

**Cour
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**International
Criminal
Court**

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TRIAL CHAMBER V

Before: Judge Beti Hohler , Presiding Judge
Judge Joanna Korner
Judge Keebong Paek

SITUATION IN THE CENTRAL AFRICAN REPUBLIC II

***IN THE CASE OF THE PROSECUTOR v. ALFRED YEKATOM AND
PATRICE-EDOUARD NGAÏSSONA***

Public Document

Public redacted version of 'Defence Response to the "Confidential Redacted Version of 'Prosecution's Request pursuant to Rule 81(4) for delayed disclosure of the identity and materials related to Prosecution Witness P-0306"', ICC-01/14-01/18-680-Conf, dated 12 October 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. Withholding the identity and significant portions of a witness' testimony, particularly at the trial stage, is the most severe form of non-disclosure. Such an exception to the overriding principle of full disclosure may only be allowed in the most exceptional circumstances, where a risk to a witness' security, based on concrete factual sources, would arise from disclosure of the information to the Defence specifically. The threshold for meeting the legal test for non-disclosure pursuant to rule 81(4) of the Rules of Procedure and Evidence ("Rules") is particularly heightened, moreover, at the trial stage of the proceedings and where the witness is expected to provide alleged key incriminating evidence, given the potential prejudice to the accused.
2. Against this legal backdrop, on 29 September 2020, the Prosecution filed the "Confidential Redacted Version of 'Prosecution's Request pursuant to Rule 81(4) for delayed disclosure of the identity and materials related to Prosecution Witness P-0306'" ("Request").¹ In its Request, the Prosecution seeks the Chamber's authorisation to withhold the identity and witness materials related to Witness P-0306 from the Defence until 45-60 days prior to his testimony to protect the Witness' safety, in accordance with article 68 of the Rome Statute ("Statute"). According to the Prosecution, Witness P-0306 is a [REDACTED] Anti-Balaka [REDACTED] and insider witness who is allegedly expected to provide key "distinctive" and "detailed" incriminating evidence against Mr Ngaïssona, including with respect to his alleged criminal responsibility.²
3. *First*, the Prosecution's Request is excessively redacted and does not appear to meet the requirements of regulation 23(1)(d) of the Regulations of the Court ("Regulations"). *Second*, despite the redactions, the Defence is able to submit on the basis of the information before it, that the Request does not appear to meet

¹ ICC-01/14-01/18-668-Conf-Red.

² ICC-01/14-01/18-628-Conf-Red, para. 11; ICC-01/14-01/18-642-Conf-AnxA, page 7.

the requirements for restricting disclosure pursuant to rule 81(4) of the Rules, namely showing the existence of an “objectively justifiable risk”. *Third*, the Prosecution has failed to show that its Request is proportional and not unduly prejudicial to the rights of the Defence. The withholding of Witness P-0306’s identity and other information until shortly before he is scheduled to testify deprives the Defence of the ability to adequately investigate and prepare for trial and is not justified in the circumstances.

II. CONFIDENTIALITY

4. The present response is filed confidentially pursuant to regulation 23bis(2) of the Regulations, as it responds to a document of the same classification.³

III. RELEVANT PROCEDURAL HISTORY

5. On 16 July 2020, the Chamber issued a decision setting the beginning trial date to 9 February 2021 and ordering the Prosecution to disclose all evidence relating to the witnesses in the Prosecution’s Preliminary Witness list – including witnesses’ identities – by 31 August 2020.⁴
6. On 24 August 2020, the Prosecution filed a redacted version of a request for an extension of time pursuant to regulation 35 to disclose several witness-related materials, including the identity and materials relating to Witness P-0306.⁵ On the same day, the Chamber shortened the deadline for responding to the request.⁶
7. On 28 August, the Defence filed its response to the Prosecution’s regulation 35 request, arguing *inter alia* that the Prosecution incorrectly relied on regulation 35 to request the withholding of the identity and materials relating to Witness

³ Request, para. 2.

⁴ ICC-01/14-01/18-589.

⁵ ICC-01/14-01/18-628-Conf-Red.

⁶ Email from Chamber to parties and participants, 24 August 2020, at 12:32.

P-0306, as this should have been the subject of a request pursuant to rule 81(4) of the Rules.⁷

8. On 31 August 2020, the Chamber issues its decision by email, with reasons to follow, ordering the Prosecution file a rule 81(4) request for delaying the disclosure of Witness P-0306's identity and materials by 29 September 2020 and that a redacted version of his statement be disclosed to the Defence by 7 September 2020.⁸ On 3 September 2020, following *inter partes* exchanges, and at the Prosecution's request, the Chamber granted a second extension of time for the Prosecution to disclose the redacted versions of Witness P-0306's statements to the Defence.⁹
9. On 11 September 2020, the Chamber issued its full reasons for its decision of 31 August 2020, *inter alia* ordering the Prosecution to file any request for delayed disclosure relating to Witness P-0306 pursuant to rule 81(4) of the Rules, by 29 September 2020.¹⁰
10. On 29 September, the Prosecution filed its Request *ex parte*. A confidential redacted version was filed contemporaneously.
11. On 6 October 2020, the Defence for Mr Yekatom filed its response to the Prosecution's Request, wherein it "defers and supports" the position which would be taken by the Defence, given P-0306's evidence "appears to relate principally to Mr Ngaïssona".¹¹

IV. APPLICABLE LAW

12. Article 67(1)(b) of the Statute provides:

⁷ ICC-01/14-01/18- 638-Conf.

⁸ Email from Trial Chamber V to parties and participants, 31 August 2020, 14:58.

⁹ Email from the Trial Chamber V to parties and participants, 3 September 2020, 12:50.

¹⁰ ICC-01/14-01/18-648-Conf-Red.

¹¹ ICC-01/11-01/18-674-Conf, para. 14.

1. In the determination of any charge, the accused shall be entitled to a public hearing, having regard to the provisions of this Statute, to a fair hearing conducted impartially, and to the following minimum guarantees, in full equality:

(...) (b) To have adequate time and facilities for the preparation of the defence and to communicate freely with counsel of the accused's choosing in confidence;

13. Article 68(1) of the Statute provides:

1. The Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. (...) These measures shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

14. Rule 76(1) of the Rules provides:

1. The Prosecutor shall provide the defence with the names of witnesses whom the Prosecutor intends to call to testify and copies of any prior statements made by those witnesses. This shall be done sufficiently in advance to enable the adequate preparation of the defence.

15. Rule 81(4) of the Rules provides an exception to the rule of full disclosure :

The Chamber dealing with the matter shall, on its own motion or at the request of the Prosecutor, the accused or any State, take the necessary steps to ensure the confidentiality of information, in accordance with articles 54, 72 and 93, and, in accordance with article 68, to protect the safety of witnesses and victims and members of their families, including by authorizing the non-disclosure of their identity prior to the commencement of the trial.

V. SUBMISSIONS

16. Withholding the identity of a witness is the most severe form of non-disclosure and “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”.¹² Exceptions to the rule of full disclosure, which is a

¹² *Prosecutor v. Muthaura and Kenyatta*, Public redacted version of Decision on prosecution application for delayed disclosure of witness identities, 21 December 2012, ICC-01/09-02/11-580-Red2, 3 February 2017, para 33.; *Prosecutor v. Lubanga*, Decision on the Prosecutor's request for non-disclosure in relation to document "OTP/DRC/COD-

component of fairness of the proceedings and the principle of equality of arms, may only be granted exceptionally.¹³ As recently recalled by the Single Judge, “‘the overriding principle is that full disclosure should be made’ and non-disclosure is the exception.”¹⁴ It is for this reason that the ICC Appeals Chamber has formulated a strenuous legal test for restricting disclosure to the Defence pursuant to rule 81(4) of the Rules, which must balance the need to safeguard the safety of witnesses, as protected in article 68 of the Statute, with the rights of the accused.¹⁵ As provided in the jurisprudence, in order to justify restrictions on disclosure, the Prosecution must show:

“(i) the existence of an ‘objectively justifiable’ risk to the safety of the person concerned (would disclosure of the particular information to the *Defence* endanger the person’s security?);

(ii) the necessity of the measure (would the delayed disclosure of the information eliminate or reduce that risk? Is the measure the least restrictive possible?); and that

190/JCCD-pt”, ICC-01/04-01/06-3031, 27 May 2013, para. 10; *Prosecutor v. Katanga*, “Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I entitled ‘First Decision on the Prosecution Request for Authorisation to Redact Witness Statements’”, 13 May 2008, ICC-01/04-01/07-475, para 70; *Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Public Redacted version of ‘Decision on Prosecution requests on redactions’, ICC-02/11-01/15-68-Corr-Red2, 21 July 2016, para. 16; *Prosecutor v. Ntaganda*, Redacted First Decision on the Prosecutor’s Requests for Redactions and Other Related Requests, ICC-01/04-01/06-117-Red3, 3 July 2014, para. 3;

¹³ *Prosecutor v. Muthaura and Kenyatta*, Public redacted version of Decision on prosecution application for delayed disclosure of witness identities, 21 December 2012, ICC-01/09-02/11-580-Red2, paras 32-33; *Prosecutor v. Lubanga*, Decision on the Prosecutor’s request for non-disclosure in relation to document “OTP/DRC/COD-190-JCCD-pt”, ICC-01/04-01/06-3031, 27 May 2013, para. 10, para. 70; *Prosecutor v. Ruto and Sang*, Confidential redacted version of ‘Decision on first prosecution application for delayed disclosure of witness identities’, ICC-01/09-01/11-531-Red, 4 January 2013, para. 2.

¹⁴ See also ICC-01/14-01/18-648-Conf-Red, paras 46-47; It further held that “[i]nformation withheld from the Defence must remain under review and, should circumstances change, must be disclosed, ICC-01/14-01/18-670-Conf-Red, para. 10, relying on the Appeals Chamber Judgments in *Prosecutor v. Katanga*, Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I entitled “First Decision on the Prosecution Request for Authorisation to Redact Witness Statements”, ICC-01/04-01/07-475, 13 May 2008, paras 61, 70 and Judgment on the appeal of Mr Germain Katanga against the decision of Pre-Trial Chamber I entitled “First Decision on the Prosecution Request for Authorisation to Redact Witness Statements”, ICC-01/04-01/07-476, 13 May 2008, para. 64.

¹⁵ *Prosecutor v. Lubanga*, Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled “First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81”, ICC-01/04-01/06-773, 14 December 2006, para. 21; *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’, ICC-01/12-01/18-741-Red2, 27 May 2020, para. 19.

(iii) that the measure is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.”¹⁶

A. Preliminary remarks in relation to the excessive redactions and the insufficient legal and factual substantiation of the Request

17. *First*, the Prosecution’s Request is excessively redacted, stripping the Defence of its ability to offer meaningful and specific observations to the Prosecution’s Request. Rather than limiting redactions to sensitive and confidential information, the Prosecution has redacted entire paragraphs and full sentences of its Request, which is clearly excessive. For instance, paragraphs 8-11 are redacted in their entirety whereas paragraphs 5-16 are almost entirely redacted, jointly consisting of the near-entirety of the Prosecution’s Request. The Prosecution’s approach to redactions is clearly disproportionate and highly prejudicial to the Defence. It also appears to run contrary to the Chamber’s specific instruction to limit *ex parte* submissions.¹⁷ It is therefore requested that the Chamber order the Prosecution to file a lesser redacted version of its Request to allow the Defence to be apprised of the portions which do not directly reveal sensitive information.

18. *Second*, the Request lacks the qualities of a legally and factually substantiated request, contrary to the requirements of regulation 23(1)(d) of the Regulations which provides that “any document filed with the Court shall, as far as practicable, state: (...) “[a]ll relevant legal and factual issues, including details of the articles, rules, regulations or other applicable law relied upon”.¹⁸ For

¹⁶ ICC-01/14-01/18-273-Conf, para. 26; *Prosecutor v. Al Hassan*, Public redacted version of “Decision on Prosecution request relating to protective measures for P-0542”, ICC-01/12-01/18-765-Red2, 27 May 2020, para. 22, relying on *Prosecutor v. Ntaganda*, Decision on Delayed Disclosure, ICC-01/04-02/06-537-Red2, para. 16; *Prosecutor v. Ruto and Sang*, Decision on Delayed Disclosure, ICC-01/09-01/11-531-Red, para. 28; *Prosecutor v. Muthaura and Kenyatta*, Decision on Delayed Disclosure, ICC-01/09-02/11-580-Red2, para. 31; *Prosecutor v. Katanga and Ngudjolo*, Decision on Rolling Disclosure, ICC-01/04-01/07-1179-tENG, para. 34; *Prosecutor v. Al Hassan*, ICC-01/12-01/18-741-Red2, para. 22; *Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Public redacted version of “Decision on Prosecution requests on redactions”, ICC-02/11-01/15-68-Corr-Red2, 21 July 2016, para. 17.

¹⁷ ICC-01/14-01/18-T-012-ENG ET WT, page 7, lines 7-9.

¹⁸ See also regulation 22 of the Regulations of the Court which specifies that the term “document” shall include a motion or request; See *Prosecutor v. Bemba*, Public Redacted Version of “Decision on in-court protective measures for Witness 45, ICC-01/05-01/08-2063-Red, 29 June 2016, para. 21.

instance, the Prosecution does not rely on the Court's jurisprudence with respect to the applicable legal criteria for delayed disclosure. It merely relies on one single decision in the *Al Hassan* case to support its proposed timeline for delayed disclosure.¹⁹ Moreover, the Prosecution does not appear to rely on almost any sources to support its factual allegations.²⁰

19. It is recalled that in its previous request to delay disclosure of Witness P-0306's identity and evidence, the Prosecution relied on broad generalisations, while failing to cite sources.²¹ In its Decision dated 11 September 2020, the Chamber held that the Prosecution's request relating to Witness P-0306 lacked "the necessary legal and factual basis to allow for a substantive examination by the Chamber".²² It further observed that such substantiation was "especially significant since the Prosecution is seeking to disclose the witness's identity and statement after the commencement of trial" and that "requesting such an exceptional measure requires the submission of a *detailed and thorough* request under the appropriate legal basis, namely Rule 81(4) of the Rules".²³ These deficiencies found by the Chamber do not appear to have been remedied in the Request, which does not appear to comply with its obligation to show that the "available information [indicates] the existence of circumstances that give rise to such a risk".²⁴

B. The Prosecution has failed to meet the requirement that the alleged risk must be "objectively justifiable" and that it must arise specifically from disclosure to the Defence

20. Pursuant to the first prong of the legal test for restricting disclosure to the Defence, the Prosecution must show that disclosure of the Witness P-0306's

¹⁹ Request, paragraph 17, footnote 8.

²⁰ There are only three apparent factual sources, See Request, paragraphs 6, 10 and 11, footnotes 3, 4 and 5.

²¹ ICC-01/14-01/18-638-Conf, para. 34.

²² ICC-01/14-01/18-648-Conf-Red, para. 46.

²³ Emphasis added, ICC-01/14-01/18-648-Conf-Red, para. 46.

²⁴ *Prosecutor v. Ongwen*, Decision on Prosecution Request under Paragraph 9 of Decision 1207, ICC-02/04-01/15-1234, 20 April 2018, para. 7.

identity and evidence posed an “objectively justifiable risk” to the safety of Witness P-0306. Additionally, it must show that alleged risk arises from disclosure of the information to the Defence specifically, as opposed to the public at large.²⁵ Even though the Defence has been deprived of a significant amount of information as a result of excessive redactions in the Request, it submits that on the basis of the information before it there is no objectively justifiable risk to the security of Witness P-0306.

21. *First*, the alleged risk to his security of Witness P-0306 appears subjective rather than objective. The Prosecution argues that Witness P-0306 “has expressed security concerns regarding his cooperation with the Prosecution”.²⁶ A mere subjective risk is not determinative and does not, in itself, meet the legal requirement that the risk be “objectively justifiable”.²⁷ Moreover, whether the “witness him/herself has undertaken any activity to endanger his/her personal safety” is one of the factors which must be taken into consideration when evaluating the alleged danger.²⁸ It may be inferred from Witness P-0306’s statement that his perceived security risk may be linked to his former position as a [REDACTED]²⁹ and his own previous actions which apparently gave him, from his own account, [REDACTED],³⁰ rather than stemming from his cooperation with the Prosecution and from disclosure of his identity and evidence to the Defence. In the Request, the Prosecution concedes that it “has

²⁵ *Prosecutor v. Katanga*, “Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I entitled ‘First Decision on the Prosecution Request for Authorisation to Redact Witness Statements’”, 13 May 2008, ICC-01/04-01/07-475, para. 71; *Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Public Redacted version of “Decision on Prosecution requests on redactions”, ICC-02/11-01/15-68-Corr-Red2, 21 July 2015, para. 17; *Prosecutor v. Ongwen*, Decision on the Prosecution Amended Request for Non-Standard Redactions, ICC-02/04-01/15-1750, 2 October 2020, para. 12.

²⁶ Request, para. 7; ICC-01/14-01/18-628-Conf-red, para. 11; See ICC-01/14-01/18-648-Conf-Red, para. 44.

²⁷ *Prosecutor v. Katanga*, “Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I entitled ‘First Decision on the Prosecution Request for Authorisation to Redact Witness Statements’”, 13 May 2008, ICC-01/04-01/07-475, para. 71; *Prosecutor v. Muthaura and Kenyatta*, Public redacted version of Decision on prosecution application for delayed disclosure of witness identities, 21 December 2012, ICC-01/09-02/11-580-Red2, 3 February 2017, para. 31.

²⁸ ICC-01/14-01/18-273-Conf-red, para. 27, *Prosecutor v. Ntaganda*, Redacted First Decision on the Prosecutor’s Requests for Redactions and Other Related Requests, ICC-01/04-02/06-117-Red3, 3 July 2014, para. 34

²⁹ CAR-OTP-2118-0552-R01, p. 0562, lines 297-305; ICC-01/14-01/18-642-Conf-AnxA, page 7.

³⁰ [REDACTED].

not been able to [REDACTED]" and that it is still looking into "these matters".³¹ This only further suggests that the risk to Witness P-0306's safety is subjective and that it does not appear to arise from Witness P-0306's cooperation with the Prosecution, but rather, from extraneous considerations. These factors indicate the absence of an "objectively justifiable risk".

22. *Second*, the alleged risk does not arise from disclosure to the Defence specifically, as opposed to the public at large.³² As held by the Appeals Chamber, in its determination, the Chamber should consider *inter alia* "whether the danger could be overcome by ruling that the information should be kept confidential between the parties", particularly whether "there are factors indicating that [the accused] may pass on the information to others or otherwise put an individual at risk by his or her actions".³³

23. Although the Prosecution does not appear to distinguish, as it should have, the risk of disclosure of sensitive information relating to Witness P-0306 to the Defence specifically, it is clear that no such risk exists. Defence team members are held to the highest standards of integrity, confidentiality and ethics by virtue of their adherence to the ICC Code of Conduct. Additionally, several team members are bound by their respective legal ethics codes by virtue of their membership in various bar associations.³⁴ Also, every Defence team member, including interns and visiting professionals, are bound to respect utmost confidentiality by virtue of their contractual relationships within the Defence team and with the Court, which includes strict confidentiality clauses that continue to apply after their engagement with the team. The non-observance of

³¹ Request, para. 12.

³² *Prosecutor v. Katanga*, Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I entitled "First Decision on the Prosecution Request for Authorisation to Redact Witness Statements", ICC-01/04-01/07-475, 13 May 2008, para 71.

³³ *Ibid.*

³⁴ ICC Code of Professional Conduct for Counsel, Article 8(1) provides that "counsel shall respect and actively exercise all care to ensure respect for professional secrecy and the confidentiality of information in accordance with the Statute, the Rules of Procedure and Evidence and the Regulations of the Court."; see also Article 2.3.2 of *the Code de déontologie des avocats de l'Union européenne*.

those duties could lead to its members being disbarred and/or be held in contempt of Court. Thus, the risk stemming from disclosure of information relating to Witness P-0306 is non-existent.

24. Additionally, the alleged risk clearly does not arise from disclosure to Mr Ngaïssona. Among other factors eliminating that risk are: (i) Mr Ngaïssona has not discussed any Prosecution evidence or divulged any case-related information to any of his non-privileged contacts and it was not shown that he would be inclined to do so in the future;³⁵ (ii) Mr Ngaïssona is under a strict active monitoring regime, which has been in place since his transfer to the Detention Centre in January 2019 and will likely continue to apply for the foreseeable future;³⁶ (iii) at all times Mr Ngaïssona is prohibited from discussing the case, including witnesses, with anyone outside of his legal team.³⁷ If Mr Ngaïssona were to breach this rule, his communication would be immediately interrupted and the incident would be reported to the Chamber.³⁸ There are no factors indicating that Mr Ngaïssona “may pass on the information to others or otherwise put an individual at risk by [his] actions”.³⁹ The Prosecution appears, however, to completely ignore these considerations demonstrating that Mr Ngaïssona is not in a position to disclose confidential information or to interfere with witnesses.

25. There is therefore no factual basis to conclude that any alleged risk to the safety of Witness P-0306 would arise out of the disclosure of his identity and related

³⁵ After incidents took place during Mr Ngaïssona’s contacts with the outside world, the Prosecutor requested the Pre-Trial Chamber to “direct the Registry to release the Recorded Conversations to the Prosecution where their possible relevance to a breach of articles 68 or 70 cannot be excluded”, ICC-01/14-01/18-446-Conf-Exp, para 10. The Chamber refused the Prosecutor’s request (Pre-Trial Chamber II’s e-mail to Counsel of 11 March 2020, at 11:59 am). This confirms that the incidents did not give rise to any risk to the Prosecution’s witnesses or investigations.

³⁶ In its last Regulation 101 Decision, the Chamber held that it will review the necessity of continued restrictions on Mr Ngaïssona’s contacts every six months, unless circumstances change: ICC-01/14-01/18-672-Conf, paras 25-26.

³⁷ ICC-01/14-01/18-484-Conf-Exp, para. 15 ; ICC-01/14-01/18-582-Conf, para. 17 ; ICC-01/14-01/18-672-Conf, para. 24.

³⁸ ICC-01/14-01/18-484-Conf-Exp, para. 15.

³⁹ *Prosecutor v. Katanga*, Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I entitled “First Decision on the Prosecution Request for Authorisation to Redact Witness Statements”, ICC-01/04-01/07-475, 13 May 2008, para. 71.

evidence to the Defence or to Mr Ngaïssona specifically.⁴⁰ Additionally, as noted by the Chamber in its “Decision on the Prosecution Request to Vary the Time Limit for Disclosure of Evidence related to Witnesses on the Preliminary Witness List” of 11 September 2020, the Prosecution had insufficiently substantiated the alleged “objectively justifiable” risk arising from disclosure to the Defence, both legally and factually.⁴¹ These shortcomings do not appear to have been overcome in the Prosecution’s renewed Request.

26. *Third*, should the Chamber find that the Prosecution has demonstrated to the requisite threshold the existence of an “objectively justifiable” risk, non-disclosure of Witness P-0306’s identity and related materials would not “eliminate, or at least, reduce such a risk”.⁴² The Defence is already in possession, albeit in redacted form, of Witness P-0306’s statement.⁴³ The Prosecution will be inevitably obliged to disclose to the remaining identifying information to the Defence well in advance of the Witness’ in-court testimony. Withholding Witness P-0306’s identity and his remaining evidence, at this stage, would therefore not eliminate or reduce any alleged risk stemming from disclosure to the Defence. As further developed below, the prejudice to Mr Ngaïssona and to the Defence’s investigations and preparation for trial significantly outweighs the necessity of withholding Witness P-0306’s identity and evidence.

C. Delayed disclosure of the identity and related materials of Witness P-0306 would cause undue prejudice to the Defence

27. The withholding of Witness P-0306's identity and witness material would be unduly prejudicial to or inconsistent with the rights of Mr Ngaïssona and to his

⁴⁰ *Ibid*, para. 60.

⁴¹ ICC-01/14-01/18-648-Conf-Red, paras 45-46.

⁴² *Prosecutor v. Katanga*, Sixth Decision on the Prosecution Request for Authorisation to Redact the Interviews Transcripts of Witness 238, ICC-01/04-01/07-425, 21 April 2008, para. 5.

right to a fair and impartial trial.⁴⁴ *First*, given the nature of Witness P-0306's expected testimony, who is a key insider expected to provide alleged "distinctive" and "detailed" incriminating evidence against Mr Ngaïssona, including with respect to his alleged criminal responsibility, the non-disclosure of his identity and related materials would be unduly prejudicial to the Defence.⁴⁵ *Second*, in light of the current stage of the proceedings, the withholding of Witness P-0306's identity and substantive information in his statement until shortly before his testimony would be particularly prejudicial to the Defence, as it would hamper its ability to effectively challenge Witness P-0306's allegations at trial. *Third*, the deadline proposed by the Prosecution, namely disclosure 45-60 days prior to Witness P-0306's testimony, will not provide the Defence with sufficient time to prepare. *Fourth*, the provision of a redacted version of Witness P-0306's statement in no way diminishes the prejudice caused to the Defence, given that, in the redacted version of Witness P-0306's statement provided by the Prosecution, substantive testimony which goes beyond merely identifying information has been redacted, hampering the Defence's ability to start preparing and conducting investigations.

28. *First*, Witness P-0306 is a former Anti-Balaka [REDACTED], who is expected to testify about, *inter alia*, "[Mr] Ngaïssona's role prior, during and after the attack on Bangui, including regarding the coordination of the attack" and Mr Ngaïssona's "co-ordination of the Anti-Balaka, and the orders and missions he gave [REDACTED]." ⁴⁶ The fact that Witness P-0306 would be the only witness from 145 fact witnesses whose identity and statement would be disclosed after the commencement of trial⁴⁷ does not diminish the prejudice caused to Mr

⁴⁴ *Prosecutor v. Lubanga*, Judgment on the appeal of Mr Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled "First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81", 14 December 2006, ICC-01/04-01/06-773, ICC-01/04-01/06-773, para. 34; *Prosecutor v. Gbagbo and Blé Goudé*, Public redacted version of 'Decision on Prosecution requests on redactions', ICC-02/11-01/15-68-Corr-Red2, 21 July 2015, para. 17.

⁴⁵ ICC-01/14-01/18-628-Conf-Red, para. 11; ICC-01/14-01/18-642-Conf-AnxA, page 7.

⁴⁶ *Ibid.*

⁴⁷ Request, para. 17.

Ngaïssona. Prejudice cannot be assessed artificially, by merely counting the number of withheld witnesses, but it must rather be assessed by examining the substance of the testimonies of witnesses whose identities the Prosecution seeks to withhold. The nature of a witness' statement and its relevance to the Defence is a significant factor in assessing whether non-disclosure to the Defence is warranted.⁴⁸ The Prosecution's reliance on the Al Hassan Trial Chamber X decision is inapposite.⁴⁹ While relying on a decision in the *Al Hassan* case to show that "other Chambers have granted similar measures",⁵⁰ the Prosecution fails to acknowledge that Trial Chamber X granted the withholding of two witnesses' identities up to 45 days prior to their testimony because these witnesses did not directly implicate Mr Al Hassan in the commission of crimes, which reduced the potential prejudice to the Defence.⁵¹ On the contrary, in the case of a crime-based witness who provided some evidence on the role of Mr Al Hassan, which had been partly redacted from the Defence because it was considered to qualify as identifying information, Trial Chamber X held that withholding the identity of such witness past the commencement of trial would have disproportionately affected the Defence.⁵² In the case at hand, Witness P-0306 allegedly largely and directly implicates Mr Ngaïssona in the commission of crimes. Hence, the withholding of his identity and witness material after commencement of trial would cause undue prejudice to the Defence.

⁴⁸ The Appeals Chamber in Katanga held that *relevance of the information to the Defence* was an important factor to necessarily be considered when assessing whether the interests of a witness potentially at risk outweighed the interests of the Defence. *Prosecutor v. Katanga*, Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I entitled "First Decision on the Prosecution Request for Authorisation to Redact Witness Statements", ICC-01/04-01/07-475, 13 May 2008, para. 72. Similarly, see *Prosecutor v. Ntaganda*, Decision on Prosecution application for authorisation to provide a summary of Witness P-0040's statement and to apply redactions to the statement's annexes, ICC-01/14-02/06-550-Red, 08 April 2015, para. 14, where the Trial Chamber found that the non-disclosure of a witness' identifying information would not unduly prejudice the Defence because the Prosecution did not intend to rely on that witness at trial.

⁴⁹ Request, para. 17.

⁵⁰ Ibid.

⁵¹ *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, paras 18-19, 25-26.

⁵² Ibid, paras 30-31.

29. *Second*, the stage of the current proceedings is also a factor to be taken into account when determining whether the requested measures will cause undue prejudice to the Defence.⁵³ As held by the Appeals Chamber, “it may be permissible to withhold the disclosure of certain information from the Defence prior to the hearing to confirm the charges that could not be withheld prior to trial.”⁵⁴ Contrary to the Pre-Trial stage, where the legal test is that of “substantial grounds to believe”, the purpose of the current stage of the proceedings is to establish Mr Ngaïssona's guilt or innocence “beyond reasonable doubt”.⁵⁵ Hence, the Defence should be provided with the opportunity to effectively challenge the totality of the Prosecution's evidence, especially the evidence which is allegedly particularly incriminating towards Mr Ngaïssona.

30. *Third*, the disclosure of Witness P-0306's identity and related material 45-60 days prior to *testimony* would not allow the Defence sufficient time to investigate Witness P-0306's allegations and credibility, and to effectively prepare for cross-examination at trial. In addition to investigations in CAR requiring considerable prior planning, the Defence is facing difficulties in conducting missions outside of Bangui in light of current travel restrictions due to the Covid-19 pandemic. Only those missions that are deemed “essential” by the Registry are allowed, and a request to conduct said missions must be submitted to the Registry at the very least 30 days in advance.⁵⁶ Missions often require subsequent missions in order to follow up on previously identified leads. Hence, even if the Defence were to be provided with Witness P-0306's identity and statement 60 days prior

⁵³ During the Pre-Trial stage of the current proceedings, the Pre-Trial Chamber considered inter alia the limited purpose of the Confirmation proceedings when allowing the non-disclosure of witnesses' identities, see ICC-01/14-01/18-273-Conf-Red, paras 29-30; ICC-01/14-01/18-261-Red2, paras 28-29. When ordering the Prosecution to submit a request pursuant to Rule 81(4) in order to seek the withholding of Witness P-0306's identity, the Trial Chamber gave particular emphasis to the fact that the Prosecutor sought to delay the disclosure of Witness P-0306's identity and statement until after the commencement of trial. ICC-01/14-01/18-648-Conf-Red, para. 46.

⁵⁴ *Prosecutor v. Katanga*, Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I entitled “First Decision on the Prosecution Request for Authorisation to Redact Witness Statements”, ICC-01/04-01/07-475, 13 May 2008, para. 68.

⁵⁵ *Ibid*; *Prosecutor v. Ntaganda*, Redacted First Decision on the Prosecutor's Requests for Redactions and Other Related Requests, ICC-01/04-02/06-117-Red3, 03 July 2014, para. 18. See and compare articles 61(7) and 66(3) of the Rome Statute.

⁵⁶ See Joint Threat Assessment Group (JTAG) Recommendations, updated on 1 October 2020.

to testimony, the Defence would be deprived of the opportunity to conduct follow-up missions and effectively follow investigative leads. Moreover, should the Defence require the assistance of national authorities in order to gather relevant documents concerning Witness P-0306's testimony, 60 days would not afford it sufficient time to request, examine and eventually conduct follow-up investigations on the content of said documents. At a time when the limited Defence's resources will be fully engaged in the ongoing trial, it would be unfeasible to expect the Defence to effectively investigate a witness's evidence 60 days prior to his testimony, especially when this witness is a [REDACTED] insider, who provides, as the Prosecution acknowledges, "distinctive" and "detailed" testimony on Mr Ngaïssona's alleged responsibility, relating to various episodes and incidents, including the 5 December attack, spanning over several months.⁵⁷ Moreover, the Prosecution intends to call Witness P-0306 at trial pursuant to rule 68(3) of the Rules.⁵⁸ Hence, the Defence would need to have access to the substance of P-0306's statement sufficiently in advance in order to respond to the Prosecution's rule 68(3) request which is to be filed, at the latest, 45 days prior to testimony,⁵⁹ in addition to preparing for his cross-examination, which is expected to last four hours⁶⁰ and which will require significant preparations.

31. Moreover, Witness P-0306's testimony cannot be viewed in isolation but rather, must be examined in the context of other witness testimonies, allowing the Defence to tailor its strategy and questioning of witnesses on the totality of the evidence. Witness P-0306 appears to refer to a variety of incidents, both in Bangui and in the provinces, and to mention a number of high-profile Anti-Balaka members, many of which are Prosecution witnesses. Hence, Witness P-0306's testimony must be compared to other testimonies on the same events and

⁵⁷ ICC-01/14-01/18-628-Conf-Red, para. 11; ICC-01/14-01/18-642-Conf-AnxA, page 7.

⁵⁸ ICC-01/14-01/18-642-Conf-AnxA, page 7.

⁵⁹ See Trial Chamber V's email Decision of 06 October 2020, at 15:00, with reasons to follow.

⁶⁰ ICC-01/14-01/18-642-Conf-AnxA, page 7.

questioning of Prosecution witnesses must be organised accordingly. If the Chamber were to allow the Prosecutor to withhold Witness P-0306's identity past the commencement of trial, the Defence may either lose the opportunity to question other witnesses on facts alleged by Witness P-0306, or be forced to call back witnesses who already testified, considerably affecting the expeditiousness of the proceedings.

32. *Fourth*, the provision of a redacted statement does not reduce the prejudice caused to Mr Ngaïssona, since the majority of the statement's substance has been heavily redacted and redactions are not limited to strictly identifying information. The Prosecution's approach appears to be in direct contrast with the established jurisprudence of this Court according to which "protective measures should restrict the rights of the suspect only as far as necessary".⁶¹ For example, Witness P-0306 alleges that: [REDACTED];⁶² [REDACTED];⁶³ [REDACTED].⁶⁴ These potentially incriminating allegations should be investigated timely by the Defence. However, the Defence is unable to conduct any follow-up investigations on these allegations, since: [REDACTED];⁶⁵ [REDACTED];⁶⁶ and [REDACTED].⁶⁷ These only constitute limited examples of the substantive information, which goes beyond identifying information, which is currently being withheld from the Defence.

33. The Defence's ability to have access to substantive information in order to start investigating is an important factor to take into account when determining whether the withholding of a witness' identity and related material will unduly

⁶¹ *Prosecutor v. Lubanga*, Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled "First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81", ICC-01/04-01/06-773, 14 December 2006, para. 33.

⁶² CAR-OTP-2118-4791-R01, at 4795-4796, lines 111-180; CAR-OTP-2118-4923-R01, at 4932-4937, lines 295-513.

⁶³ CAR-OTP-2118-4791-R01, at 4795, lines 132-134; Similarly CAR-OTP-2118-4923-R01, at 4937, lines 489-492.

⁶⁴ CAR-OTP-2118-4791-R01, at 4804-4807, lines 459-574.

⁶⁵ CAR-OTP-2118-4791-R01, at 4795, line 111.

⁶⁶ CAR-OTP-2118-4791-R01, at 4795-4796, lines 117-165; CAR-OTP-2118-4923-R01, at 4932-4937, lines 295-513.

⁶⁷ CAR-OTP-2118-4791-R01, at 4804-4807, lines 459-574.

prejudice the accused.⁶⁸ Moreover, the Defence respectfully draws the Chamber's attention to the fact that the witness' answer to the question whether he was threatened or induced to give his testimony has been redacted, hence hampering the Defence's ability to conduct follow-up investigations relating to Witness P-0306's credibility.⁶⁹ Additionally, the Defence regrets the increase of redactions in the final tracks of P-0306's statement, more specifically from page 4957 until the end of the statement, which appear to touch upon, *inter alia*, the 5 December attack and personalities which were allegedly close to Mr Ngaïssona during the relevant time-frame of the charges. These elements are central to charges as confirmed by the Pre-Trial Chamber.⁷⁰ On 23 September 2020, the Defence informed the Prosecution that the redactions applied to P-0306's statement appeared to go beyond the redaction of identifying information and requested it to review the redactions applied, with a view to potentially lifting unnecessary ones. However, as of today, the Defence's request has been left unanswered.⁷¹

VI. CONCLUSION

34. To conclude, the Prosecution has failed to meet the legal criteria for non-disclosure pursuant to rule 81(4) and failed to show the existence of an “objectively justifiable” risk which would arise specifically from disclosure to the Defence and which would be necessary to the aim of eliminating or reducing the alleged risk to Witness P-0306's safety. Additionally, the Prosecution's Request would cause undue prejudice to Mr Ngaïssona's fair trial rights, by hampering the Defence's ability to, *inter alia* : effectively investigate Witness P-0306's allegations and credibility prior to his testimony; effectively

⁶⁸ For example, in the same case relied on by the Prosecution, Trial Chamber X took into account the fact that, despite the redactions applied to identifying information, the substance of these statements was already available to the Defence, hence allowing it to start investigating on the substance of these statements: *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, paras 18-19, 25-26, 30-31.

⁶⁹ CAR-OTP-2118-5024-R01, at 5031, lines 239-243.

⁷⁰ ICC-01/14-01/18-403-Conf, para. 101.

⁷¹ Email from the Defence team of Mr Ngaïssona to the Prosecutor, 23 September 2020, at 12:08 pm.

challenge Witness P-0306's allegations at trial; and tailor its questioning of witnesses on the totality of the prosecution evidence.

VII. RELIEF SOUGHT

35. The Defence respectfully requests the Chamber to:

- **REJECT** the Prosecution's Request pursuant to rule 81(4) for delayed disclosure of the identity and materials related to Prosecution Witness P-0306;
- **ORDER** the Prosecution to disclose lesser redacted versions of Witness P-0306's statement before the 9 November 2020 disclosure deadline, and;
- **ORDER** the Prosecution to file a lesser redacted version of the Request.

Respectfully submitted,



G. J. Alexander Knoops
on behalf of
Patrice-Edouard Ngaïssona

Dated this 2 February 2026

At The Hague, the Netherlands