2620 and P-2671.

19. *First*, despite the Prosecution's assessment that these witnesses are at "high risk of physical harm to the witnesses once their identity and status are disclosed to the Accused", it appears that only P-2582 was referred to VWS.²⁸ This suggests an apparent lack of diligence on the Prosecution's part in engaging with VWS as soon as possible in order to implement protective measures for Witnesses P-2620 and P-2671.²⁹

20. It is critical to the expeditiousness of the proceedings that the Prosecution finalise its risk assessments and refer any witness to the VWS in advance, "preferably during the investigation".³⁰ The Prosecution's choice to pursue investigations well beyond the confirmation of charges proceedings, for instance by collecting new witness statements as late as August 2020,³¹ cannot justify its non-compliance with the established disclosure deadlines.³² Mr Ngaïssona should not have to bear the Prosecution's lack of foresight in setting in motion protective measures sufficiently or for its strategic decision to focus on collecting new evidence rather than ensuring that its existing case would be ready to be disclosed according to the Chamber's orders.

²⁸ Request, para. 4.

²⁹ Request para. 4.

³⁰ ICC-01/14-01/18-64-Conf, para. 14. The Prosecution had provided assurances, as early as December 2018 that it would be able to provide all IRAs for all witnesses by the end of January 2019, ICC-01/14-01/18-40, para. 4; see ICC-01/14-01/18-473-Conf, paras 28-30.

³¹ See for instance, ICC-01/14-01/18-630-Conf, para 6 in relation to Witness P-0889 and Request, para. 16 with respect to Witness P-0992.

³² P-1528's supplemental statement was taken on the 13 and 15 January 2020; P-1490's statement was taken on the 12,13 and 15 January 2020; P-0473's statement was taken on the 25-28 January 2020; P-2660's statement was taken on the 4-7 February 2020; P-2658's statement was taken on the 9-11 February 2020; P-2652's statement was taken on the 18-21 February 2020; P-2675's statement was taken on 18 and 25 February 2020; P-2682's statement was taken on 22-24 February 2020; P-2324's statement was taken on 19-20 and 26 February 2020; P-2657's statement was taken on 12-14 February 2020.

21. *Second*, while the Prosecution argues that Covid-19 has delayed the implementation of full protection measures,³³ Covid-19 was declared a global pandemic over six months ago, on 11 March.³⁴ The Prosecution has thus had ample time to organise its investigations and activities regarding witness protection in such a manner as to enable it to comply with its disclosure obligations and deadlines in the intervening time. This includes foreseeing and accounting for potential delays caused by the pandemic, among other factors which could affect this process.³⁵ The pandemic is likely to persist in the long-term for the foreseeable future;³⁶ it therefore cannot be used as a blanket justification to interminably delay the Prosecution's disclosure obligations and the start of trial. Doing so would amount to a clear violation of article 67(1) of the Statute. Mr Ngaïssona has been held in pre-trial detention for more than one and a half year and any further delays would be unacceptable.³⁷

22. *Third*, the Prosecution appears to rely on broad claims to support the "particularly high risk profile" of Witnesses P-2582 and P-2620, for instance the fact that "both witnesses reside in areas accessible to Anti-Balaka elements", without however, providing any indication of a geographic scope, or whether the areas have ever been accessed by Anti-balaka elements. In addition, there is no footnote, which indicates that no source was cited in support of this claims.³⁸ Such broad and general arguments do not meet the threshold of good cause for delaying disclosure at this late stage of proceedings.

³³ Request, paras 5-8.

³⁴ <https://www.euro.who.int/en/health-topics/health-emergencies/coronavirus-covid-19>. The first case was declared in CAR on 14 March 2020 : <https://www.afro.who.int/fr/news/covid-19-en-rca-declarations-de-cas>. The first case was declared in The Netherlands on 27 February 2020: <https://www.dutchnews.nl/news/2020/08/the-first-dutch-coronavirus-case-was-confirmed-six-months-ago-where-are-we-now/>.

³⁵ ICC-01/14-01/18-163, para. 28; ICC-01/14-01/18-64-Red, para. 14.

³⁶ <https://www.reuters.com/article/us-health-coronavirus-who-end/who-chief-hopes-coronavirus-pandemic-will-last-less-than-two-years-idUSKBN25H294>.

³⁷ See below, para. 31.

³⁸ Request, paras 4-5. The Prosecution also provides no footnote for this latter argument of a very broad and general nature.

23. *Fourth*, given excessive redactions, virtually no information is known by the Defence about the Prosecution's request in relation to Witness P-2671 – except that this witness was not referred, inexplicably, to VWS and that disclosure of their identity and statement is dependent on protective measures applied to witnesses P-2582 and P-2620. These redactions prevent the Defence from meaningfully responding to this specific request and as a result, Mr Ngaïssona is prevented from exercising his right to be heard.

b. The delayed disclosure of the identities and statements of P-2582, P-2620 and P-2671 is prejudicial to Mr Ngaïssona's fair trial rights and should be rejected

24. *First*, contrary to the Prosecution's argument, the requested over two-month extension of time is not "short". Under the guise of a regulation 35 request, the Prosecution attempts to relitigate an issue already disposed of by the Chamber and which resulted in the Prosecution's disfavor. The staggered 31 August 2020 and 9 November deadlines were established by the Chamber to allow the Defence to adequately prepare for trial.³⁹ The Defence must be apprised sufficiently in advance of the evidence the Prosecution intends to rely on at trial and this is especially the case when it concerns witnesses whom the Prosecution intends to call live. Moreover, the Prosecution provides no commitment or assurance that it will meet this projected deadline. Instead, it tempers its request by specifying that its proposed deadline would depend on "the prevailing COVID-19 circumstances and Court's ability to implement necessary measures".⁴⁰

25. *Second*, the withholding of witness' identities is the most severe form of non-disclosure. The Prosecution's contention that disclosing the identities and statements of witnesses by 9 November would be "sufficiently in advance of

³⁹ ICC-01/14-01/18-589, para. 14, relying on *Prosecutor v Ongwen*, Decision Setting the Commencement Date of the Trial, 30 May 2016, ICC-02/04-01/15-449, para. 8; *Prosecutor v Al Hassan*, Decision Setting the Commencement Date of the Trial, 6 January 2020, ICC-01/12-01/18-548, para. 16.

⁴⁰ Request, para. 8.

trial to enable the adequate preparation of the Defence” disregards Mr Ngaïssona’s fair trial right to have adequate time and facilities for the preparation of the Defence, pursuant to article 67(1)(b) of the Statute. It would also hamper the Defence’s ability to effectuate a holistic analysis of the evidence which includes the evidence of P-2582, P-2620, and P-2671.

26. *Third*, the Prosecution does not offer any intermediate, less encroaching proposals to limit the prejudice caused to the Defence, such as disclosing the three witness statements with redactions on portions which would reveal the witnesses’ identity, neither does it provide a projected timeframe for the implementation of protective measures. In sum, the Prosecution has failed to show good cause justifying the delayed disclosure of the identities and statements of Witnesses P-2582, P-2620, and P-2671.

c. The Prosecution’s attempt to circumvent the legal requirements for non-disclosure by requesting the withholding of the identity and statement of Witness P-0306 under the guise of a regulation 35 request must be rejected

27. The Prosecution requests the Chamber to withhold the identity and statement of Witness P-0306 until 45 to 60 days prior to his testimony.⁴¹ Such a sweeping request, made under the guise of a regulation 35 request, finds no procedural or legal basis and should be rejected *in limine*. Not only is the Prosecution attempting to exploit regulation 35 in order to re-litigate issues which have already been disposed of,⁴² but it is also attempting to introduce an entirely new request to withhold the identity of Witness P-0306, without, however, making the requisite legal and factual substantiation under rule 81(4) of the Rules.

28. *First*, any exception to the Prosecution’s overriding obligation of full disclosure, as enshrined in article 67(2) of the Statute and rules 76 and 77 of the Rules, may

⁴¹ Request, para. 14.

⁴² See above, paras 2, 14.

only be granted in exceptional circumstances.⁴³ Such a request must be well-founded, based on concrete concerns for a witness' security and safety, and must be balanced with the rights of the accused.⁴⁴ As emphasized by the Trial Chamber in *Kenyatta*, "withholding disclosure beyond the date for final prosecution disclosure [...] must be limited as far as possible in order to ensure full respect for the rights of the Defence".⁴⁵

29. Rule 81(4) allows the Chamber to take steps to ensure the safety of witnesses, "including by authorizing the non-disclosure of their identity prior to the commencement of the trial".⁴⁶ As recalled by the Trial Chamber in the *Kenyatta* case:

(...) according to the consistent jurisprudence of this Court, in order to justify its request for delayed disclosure, the Prosecution must show that: there is an "objectively justifiable risk" to the safety of the person concerned; the risk arises from disclosing the particular information to the accused; that the risk can be overcome by the proposed delayed disclosure; that no lesser restrictive measures are feasible; and that the delayed disclosure is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial. In weighing the danger posed to the witness against the Defence right to timely disclosure, the Chamber may consider the risk that the witnesses will be interfered with or intimidated once their identity is disclosed to the accused. The subjective fear of a witness is of relevance to the Chamber in considering whether an objectively justifiable risk exists but is not, in itself, determinative.⁴⁷

30. By seeking an exception through regulation 35 to the overriding principle of full disclosure by endeavoring to withhold the identity and statement of Witness P-0306 until after the commencement of trial, the Prosecution seeks to effectively

⁴³ *Prosecutor v Kenyatta*, ICC-01/09-02/11-580-Red2, para. 32; ICC-01/04-01/06-3031, para. 10; ICC-01/04-01/17-475, para. 70; *Prosecutor v Ruto and Sang*, Confidential redacted version of 'Decision on first prosecution application for delayed disclosure of witness identities', 4 January 2013, ICC-01/09-01/11-531-Red, para. 25.

⁴⁴ See rules 68(1) and (4), Rules of Procedure and Evidence.

⁴⁵ *Prosecutor v Kenyatta*, Public redacted version of Decision on prosecution application for delayed disclosure of witness identities, 21 December 2012, ICC-01/09-02/11-580-Conf-Exp, 3 February 2017, ICC-01/09-02/11-580-Red2.

⁴⁶ *Ibid*, para. 31.

⁴⁷ *Ibid*, para. 31. See also, *Prosecutor v Ntaganda*, Public redacted version of 'Decision on Prosecution application for delayed disclosure', 2 April 2015, ICC-01/04-02/06-537-Red2, paras 15-16; See *Prosecutor v Ruto and Sang*, Confidential redacted version of 'Decision on first prosecution application for delayed disclosure of witness identities', 4 January 2013, ICC-01/09-01/11-531-Red, para. 28.

circumvent the strenuous legal test applicable for such requests pursuant to rule 81(4) of the Rules and article 68 (1) and (5) of the Statute.⁴⁸

31. Mr Ngaïssona has been in pre-trial detention since January 2018, during which he has been under stringent restrictions on his contacts with the outside world.⁴⁹ Since one year, Mr Ngaïssona has not had any contact with anyone except other detainees and his legal defence team through telephone communications, which he also has not seen since March 2020.⁵⁰ There has been no allegation of witness interference by Mr Ngaïssona. The reported breaches by Mr Ngaïssona of the restrictions regime at the Detention centre, to which the Prosecution does not have access, concerned purely private matters. In its redacted Request, the Prosecution advances no argument as to why disclosure to the Defence would put Witness P-0306 in such a risk that it would warrant the exceptional remedy of withholding his identity and statement until shortly before his testimony.

32. The Prosecution's request to keep Witness P-0306 anonymous and to withhold his evidence from the Defence is highly prejudicial to the Defence. *First*, despite the numerous redactions applied to this section of the Request, stripping it of virtually all meaningful content, it appears that this witness will provide key testimony against Mr Ngaïssona, namely in relation to his "role", and Mr Ngaïssona's individual criminal responsibility.⁵¹ Such evidence is crucial to the Defence's preparation for trial and must be disclosed at the earliest opportunity, and at the latest, by the deadline set by the Chamber of 31 August 2020.

33. As held by the Trial Chamber in *Kenyatta*, the decision whether or not to authorise delayed disclosure of any given witness' identity depends on

⁴⁸ For instance, *Prosecutor v Ntaganda*, Public redacted version of 'Decision on Prosecution application for delayed disclosure', 2 April 2015, ICC-01/04-02/06-537-Red2, paras15-16.

⁴⁹ ICC-01/14-01/18-176-Conf-Red; ICC-01/14-01/18-582-Conf.

⁵⁰ ICC-01/14-01/18-541-Conf.

⁵¹ The Prosecution argues that Witness P-0306 is "expected to testify about: (i) [Mr] NGAISSONA's role, including [REDACTED] from [Mr] NGAISSONA; (ii) the 5 December 2013 attack; and (iii) [REDACTED] with NGAISSONA", Request, para. 10.

“circumstances of each individual witness *and the related impact on the Defence’s preparations for trial*”.⁵² The nature of Witness P-0306’s testimony, namely that he will provide highly specific and detailed testimony incriminating Mr Ngaïssona weighs in favor of immediate disclosure. Such evidence is crucial for the Defence’s investigations, preparation for cross-examinations and for trial generally. The need to be apprised of P-0306’s identity and statement is heightened in the context of the pandemic, where additional foresight must be had and more resources must be spent and directed to accomplishing certain investigative steps. It is therefore vital that the Defence be apprised of this Witness’ evidence at the very latest by the disclosure deadline of 31 August 2020 imposed by the Chamber.

34. *Second*, although the Prosecution’s request for withholding P-0306’s identity and evidence should not be examined by the Chamber in the context of the Request, the Defence nonetheless wishes to observe that the Prosecution appeals to broad generalisations in support of the alleged risk incurred by Witness P-0306, which appear to not be supported by sources, as with Witnesses P-2582, P-2620 and P-2671.⁵³ For instance, there is no corresponding footnote to the claim that the Witness is “within reach of the sympathisers or associates of the Accused”.⁵⁴ Such broad statements fall short of the threshold required for the granting of an exception to the full disclosure rule under rule 81(4) of the Rules.

35. *Third*, the Prosecution’s further arguments to support its claim that the Accused will not be unfairly prejudiced by the delayed disclosure are patently unconvincing for the following two reasons. *Firstly*, the Prosecution argues, that “P-0306 will be the only witness whose identity and statement would be

⁵² *Prosecutor v Kenya*, Public redacted version of Decision on prosecution application for delayed disclosure of witness identities, 21 December 2012, ICC-01/09-02/11-580-Conf-Exp, 3 February 2017, ICC-01/09-02/11-580-Red2, para. 33.

⁵³ See above, para. 22; Request, paras 11-12.

⁵⁴ Request, para. 11.

disclosed after the commencement of the trial”.⁵⁵ This would not, however, in any way mitigate the prejudice caused by the withholding of P-0306’s evidence for a prolonged period of time, especially given the highly incriminating nature of his testimony against Mr Ngaïssona and his knowledge with respect to Mr Ngaïssona’s “role”.⁵⁶ Indeed, a single witness whose anticipated evidence provides specific and detailed information as to Mr Ngaïssona’s role has the potential to change the Defence’s gestalt of the Prosecution’s case, and thereby has a direct impact on defence preparation. *Secondly*, the Prosecution “recognizes the potential impact of delayed disclosure on the Defence’s preparation and is requesting a longer period for delayed disclosure of 45 to 60 days prior to his testimony”.⁵⁷ The Prosecution’s argument that “there is precedent for this type of delayed disclosure”, relying on a single decision in the *Al Hassan* case, is unconvincing and inapposite.⁵⁸ The cited *Al Hassan* decision is clearly distinguishable, first, in that it was made on a Prosecutor’s request for delayed disclosure of witness identities and not a regulation 35 request.⁵⁹ In that case, Chamber X had specifically instructed the Prosecution to file any application seeking authorisation to delay the disclosure of the identity of a witness by a certain deadline, and had established a set of criteria upon which it would evaluate such requests for non-disclosure, relying on articles 43(6), 54(3)(f), 64(2), 3(c) and (6), 67 and 68(1), (4) and (5) of the Statute and Rules 76, 77, 81(4) and 84 of the Rules.⁶⁰ In other words, it did not make its determination on the basis of regulation 35 considerations, i.e. the ‘good cause’ test the Prosecution attempts

⁵⁵ Request, para. 15.

⁵⁶ Request, para. 10.

⁵⁷ Request, para. 15.

⁵⁸ Request, para. 15.

⁵⁹ *Prosecutor v Al Hassan*, Public redacted version of ‘Second Decision on the Prosecution request for delayed disclosure of the identities of Witnesses P-0542, P-0570, and P-0603’, 27 May 2020, ICC-01/12-01/18-794-Red2, para. 19.

⁶⁰ *Prosecutor v Al Hassan*, Public redacted version of ‘Decision on the Prosecution request for delayed disclosure of the identities of Witnesses P-0538, P-0542, P-0553, P-0570, P-0574, and P-0603’, 27 May 2020, ICC-01/12-01/18-741-Red2, para. 18; *Prosecutor v Ntaganda*, Public redacted version of ‘Decision on Prosecution application for delayed disclosure, 2 April 2015, ICC-01/04-02/06-537-Red.

to rely on here. More importantly, upon balancing competing interests and evaluating the prejudice to the right of the accused, Trial Chamber X considered the fact that the witness did not directly implicate the accused and that the substance of her statement was already available to the Defence, despite redactions applied to her identifying information.⁶¹ Such circumstances are not present in the instant case. Indeed, if the Chamber considers the Prosecution's request, the highly particularized information relating to Mr Ngaïssona's role tips the balance in favor of immediate disclosure.⁶² The *Al Hassan* "precedent" undermines, rather than supports, the Prosecution's Request in relation to Witness P-0306.

36. *Thirdly* and similarly, the Prosecution's reliance on the *Ntaganda* decision is inapposite, in that it concerned a request by the Prosecutor for delayed disclosure pursuant to rule 81(4) and article 68(1) and not a regulation 35 request.⁶³ Directly under the paragraph cited by the Prosecution, where the Trial Chamber held that it "may consider the potential for interference and intimidation once disclosure is made to the Defence and to the accused",⁶⁴ the Trial Chamber held that "[f]ull consideration must also be given to *the impact of any delayed disclosure on the Defence's preparation for trial*. Such impact may be assessed by measuring the effect of withholding the identity not just of any single witness but also the cumulative effect where delayed disclosure is requested for a number of witnesses".⁶⁵ The Prosecution chose to ignore such impact on the Defence's preparation for trial.

⁶¹ ICC-01/12-01/18-794-Red2, para. 18.

⁶² See *Prosecutor v Ruto and Sang*, Confidential redacted version of 'Decision on first prosecution application for delayed disclosure of witness identities', 4 January 2013, ICC-01/09-01/11-531-Red, paras 27-28.

⁶³ *Prosecutor v Ntaganda*, Public redacted version of "Prosecution application for delayed disclosure", 16 February 2015, ICC-01/04-02/06-461-Conf-Exp, 17 February 2015, ICC-01/04-02/06-461-Red2, para. 5.

⁶⁴ *Prosecutor v Ntaganda*, Public redacted version of 'Decision on Prosecution application for delayed disclosure, 2 April 2015, ICC-01/04-02/06-537-Red2, para. 17, cited in the Request, para. 13.

⁶⁵ *Prosecutor v Ntaganda*, Public redacted version of 'Decision on Prosecution application for delayed disclosure, 2 April 2015, ICC-01/04-02/06-537-Red2, para. 18.

37. *Fourth*, the Prosecution argues that good cause is shown because withholding P-0306's identity and evidence until 45 to 60 days before his testimony would mean that the length of time between disclosure and the Witness' testimony would be shorter, and the Witness would therefore be "exposed for a shorter period".⁶⁶ The Prosecution's sole reliance on one ICTY decision in the *Bradnin* case is telling. A more thorough reading of the decision shows that the alleged facts were significantly different, namely the Prosecutor had alleged concrete instances of witness interference on the defence team members' part.⁶⁷ Here, the Prosecution can point to no incidents involving the interference with any Prosecution witness.

38. *In sum*, allowing the Prosecution to exploit the regulation 35 regime in order to present a new request to withhold the identity and evidence of a Witness it intends to call live, and whose testimony is crucial to the charges against Mr Ngaïssona, would amount to an egregious violation of Mr Ngaïssona's fair trial rights to full disclosure and to have adequate time and facilities to prepare for trial. Even if the Chamber were to apply, for the sake of argument, the 'good cause' test of regulation 35 – which the Defence strongly opposes – the threshold is clearly not met.

C. The Prosecution's request for an extension of time to disclose transcripts/translations relating to witnesses P-1839 and P-0889, P-0992's statement, and redacted Sango audio interviews of P-0965, P-0458, P-2233 and P-2602

a. Transcripts of P-1839, P-0889 and P-0992

⁶⁶ Request, para. 14.

⁶⁷ However, the Trial Chamber emphasised that only "exceptional circumstances" and "specific evidence of such risk" could justify non-disclosure in relation to particular victims and witnesses, while In that decision, the Trial Chamber stressed that the "right to a fair trial holds so prominently a place in a democratic society that it cannot be sacrificed to expediency", *Prosecutor v Brdanin and Talic*, Case No. IT-99-36-PT, Decision on Motion by Prosecution for Protective Measures, 3 July 2000, paras 23-31.

39. The Prosecution fails to show good cause which would warrant a variance of the 31 August 2020 time limit to disclose the transcribed statements of P-1839, P-0889 and P-0992's statement, by over two months, to 9 November 2020.⁶⁸
40. During the status conference of 9 July 2020, the Single Judge noted that "while the Chamber will therefore take the Prosecution's submissions into consideration, it likes to stress that the ongoing investigations will not be the determinative factor in setting disclosure deadlines and a date to commence the trial."⁶⁹ During the hearing, the Single Judge also recalled the Appeals Chamber jurisprudence establishing that the Prosecution should not continue investigating post-confirmation with a view of collecting new evidence it could reasonably have expected to collect prior to confirmation.⁷⁰ Circumstances in which Chambers have permitted the Prosecution to extend investigations after the confirmation of charges are strictly circumscribed.⁷¹
41. The Prosecution's choice to focus its investigations on gathering new evidence, instead of focusing on its existing case in order and meeting its disclosure deadlines is therefore not a determinative factor for the setting or varying of the disclosure deadlines, and certainly does not amount to good cause pursuant to regulation 35.
42. The Prosecution's argument that the Prosecution's investigative missions were postponed due to Covid-19 is equally unconvincing. Six months have elapsed between the confirmation of charges hearing and the declaration of the Covid-19 pandemic in March 2020. The Prosecution provided no arguments to justify why

⁶⁸ Request, para. 16.

⁶⁹ ICC-01/14-01/18-T-012-ENG ET, page 12.

⁷⁰ ICC-01/14-01/18-T-012-ENG ET, page 12, lines 17-23 ; ICC-01/14-01/18-163, para. 28, relying on *Prosecutor v Mbarushimana*, Appeals Chamber, Judgment on the Appeal of the Prosecutor against the Decision of Pre-Trial Chamber I of 16 December 2011 entitled "Decision on the Confirmation of Charges", 30 May 2012, ICC-01/04-01/10-514, para. 44; *Prosecutor v Kenyatta*, Decision on Defence Application Pursuant to Article 64(4) and Related Requests, 26 April 2013, ICC-01/09-02/11-728, para. 121.

⁷¹ See *Prosecutor v Kenyatta*, Decision on Defence application pursuant to article 64(4) and related requests, 26 April 2013, ICC-01/09-02/11-728, Concurring opinion of Judge Van den Wyngaert, para. 5; See ICC-01/14-01/18-473-Conf, para. 20.

it could not have pursued these investigative efforts and conduct witness interviews before any lockdown and travel measures were imposed. The Prosecution admits that it is *currently* completing its second interview of P-0992 and that it has conducted a second interview with Witness P-0889 only last month, in July 2020,⁷² while offering no explanation as to (i) why these interviews could not have taken place before the pandemic and after the confirmation hearing; (ii) why it was unable to put in place alternatives to respond to the limitations caused by the pandemic in the intervening six months since the pandemic was declared in March; and (iii) what efforts or steps it concretely took to “ensure that investigations are completed in a sufficiently timely manner to enable any transcriptions and translations to be prepared in advance of the disclosure deadline”.⁷³

43. In addition, the delayed disclosure of the transcriptions of the Witness statements of P-1839, P-0889 and P-0992 is highly prejudicial to the Defence. These three witnesses are subject to article 55, meaning that they are at risk of self-incrimination and provide incriminating insider information in relation to the accused. In particular, P-0889 provides insider information with respect to Mr Ngaïssona.⁷⁴ It is therefore critical that the Defence be apprised of the Witness’ second statements and any corresponding annexes, at the earliest opportunity and at the latest, by the 31 August deadline, in order to have sufficient time to analyse and compare statements, prepare investigations deriving from witness testimony, and to prepare for trial, including cross-examination.

44. Moreover, it is regrettable that in seeking an extension of time to disclose the transcriptions of interviews for Witnesses P-1839, P-0889 and P-0992 at such a

⁷² ICC-01/14-01/18-590-US, para. 30.

⁷³ Request, para. 16.

⁷⁴ CAR-OTP-2027-2290-R01.

late stage, the Prosecution assumed that the Chamber would grant such an extension of time.⁷⁵ Such an approach defeats the purpose of setting deadlines in order to ensure the respect for fairness and expeditiousness and favors an approach whereby deadlines are perceived as a suggestive rather than firm.

45. If the Prosecution is unable to comply with the deadlines set by the Chamber by 31 August 2020, it should not be permitted to rely on this evidence at trial seeing as it would amount to a violation to the Chamber's explicit orders.

b. Delayed disclosure of the Sango transcripts of P-0965, P-0458, P-2233 and P-2602

46. The Defence joins the Defence for Mr Yekatom's submission in that it does not oppose the Prosecution's request, insofar as the Defence is in possession of the transcripts of P-0965, P-2233 and P-2602 and P-0458's interviews as interpreted or translated.⁷⁶ However, the Prosecution should be ordered to disclose the original Sango portions of the witness statements as soon as possible and on a rolling basis, and by 9 November 2020, at the latest.

c. The Prosecution's request for a variation of the time limit to disclose witness materials relating to P-1143, P-1172, P-2377, P-0992, P-1558, and P-2587 that are subject to a request for non-Standard redactions under rule 81(2) does not meet the good cause test

47. The Prosecution's request to withhold the witness materials of Witnesses P-1143, P-1172, P-2377, P-0992, P-1558, and P-2587 until the Chamber renders its decision on the Prosecution's request does not meet the good cause test.⁷⁷ First, through this request, the Prosecution attempts to bypass its disclosure obligations. Disclosure is not a "all of nothing" obligation. The Prosecution should, at a minimum, disclose the witness statements it is currently withholding from the

⁷⁵ Request, para. 16.

⁷⁶ ICC-01/14-01/18-629-Conf, para. 24.

⁷⁷ Request, para. 19.

Defence with its proposed non-standard redactions, and either maintain or lift them accordingly, when the Chamber determines the Prosecution's request for non-standard redactions.⁷⁸ *Second*, this particular issue was ripe at the time the Prosecution sought the application of non-standard redactions. Thus, no good cause exists and the Prosecution's request should therefore be rejected.

VI. RELIEF SOUGHT

48. The Defence *respectfully* requests the Chamber to:

- **REJECT** the Prosecution's Request to delay disclosure with respect to the identities and materials relating to Witnesses P-2582, P-2620, P-2671, P-0306, P-1839, P-0889, P-0992, P-1143, P-1172, P-2377, P-0992, P-1558 and P-2587.

Respectfully submitted,



Mr Knoops, Lead Counsel for Patrice-Edouard Ngaïssona

Dated this 28 August 2020,

At The Hague, the Netherlands

⁷⁸ ICC-01/14-01/18-609-Conf-Red; ICC-01/14-01/18-625-Conf.