

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/05-01/13

Date: 29 June 2016

TRIAL CHAMBER VII

Before: Judge Bertram Schmitt
Judge Marc Perrin de Brichambaut
Judge Raul Pangalangan

SITUATION IN THE CENTRAL AFRICAN REPUBLIC

**IN THE CASE OF
THE PROSECUTOR *v.* JEAN-PIERRE BEMBA GOMBO, AIME KILOLO
MUSAMBA, JEAN-JACQUES MANGENDA KABONGO, FIDELE BABALA WANDU
AND NARCISSE ARIDO**

**Public Redacted Document
with**

**Confidential, *EX PARTE*, only available to the Prosecution and the VWU,
Annexes A to E**

**Public redacted version of "Prosecution Application for Delayed Disclosure",
4 June 2015, ICC-01/05-01/13-985-Conf-Exp**

Source: The Office of the Prosecutor

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

The Office of the Prosecutor

Ms Fatou Bensouda

Mr James Stewart

Mr Kweku Vanderpuye

Counsel for Jean-Pierre Bemba Gombo

Ms Melinda Taylor

Counsel for Aimé Kilolo Musamba

Mr Paul Djunga Mudimbi

Mr Steven Sacha Powles

Counsel for Jean-Jacques Mangenda Kabongo

Mr Christopher Michael Gosnell

Mr Arthur Vercken De Vreuschmen

Counsel for Fidèle Babala Wandu

Mr Jean-Pierre Kilenda Kakengi Basila

Mr Godefroid Bokolombe Bompondo

Counsel for Narcisse Arido

Mr Charles Achaleke Taku

Ms Beth Lyons

The Office of Public Counsel for Victims	The Office of Public Counsel for the Defence
---	---

States Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Mr Nigel Verrill

Detention Section

Victims Participation and Reparations Section	Others
--	---------------

I. Introduction

1. The Office of the Prosecutor ("Prosecution") seeks the delayed disclosure of the identity and interview records of Prosecution Witness CAR-OTP-P-0261¹ until 30 days before the start of trial ("Request"). Alternatively, P-0261's identity and interview records should not be divulged until the Victims and Witnesses Unit ("VWU")'s assessment is complete and the Registrar's decision on protective measures is implemented ("Alternative Request"). Delayed disclosure is necessary to protect the witness' well-being, preserve critical evidence, and ensure the integrity of the proceedings.

2. P-0261 was a witness for the Defence in the Main Case. He has given two statements to the Prosecution that are highly incriminating of the Accused. Among other things, P-0261 states: (a) that he was approached to testify falsely on behalf of the Defence in the Main Case; (b) that he discussed the substance of his testimony with Defence Counsel by phone during breaks in his testimony; and (c) that he received money and a new laptop computer from Defence Counsel prior to his testimony. The Prosecution intends to call P-0261 to testify at trial.

3. As detailed below, P-0261 has unique security concerns that justify delayed disclosure, [REDACTED]. Delaying the disclosure of P-0261's identity is necessary to protect his safety and ensure that [REDACTED] testimony at trial is free from interference or intimidation. Given the circumstances, it is an "appropriate measure" under article 68(1) of the Statute ("Statute") and properly balances the witness' well-being and the integrity of the case with the rights of the Accused.

4. As a procedural protective measure, delayed disclosure is particularly appropriate in this case. The evidence establishes "substantial grounds to believe" that the Accused corruptly influenced witnesses and presented false testimony in the

¹ Witness D04-0023 in case ICC-01/05-01/08 ("Main Case").

Main Case. All currently have unrestricted access to those witnesses—some of whom the Prosecution intends to call in this case.

II. Confidentiality

5. This application and its annexes are classified as “Confidential, *ex parte*, only available to the Prosecution and the VWU.” They reveal the identity of a Prosecution witness whose evidence has not yet been disclosed to the Accused, along with his current location and details of his security situation. Revealing this information would undermine the relief sought and create security risks. The Prosecution will file a redacted version of the application.

III. Background

6. From 17-18 December 2014, the Prosecution interviewed P-0261 pursuant to article 55(2) of the Statute. On 13 April 2015, the finalised transcripts of that interview were registered in Ringtail. The Prosecution interviewed P-0261 again on 19-20 March 2015. The transcripts of that interview were registered in Ringtail on 3 June 2015.

7. After conducting its own assessment of P-0261’s security situation, and consulting with the VWU,² [REDACTED].

8. On 22 May 2015, Trial Chamber VII (“Chamber”) issued its Decision on Modalities of Disclosure, ordering the Prosecution to file any requests to apply non-standard redactions to material currently in its possession by 9 June 2015.³

² ICC-01/05-01/13-T-8-CONF-ENG ET, p.34, lns.12-13.

³ ICC-01/05-01/13-959, p.19.

IV. Submissions

A. Legal Standard

9. The Request is justified under the Court's legal framework. It is also consistent with the established practice of the *ad hoc* tribunals, where Chambers have consistently allowed delayed disclosure of witness identities and identifying information until a fixed date before trial or before their testimony.

10. Articles 64(2) and 68(1) of the Statute, and rule 81(4) of the Rules of Procedure and Evidence authorise the Chamber to delay the disclosure of witnesses' identities and identifying information where necessary to protect their wellbeing. As recognised in *Katanga*, "the Defence's right to have evidence disclosed – essential as this may be – cannot be considered to be absolute. Where the protection of victims and witnesses is at stake, the Chamber must seek a solution which strikes a fair balance between the equally legitimate rights of the accused, on the one hand, and of the victims and witnesses on the other."⁴

11. Furthermore, the Chamber has the inherent authority to take all measures necessary to protect the integrity of the proceedings and preserve evidence. This authority emanates from the Chamber's overarching duty to ensure that the proceedings are fair and expeditious and conducted with full respect for the rights of the Accused and due regard for the protection of victims and witnesses under article 64(2), as well as from articles 4(1), 54(3)(f), 57(3)(c), and 61(11) of the Statute.

12. Trial Chambers of this Court have previously allowed delayed disclosure of witness identities and identifying information. For example, in *Katanga*, Trial Chamber II ordered delayed disclosure of the identity of one witness until 45 days prior to the commencement of trial.⁵ Similarly, in *Ruto, Kenyatta*, and *Ntaganda*, the

⁴ ICC-01/04-01/07-1179-tENG (translation of ICC-01/04-01/07-1179), para.31.

⁵ ICC-01/04-01/07-1179-tENG (translation of ICC-01/04-01/07-1179), para.47.

Chambers granted multiple Prosecution requests for delayed disclosure of witness identities and identifying information beyond the initial deadline set by the Chamber.⁶ In certain circumstances, Trial Chambers have even authorised the Prosecution to withhold witness identities and identifying information until after the commencement of trial.⁷

13. Similarly, the *ad hoc* tribunals have long permitted the delayed disclosure of witness identity and identifying information where necessary to mitigate security concerns. Temporary anonymity of witnesses has been considered a “critical measure”⁸ to maintain the confidentiality and safety of protected witnesses. As explained by an ICTY Trial Chamber, “once the Defence commences (quite properly) to investigate the background of a witness whose identity has been disclosed to them, there is a risk that those to whom the Defence have spoken may reveal to others the identity of that witness, with the consequential risk that the witness will be interfered with.”⁹ Similarly, in *Bagosora*, an ICTR Trial Chamber found that “unwarranted advance disclosure may severely compromise the safety and security of protected witnesses who may in the interim become targets for coercion or other threats which would prevent or at least discourage them from testifying at trial.”¹⁰

14. At the ICTY, Chambers have generally required the disclosure of witness identities and unredacted statements 30 days before trial,¹¹ although some Chambers have permitted non-disclosure of witness identity until 30 days,¹² or even less,¹³

⁶ See, e.g., ICC-01/04-02/06-537-Red2, p.22; ICC-01/09-02/11-580-Conf-Red, paras.37, 44 and p.22; ICC-01/09-01/11-564-Conf-Red, p.32.

⁷ ICC-01/04-01/07-1179-tENG (translation of ICC-01/04-01/07-1179), para.48 (authorising a witness’s identity to be withheld from the Defence until 45 days prior to his/her testimony); ICC-01/09-02/11-580-Conf-Exp, para.51, p.23 ([REDACTED]).

⁸ *Prosecutor v. Bagosora*, ICTR-98-41-I, Decision and Scheduling Order on the Prosecution Motion for Harmonisation and Modification of Protective Measures for Witnesses, 5 December 2001 (“*Bagosora* Decision”), para.20.

⁹ *Prosecutor v. Brđanin*, IT-99-36-T, Decision on Prosecution’s Twelfth Motion for Protective Measures for Victims and Witnesses, 12 December 2002 (“*Brđanin* 12 December 2002 Decision”), para.13.

¹⁰ *Bagosora* Decision, para.20.

¹¹ *Prosecutor v. Delić*, IT-04-83-PT, Decision on the Prosecution Motion for Protective Measures, 1 December 2006, p.6.

¹² *Brđanin* 12 December 2002 Decision, p.6.

before testimony. The ICTY Appeals Chamber has upheld such protective measures, noting the authority of Trial Chambers to grant such measures as are “necessary to protect the integrity of its victims and witnesses”, so long as the defence has adequate time to prepare.¹⁴ The ICTR has taken a similar approach, permitting the “rolling” disclosure of witness identities and identifying information with deadlines between 35¹⁵ and 21¹⁶ days before testimony.

15. The Court’s appellate jurisprudence sets out several factors relevant to substantiating a request for delayed disclosure. These factors include: (i) the existence of an “objectively justifiable risk” to the safety of the witness if the particular information is disclosed to the accused¹⁷; (ii) the infeasibility or insufficiency of less restrictive protective measures¹⁸; and (iii) an assessment as to whether the delayed disclosure would be “prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial”.¹⁹

16. ICC Trial Chambers have recognised that when evaluating security risks to individual witnesses, the Chamber may consider the potential for interference and intimidation once their identity is disclosed to the accused.²⁰ Chambers have also recognised that a witness’ subjective fear may be relevant when considering whether an objectively justifiable risk exists.²¹ Delayed disclosure of witnesses’ identity may

¹³ *Prosecutor v Milošević*, IT-02-54-T, First decision on Prosecution Motion for Protective Measures for Sensitive Source Witnesses, 3 May 2002, para.13.

¹⁴ *Prosecutor v Šešelj*, IT-03-67-AR73.6, Decision on Vojislav Šešelj’s appeal against the Trial Chamber’s oral decision of 7 November 2007, 24 January 2008, para.15.

¹⁵ *Bagosora* Decision, para.24.

¹⁶ *Prosecutor v. Renzaho*, ICTR-97-31-I, Decision on the Prosecutor’s Motion for Protective Measures for Victims and Witnesses to Crimes Alleged in the Indictment, 17 August 2005, para.16; *Prosecutor v Niyitegeka*, ICTR-96-14-I, Decision on the Prosecutor’s Motion for Protective Measures for Witnesses, 12 July 2000, para.16.

¹⁷ ICC-01/04-01/07-475, para.71.

¹⁸ ICC-01/04-01/06-568, para.37; ICC-01/04-01/06-773, para.33.

¹⁹ ICC-01/04-01/06-773, para.34.

²⁰ ICC-01/09-02/11-580-Conf-Red, para.31; ICC-01/09-01/11-531-Conf-Red, para.30; ICC-01/04-02/06-537-Red2, para.17. Rule 68(2)(d) of the Rules further underscores the serious nature of witness interference and the potential consequences for the proceedings.

²¹ ICC-01/09-02/11-580-Conf-Red, para.31; ICC-01/09-01/11-531-Conf-Red, para.30; ICC-01/04-02/06-537-Red2, para.17.

be ordered even where they report no direct threat.²²

17. For the reasons set out below, delayed disclosure of the identity and identifying information of P-0261 is justified. Further detailed justification for the requested delayed disclosure is set out in confidential, *ex parte*, annexes A-D. Annex A contains an individual witness security assessment for P-0261. Annex B contains material documenting a recent security incident involving a similarly-situated Prosecution witness. Annex C contains the transcript of P-0261's initial biographic and security interview. Annex D contains P-0261's interview records, including: (i) a statement of limited use, dated 17 December 2014²³; (ii) 9 transcripts of an article 55(2) interview dated 17-18 December 2014²⁴; and (iii) 6 transcripts of an article 55(2) interview dated 19-20 March 2015.²⁵

B. Disclosing P-0261's Identity and Identifying Information Gives Rise to an Objectively Justifiable Risk

18. Disclosure of P-0261's identity and identifying information would present an objectively justifiable risk to P-0261's safety and would threaten his ability to testify free from intimidation or interference. This risk is evidenced by the following factors: (a) the unique and highly incriminating nature of his evidence; (b) his being well-known to the Accused members of the Defence in the Main Case, given his status as a former Defence witness in the Main Case; a (c) [REDACTED]; (d) P-0261's fear for his safety upon disclosure; and (e) other instances of alleged interference in this case.

a. P-0261's evidence is unique and highly incriminating

19. P-0261's evidence supports multiple charges against the Accused and the Prosecution's general allegations about the scheme to defend Bemba through means

²² ICC-01/04-02/06-537-Conf-Exp, para.43 ([REDACTED]); ICC-01/04-01/07-1179-tENG, paras.41, 44 (authorising delayed disclosure even though the witnesses had not been threatened as a result of their interaction with the Court).

²³ Annex D, CAR-OTP-0084-1424.

²⁴ Annex D, CAR-OTP-0087-2392, CAR-OTP-0087-2409, CAR-OTP-0087-2426, CAR-OTP-0087-2467, CAR-OTP-0087-2481, CAR-OTP-0087-2486, CAR-OTP-0087-2521, CAR-OTP-0087-2542, CAR-OTP-0087-2554.

²⁵ Annex D, CAR-OTP-0088-1456; CAR-OTP-0088-1469; CAR-OTP-0088-1506; CAR-OTP-0088-1520; CAR-OTP-0088-1527; CAR-OTP-0088-1539.

including offences against the administration of justice. Below are some of the key allegations contained in P-0261's statements:

- P-0261's testimony in the Main Case was untruthful since, contrary to how he presented himself on the witness stand, he was never a soldier²⁶ and did not witness the events about which he testified.²⁷
- [REDACTED] approached him about testifying on behalf of Bemba in the Main Case and told him that if he testified he could be relocated to Europe.²⁸ [REDACTED] knew that P-0261 was not a soldier.²⁹
- After their first meeting, in a private interaction, Kilolo gave 100 dollars to P-0261, telling him that it was not corruption but rather was to pay the taxi.³⁰
- Shortly before P-0261 was handed over to the VWU, in a private interaction, Kilolo gave the witness 600 dollars, again telling him that the money wasn't "*une corruption*" but rather was to cover his costs because he would be immobilised.³¹ Before giving him the money, Kilolo asked the witness "*[e]st-ce que tu es prêt à faire ta déposition?*"³²
- In the same encounter where P-0261 received 600 dollars, Kilolo also gave him a phone³³ and told him "*je vais être en communication avec toi pour savoir comment ça se passe.*"³⁴
- After the VWU handover, Kilolo called P-0261, including on the night before his testimony³⁵ and during breaks in his testimony.³⁶
- During a long call on the night before P-0261's testimony began, Kilolo and P-0261 discussed the substance of P-0261's testimony. For example, Kilolo told

²⁶ Annex D, CAR-OTP-0087-2409 at 2414, lns.176-177.

²⁷ Annex D, CAR-OTP-0087-2426 at 2437, lns.408-409.

²⁸ Annex D, CAR-OTP-0087-2426 at 2434-2435, 2441 (lns.560-571), 2443 (lns.623-635), 2446 (lns.748-772).

²⁹ Annex D, CAR-OTP-0087-2426 at 2449, lns.880-894.

³⁰ Annex D, CAR-OTP-0087-2467 at 2468, lns.29-31.

³¹ Annex D, CAR-OTP-0087-2486 at 2492-2494, lns.226-314.

³² Annex D, CAR-OTP-0087-2486 at 2493, lns.288-289.

³³ Annex D, CAR-OTP-0087-2486 at 2502-2505.

³⁴ Annex D, CAR-OTP-0087-2486 at 2505, lns.726-727.

³⁵ Annex D, CAR-OTP-0087-2486 at 2512, 2514-2515; CAR-OTP-0087-2521 at 2522.

³⁶ Annex D, CAR-OTP-0087-2521 at 2526-2527.

him about a man killed by the *libérateurs* in PK12³⁷ and told him that Sambate was a member of Bozizé's military staff.³⁸ Kilolo also asked P-0261 if he knew the composition of Bozizé's troops and whether they included Chadian soldiers.³⁹

- Kilolo told P-0261 not to make an error during his testimony and say that Kilolo had given him money since that money was not official.⁴⁰
- Prior to P-0261's testimony, Kilolo gave the witness a laptop.⁴¹
- [REDACTED].⁴²

20. P-0261's evidence—notably, his description of private interactions with the Accused Kilolo—is personal to him and cannot be obtained from any other source. The unique and highly incriminating nature of this evidence creates a powerful incentive to interfere with his testimony.

b. P-0261 is well-known to the Accused members of the Defence in the Main Case

21. P-0261 and his family are well-known to the Accused members of the Defence in the Main Case, particularly to Kilolo, since P-0261 was previously a Defence witness.

22. The Chamber should consider the objectively justifiable risk that the Accused or their associates may seek to interfere with or intimidate P-0261 in the future. All five Accused are presently charged with offences related to interfering with witnesses in the Main Case,⁴³ and four of them are specifically charged with offences related to interference with P-0261.⁴⁴ After assessing the evidence, Pre-Trial Chamber II found

³⁷ Annex D, CAR-OTP-0087-2486 at 2516-2517, 2519.

³⁸ Annex D, CAR-OTP-0087-2486 at 2518-2519.

³⁹ Annex D, CAR-OTP-0087-2486 at 2519-2520, lns.1248-1271.

⁴⁰ Annex D, CAR-OTP-0087-2521 at 2529, lns.281-295.

⁴¹ Annex D, CAR-OTP-0087-2521 at 2534.

⁴² Annex D, CAR-OTP-0087-2542 at 2544, lns.47-78.

⁴³ Decision pursuant to Article 61(7)(a) and (b) of the Rome Statute, ICC-01/05-01/13-749, 11 November 2014 ("Confirmation Decision"), pp.47-55.

⁴⁴ These four are Bemba, Kilolo, Mangenda, and Babala. See Confirmation Decision, pp.47-53.

“substantial grounds to believe” that the Accused committed these offences.⁴⁵ Trial Chamber III has also recognised the risk that the Accused Bemba poses to these proceedings in its recent decision, confirmed on appeal, rejecting the Bemba Defence’s request for provisional release in the Main Case.⁴⁶

23. The risk to P-0261 is further heightened given that four of the Accused were released from custody without any conditions limiting or monitoring their contact with witnesses.⁴⁷ Presently, there is nothing to deter or to constrain those four Accused from engaging in the same behaviour that led to the charges in this case.

c. [REDACTED]

24. [REDACTED].⁴⁸

25. [REDACTED].⁴⁹ [REDACTED]⁵⁰ [REDACTED],⁵¹ [REDACTED].⁵²

26. [REDACTED],⁵³ [REDACTED].⁵⁴ [REDACTED],⁵⁵ [REDACTED],⁵⁶ [REDACTED].⁵⁷

⁴⁵ See Confirmation Decision, para.25.

⁴⁶ ICC-01/05-01/08-3221, paras.38-51; ICC-01/05-01/08-3249-Conf, para.71.

⁴⁷ See ICC-01/05-01/13-703 (ordering the release of all the Accused except Bemba, without any conditions limiting their contacts with witnesses); ICC-01/05-01/13-727, paras.24-29 (arguing that the decision to release four of the Accused failed to address the continuing risk that the Accused may obstruct or endanger the investigation or the court proceedings or commit related crimes, given that it failed to impose any meaningful and enforceable conditions of release); ICC-01/05-01/13-969 (OA5, OA6, OA7, OA8, OA9), p.25 (reversing the Pre-Trial Chamber’s decision to release the four accused and noting that “it was unclear on what basis the Pre-Trial Chamber reached its conclusion that the imposition of one condition was sufficient to mitigate [the risks listed in Article 58(1)(b)]”).

⁴⁸ Document Containing the Charges (“DCC”), ICC-01/05-01/13-Conf-Anx B1, 30 June 2014, para.21 ([REDACTED]); see also paras.28, 38, 102.

⁴⁹ DCC, para.102; Annex D, CAR-OTP-0087-2426 at 2434-2435, 2441 (lns.560-571).

⁵⁰ Annex D, CAR-OTP-0087-2426 at 2434 (lns.269-276), 2437 (lns.393-394), 2439 (lns.492-493).

⁵¹ Annex D, CAR-OTP-0087-2426 at 2434 (lns.269-282), 2438 (lns.463-465), 2441 (lns.576-579), 2449 (lns.886-888).

⁵² Annex D, CAR-OTP-0087-2426 at 2437 (lns.393-398), 2439 (lns.470-490).

⁵³ Annex A, p.2.

⁵⁴ Annex A, p.1.

⁵⁵ Annex A, p.2; Annex D, CAR-OTP-0087-2467 at 2469-2473.

⁵⁶ Annex D, CAR-OTP-0087-2467 at 2471, ln.118.

⁵⁷ See ICC-01/05-01/08-2222-Conf-AnxA, p.11.

27. [REDACTED].⁵⁸ [REDACTED].⁵⁹ [REDACTED].⁶⁰

28. [REDACTED].⁶¹ [REDACTED].⁶² [REDACTED].

29. [REDACTED].⁶³ [REDACTED].⁶⁴ [REDACTED].⁶⁵

30. [REDACTED].⁶⁶ [REDACTED].⁶⁷ [REDACTED].⁶⁸

d. P-0261 is afraid for his safety if his interview records are disclosed

31. P-0261 has expressed fear for his safety if his cooperation with the Prosecution becomes known. Chambers have recognised that a witness's subjective fear may be relevant in assessing whether an objectively justifiable risk exists.⁶⁹ As examples of threats to his security, P-0261 cited [REDACTED].⁷⁰

e. Other Prosecution witnesses have been interfered with after disclosure of identity

32. The objectively justifiable risk to P-0261 is further demonstrated by instances of interference with other Prosecution witnesses after disclosure of their identity. For example, [REDACTED].⁷¹

33. Another similarly situated Prosecution Witness—CAR-OTP-P-0260 (Defence Witness D04-0002 in the Main Case)—has also been subject to [REDACTED].⁷² [REDACTED].⁷³ [REDACTED].⁷⁴ [REDACTED].

⁵⁸ Annex A, p.3.

⁵⁹ Annex A, p.3.

⁶⁰ Annex A, p.2.

⁶¹ See *supra*, para.19.

⁶² See *supra*, para.19.

⁶³ DCC, para.21.

⁶⁴ DCC, paras.28, 66, 68, 74, 102.

⁶⁵ DCC, para.38.

⁶⁶ Annex A, pp.2-4.

⁶⁷ Annex A, pp.2-4.

⁶⁸ Annex A, pp.3-4.

⁶⁹ See ICC-01/09-02/11-580-Conf-Red, para.31; ICC-01/09-01/11-531-Conf-Red, para.30; ICC-01/04-02/06-537-Red2, para.17.

⁷⁰ Annex C, CAR-OTP-0087-2564 at 2579-2582.

⁷¹ [REDACTED].

⁷² See ICC-01/05-01/13-575-Conf-Exp, para.5; ICC-01/05-01/13-575-Conf-Exp-Anx (CAR-OTP-0082-1418).

⁷³ See ICC-01/05-01/13-665-Conf-Exp, paras.6-9; ICC-01/05-01/13-665-Conf-Exp-Anx, p.2.

C. Less Restrictive Protective Measures are Infeasible and Insufficient

34. Less restrictive protective measures are infeasible or insufficient, given the nature of these proceedings and the serious risk of interference with the witness.

35. While the VWU security assessment for P-0261 is not yet complete, delayed disclosure is uniquely justified by the circumstances of this case. It should be applied as a procedural protective measure regardless of whatever other measures may be implemented following the VWU assessment.

36. It is well-established that “the greater the length of time between the disclosure of the identity of a witness and the time when the witness is to give evidence, the greater the potential for interference with that witness.”⁷⁵ [REDACTED].⁷⁶ Authorising delayed disclosure of P-0261’s identity until 30 days before trial will ensure that [REDACTED] exposed for as short a period of time as possible, minimising the risk of interference prior to his testimony.

37. The information contained in P-0261’s statements make it impossible to provide the Defence with redacted versions or summaries, without defeating the purpose of the delayed disclosure and revealing the witness’ identity.

38. Redactions are infeasible because P-0261’s evidence focuses on matters specific to that witness and the particularities of his private dealings with one of the Accused. To achieve complete anonymity, P-0261’s interview records would need to be so heavily redacted that they would be rendered unintelligible and of no meaningful use to the Defence.⁷⁷ This scenario is distinct from the ordinary situation with which the Court is confronted, where the substantive allegations of a witness’s evidence are

⁷⁴ See ICC-01/05-01/13-665-Conf-Exp, paras.6-9; ICC-01/05-01/13-665-Conf-Exp-Anx, p.2.

⁷⁵ *Prosecutor v. Brđanin*, IT-99-36-PT, Decision on Motion by Prosecution for Protective Measures, 3 July 2000 (“*Brđanin* 3 July 2000 Decision”), para.24; *Brđanin* 12 December 2002 Decision, para.13.

⁷⁶ See *supra*, para.26.

⁷⁷ Cf. ICC-01/04-01/07-1179-tENG, para.51 (concluding that it was infeasible to redact the witness’s statement since otherwise it would “be made completely unusable”).

not in and of themselves identifying. This more common situation arises where a witness' statement discusses events or information that are not unique to them; for example, an attack witnessed by numerous individuals or the structure of an organisation about which other individuals possess information. The circumstances here are readily distinguishable.

39. For similar reasons, disclosure of a summary of P-0261's evidence is infeasible since the pertinent allegations—including his descriptions of his private phone calls with Kilolo and the money and goods he received during private interactions with Kilolo—are particular to P-0261 and thus identifying.

40. Furthermore, disclosure of P-0261's material to the Accused confidentially is insufficient because his security concerns stem from the Accused and their network of associates and supporters. As mentioned above, the Chamber has already been apprised of instances where confidentiality restrictions have been breached, [REDACTED].⁷⁸ This pattern continues with the [REDACTED].⁷⁹

41. Finally, restricting the disclosure of P-0261's identity and identifying information to Defence Counsel only would be insufficient. The Chamber has no way of ensuring that the respective Defence teams have, or can enforce, adequate mechanisms to prevent the inadvertent disclosure of this highly sensitive information to their clients. Furthermore, Defence Counsel may consider that they are not ethically permitted to withhold such information from their clients.

D. Delayed Disclosure Will Not Unduly Prejudice the Fair Trial Rights of the Accused

42. Any disadvantage to the Accused stemming from the delayed disclosure of P-0261's identity would be temporary, limited in scope, and outweighed by the Chamber's obligation to take appropriate measures to ensure the protection of

⁷⁸ See *supra*, para.33.

⁷⁹ See *supra*, para.32.

witnesses and preserve the integrity of the proceedings.⁸⁰

a. Any disadvantage to the Accused would be temporary

43. Although delayed, the Accused will receive full disclosure 30 days prior to trial, which will enable them to complete their preparation in advance of trial. This time frame is consistent with the Defence's right to adequate preparation time under article 64(3)(c) and article 67 of the Statute. Indeed, as noted above, ICC Trial Chambers have allowed even later disclosure in certain circumstances, and the *ad hoc* tribunals, applying similar law, routinely allowed delayed disclosure until 30 days before trial and frequently allowed even later disclosure.⁸¹

44. While the Prosecution considers that disclosure 30 days prior to trial will provide ample time for the Defence to prepare for P-0261's cross-examination, the Prosecution would not oppose his recalling if necessary, upon a showing of good cause.

b. Any disadvantage to the Accused would be limited in scope

45. P-0261 is the only witness for whom the Prosecution seeks delayed disclosure. ICC Trial Chambers have granted delayed disclosure even where the Prosecution had requested to withhold the identity of a number of witnesses, though it was acknowledged that this could result in a "cumulative effect" on the Defence's preparations.⁸² In contrast, the Request is limited to a single witness.

c. Any disadvantage to the Accused is outweighed by the Chamber's obligation to take appropriate measures to ensure the protection of witnesses and integrity of the proceedings

46. In assessing the necessity and proportionality of the Request, the Chamber should consider not just the circumstances particular to the specific witness, but also

⁸⁰ ICC-01/04-01/07-1179-tENG, para.31.

⁸¹ See *supra*, paras.12, 14.

⁸² See, *e.g.*, ICC-01/09-01/11-531-Conf-Red, para.31, p.35; ICC-01/04-02/06-537-Red2, para.18, p.22.

the case as a whole. This case involves the corrupt influencing of witnesses and false presentation of witness testimony. The witnesses in this case—particularly those whom the Prosecution alleges to have already been interfered with—face an obvious risk of interference or intimidation. Taking reasonable measures to minimise this risk is fully consistent with the Chamber’s duty toward witnesses.

47. The Chamber has the power to order delayed disclosure as a procedural protective measure in and of itself. The OTP/Registry Protocol on witness protection envisions the use of such a measure.⁸³ It is also well-established in the practice of the *ad hoc* tribunals, which have dealt with similar issues.⁸⁴ While some prior ICC decisions have only allowed delayed disclosure of witness materials until other protective measures could be implemented, the circumstances here are unique. Unlike other cases that have come before this Court, the Accused in this case are already charged with offences related to witness interference.⁸⁵ And four of the Accused are charged with offences related to interference with this very witness.⁸⁶

48. The Request is also consistent with the Chamber’s inherent duty to take all measures necessary to preserve critical evidence and protect the integrity of the proceedings. The Accused’s propensity to improperly interfere with witnesses in these proceedings is high, particularly given that the charges against them for corruptly influencing witnesses arising out of the Main Case — including in relation to this very witness — have been confirmed. Minimising the risk of interference with P-0261 by delaying the disclosure of his identity and identifying information would best discharge the Chamber’s duty to preserve evidence and protect the integrity of

⁸³ Prosecution – Registry Joint Protocol on the Mandate, Standards and Procedure for Protection, 17 March 2011, art. 31(1).

⁸⁴ While the language of the relevant rule at the *ad hoc* tribunals refers to non-disclosure of witness identity “until such person is brought under the protection of the Tribunal”, this language has been referred to as “curious wording” since, in practice, non-disclosure orders have been ordered until a fixed date and have not been issued pending the implementation of additional witness protection measures. See *Brđanin* 3 July 2000 Decision, para.22 (also noting that the relevant rule—Rule 69—has “always been interpreted as including the power to make non-disclosure orders which continue throughout the proceedings and thereafter”).

⁸⁵ See *supra*, para.22.

⁸⁶ See *supra*, para.22.

this case.

49. Moreover, that the Prosecution would not be able to provide redacted statements or a summary of P-0261's evidence is not a bar to the Request. The Prosecution acknowledges that such information should be provided to the Accused where possible. However, the circumstances here are exceptional. As discussed above, the nature of the witness's testimony makes it infeasible to provide a summary or redacted statement to the Accused without revealing the witness's identity. Delayed disclosure of witness materials in this type of situation is consistent with the rights of the Accused. Additionally, there is a precedent for this type of delayed disclosure at the *ad hoc* tribunals. For example, in *Karadžić*, an ICTY Trial Chamber authorised the Prosecution to withhold two witnesses' identities and statements until 21 and 30 days prior to their respective testimonies, even while noting that the Accused was "not in possession of any information about the Witnesses."⁸⁷

50. In the circumstances, the Defence will not be unduly prejudiced by the delayed disclosure of P-0261's identity and interview records until 30 days before trial.

E. Alternative Request

51. In the alternative, if the Chamber is not inclined to authorise delayed disclosure until 30 days before the start of trial, the Prosecution requests that the Chamber authorise delayed disclosure until completion of the VWU assessment, currently scheduled for the week of 15 June 2015, and implementation of the Registrar's decision on protective measures.

⁸⁷ *Prosecutor v. Karadžić*, IT-95-5/18-T, Decision on Accused's Motion for Modification of Protective Measures: Witnesses KDZ490 and KDZ492, 25 March 2010, paras.14, 16; see also *Brđanin* 12 December 2002 Decision, p.6 (authorising delayed disclosure of the "identity and statements of the Witnesses"); *Prosecutor v. Kordić & Čerkez*, IT-95-14/2-T, Order for Delayed Disclosure of Statements and Protective Measures, 19 March 1999, para.1 (authorising the Prosecution to delay disclosure of the name and all statements of six witnesses until ten days before their respective testimonies).

V. Relief Requested

52. For the foregoing reasons, the Prosecution requests that the Chamber:

- a. authorise the delayed disclosure of P-0261's identity and interview records until 30 days before the start of trial;
or, in the alternative,
- b. authorise the delayed disclosure of P-0261's identity and interview records until completion of the VWU assessment and implementation of the Registrar's decision on protective measures.



Fatou Bensouda, Prosecutor

Dated this 29th Day of June 2016
At The Hague, The Netherlands