



Original: **English**

No.: **ICC-01/14-01/21**

Date: **10 December 2021**

PRE-TRIAL CHAMBER II

Before: Judge Rosario Salvatore Aitala, Single Judge

**SITUATION IN THE CENTRAL AFRICAN REPUBLIC II
IN THE CASE OF *PROSECUTOR v. MAHAMAT SAID ABDEL KANI***

Public

**with Confidential, *EX PARTE*, only available to the Prosecution and VWU
Annexes A, B, C, D, E and F**

**Public Redacted Version of “Prosecution’s Request for Non-Disclosure of Identities
of Witnesses P-2478, P-0776 and P-2283, and Prosecution’s Request for Delayed
Disclosure of the Identity of Witness P-0481”, ICC-01/14-01/21-138-Conf-Red, 6
August 2021**

Source: 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

Mr Karim A.A. Khan QC

Mr James Stewart

Mr Eric MacDonald

Counsel for Mahamat Said Abdel Kani

Ms Jennifer Naouri

Mr Dov Jacobs

Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparations**

**The Office of Public Counsel
for Victims**

Ms Sarah Pellet

Ms Caroline Walter

**The Office of Public Counsel
for the Defence**

States Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Mr Nigel Verrill

Detention Section

**Victims Participation and Reparations
Section**

Other

I. INTRODUCTION

1. The Office of the Prosecutor ("Prosecution") requests the authorisation under rule 81(4) of the Rules of Evidence and Procedure ("Rules") to temporarily withhold the identities of Witnesses P-2478, P-0776 and P-2283 by applying non-standard redactions to their identity information in their statements, annexes to these statements and other related documents, as well as to translations and the metadata linked to the evidence concerned ("First Request").

2. While the Prosecution intends to rely on these witnesses at the confirmation of charges hearing, non-disclosure of their identity is necessary for the protection of their safety and privacy. There is an objectively justifiable risk to their safety if their identity information is disclosed at this stage, and applying non-standard redactions is the least intrusive measure to overcome or reduce the risk. Furthermore, it is not prejudicial to or inconsistent with the rights of Mr SAID or a fair and impartial trial as the redactions are applied discreetly. The Defence is provided with sufficient information to comprehend the evidence and prepare their case at this stage of the proceedings. The proposed redactions are indicated in Confidential, *ex parte* Annexes A to D. If the First Request is granted, the Prosecution will disclose the materials with the non-standard redactions and the standard redactions according to the redactions protocol before 16 August 2021.

3. The Prosecution also requests the authorisation under rule 81(4) of the Rules to delay the disclosure of materials related to Witness P-0481¹ ("Second Request"). For the reasons described below,² delayed disclosure is justified in accordance with article 68 of the Statute to protect the safety of the witness. The Prosecution requests the

¹ See ICC-01/14-01/21-135-Conf-Exp.

² See Section VI.

delayed disclosure up until 30 August 2021, which is necessary and proportionate to mitigate the unique security risk of the witness.

II. CONFIDENTIALITY

4. The First and Second Requests and corresponding Annexes A, B, C, D, E and F are filed *Confidential, ex parte*, available only to the Prosecution and the Victims and Witnesses Unit (“VWU”) pursuant to regulation 23*bis*(1) of the Regulations of the Court (“Regulations”), as they contain sensitive information pertaining to witness security. A confidential redacted version of the Requests will be filed concurrently.

III. BACKGROUND

5. On 7 April 2021, the Single Judge issued the “Order on disclosure and related matters” in which the Single Judge adopted the principles governing disclosure.³

6. On 30 June 2021, the Single Judge issued the “Second order on disclosure and postponement of the confirmation hearing”, in which the Single Judge adopted a disclosure calendar for the confirmation hearing, including the submission of requests for the non-disclosure of witnesses’ identities by Friday 6 August 2021 at the latest.⁴

IV. APPLICABLE LAW

7. Rule 76(1) of the Rules requires the Prosecution to provide the Defence with the names of witnesses whom it intends to rely on at the confirmation of charges hearing. This requirement, however, is not absolute and the Chamber may authorise the non-

³ ICC-01/14-01/21-50-Conf.

⁴ ICC-01/14-01/21-112, para. 21.

disclosure pursuant to rules 76(4) and 81(4) when it is necessary for the protection and safety and privacy of the witness.⁵

8. In the case of *The Prosecutor v. Alfred Yekatom & Patrice Edouard Ngaissona*, this Pre-Trial Chamber applied the following test in determining whether the non-disclosure of a witness' identity under rule 81(4) is permissible:

- a) there is an objectively justifiable risk to the safety of the person concerned which arises from disclosing the information to the Defence, as opposed to disclosing it to the general public. The Chamber will consider, *inter alia*, whether the risk of prejudice could be overcome by ruling that the information should be kept confidential between the parties;
- b) the non-disclosure of information could overcome or reduce the risk and it is *necessary* in that there is no less intrusive measure, short of non-disclosure, that is available and feasible in the circumstances; and
- c) the non-disclosure of information is *proportionate*, meaning that it is not prejudicial to or inconsistent with the rights of the suspect and a fair and impartial trial.⁶

9. The Chamber further stated that the assessment must be made with regard to each individual witness, taking into account his/her specific situation, and it will give particular weight to the following factors: (i) the witness' personal circumstances; (ii) whether there are currently protection or security measures in place for the witness; (iii) the relevant security situation in the area where the witness or his/her family currently reside; (iv) whether the witness or his/her family members have received any threats on account of his/her (perceived) involvement with the Court; (v) whether

⁵ ICC-01/14-01/18-273-Red2, para.25.

⁶ ICC-01/14-01/18-273-Red2, para.26.

the witness him/herself has undertaken any activity to endanger his/her personal safety; and (vi) whether the witness consented that his/her identity be disclosed to the Defence (without prejudice to the Chamber's *proprio motu* assessment whether to disclose such identity).⁷

V. REQUEST FOR NON-DISCLOSURE OF IDENTITIES OF WITNESSES P-2478, P-0776 AND P-2283

A. Justification of non-disclosure of the identity information for Witness P-2478

10. Witness P-2478 [REDACTED] provides incriminatory evidence on which the Prosecution intends to rely on for the purposes of the confirmation hearing. [REDACTED].

11. [REDACTED],⁸ the witness describes: (i) the arrival of the Séléka in Bangui and their takeover of the OCRB; (ii) the composition of police and Séléka personnel at the OCRB, the chain of command and the cooperation between both; (iii) Mr SAID's role at the OCRB and; (iv) detention, torture, murders and disappearances of prisoners held in the OCRB, including detainees held in an underground cell under Mr SAID's office.

12. There is an objectively justifiable risk to the safety of P-2478 if the witness' identity were disclosed to the Defence insofar as the witness: [REDACTED].

13. [REDACTED].⁹

⁷ ICC-01/14-01/18-273-Red2, para.27.

⁸ CAR-OTP-2107-8835 (ENG), Annex A.

⁹ As noted in by the Pre-Trial Chamber III in the *Bemba* case, anonymity for witnesses can be granted of the witness himself/herself has undertaken any activity to endanger his or her personal safety; ICC-01/05-01/08-215-Red, para. 51.

14. [REDACTED],¹⁰ [REDACTED],¹¹ [REDACTED].

15. [REDACTED],¹² [REDACTED]. [REDACTED]. Additionally, there could be a risk of inadvertent disclosure by the Defence if the identity was known to them.

16. The non-disclosure of P-2478's identity could overcome or reduce the risk and is *proportionate* since there is no less intrusive measure. [REDACTED].

17. In light of the above, the Prosecution requests the delayed disclosure to Witness P-2478's identity and identifying information until such time [REDACTED] identity may safely be disclosed. The proposed non-standard redactions to the statement are set out in Annex A in red highlights, together with their respective justifications.¹³

B. Justification of non-disclosure of the identity information for Witness P-0776

18. Witness P-0776 [REDACTED] provides incriminatory evidence on which the Prosecution intends to rely on for the purposes of the confirmation hearing.¹⁴ [REDACTED].

19. There is an objectively justifiable risk to the safety of P-0776 if the witness's identity is disclosed to the Defence insofar as the witness: [REDACTED].

¹⁰ ICC-01/14-01/21-116-Conf.

¹¹ ICC-01/14-01/21-31-Conf, para.34.

¹² ICC-01/14-01/21-9-Conf-Red, para.29.

¹³ The Prosecution is only submitting the English version of the transcripts for easier review by the Chamber. If the non-standard redactions are granted, the Prosecution will apply the same redactions to the French version of the transcripts.

¹⁴ Screening, CAR-OTP-2022-0115; Transcripts: CAR-OTP-2122-3149 to 3466 (ENG), Annex B.

20. [REDACTED]. [REDACTED].

21. [REDACTED].¹⁵ [REDACTED].

22. [REDACTED]. Redactions to [REDACTED] identity are also proportionate since there is no less intrusive measure to mitigate such risk.

23. For these reasons, the Prosecution requests the delayed disclosure to Witness P-0776's identity and identifying information until such time his identity may safely be disclosed. The proposed redactions to the witness's materials are set out in Annex B, in red highlights, together with their justifications.¹⁶

C. Justification of non-disclosure of the identity information for Witness P-2283

24. Witness P-2283 [REDACTED] provides incriminatory evidence on which the Prosecution intends to rely for the purposes of the confirmation hearing. [REDACTED],¹⁷ [REDACTED].

25. There is an objectively justifiable risk to the safety of P-2283 if [REDACTED] identity was disclosed due to: (i) [REDACTED] (ii) [REDACTED].

26. [REDACTED].¹⁸ [REDACTED].

¹⁵ ICC-01/14-01/21-116-Conf. See also ICC-01/14-01/21-69-Conf

¹⁶ The Prosecution is only submitting the English version of the transcripts for easier review by the Chamber. If the non-standard redactions are granted, the Prosecution will apply the same redactions to the French version of the transcripts.

¹⁷ CAR-OTP-2091-3132, Annex C.

¹⁸ CAR-OTP-2127-9453, Annex D. See also ICC-01/14-01/21-108-Conf-Exp, para. 8.

27. [REDACTED]. Given these factors, the disclosure of P-2283's identity as a Prosecution witness would increase [REDACTED] security risk [REDACTED] immensely. The Prosecution is currently working on establishing a protection strategy for P-2283 but has not been able to implement this for the witness [REDACTED]. This has been particularly complicated by the fact that [REDACTED]. Redactions to [REDACTED] identity are also proportionate since there is no less intrusive measure to mitigate the risk.

28. For these reasons, the Prosecution requests the delayed disclosure to Witness P-2283's identity and identifying information until such time [REDACTED] identity may safely be disclosed. The proposed redactions are set out in red highlights together with its justifications in Annex C. The investigator's report concerning P-2283's incident can be found in Annex D.

D. The non-disclosure of witness identities does not prejudice the rights of the Defence

29. The temporary non-disclosure of the three witnesses' identities is proportionate and not prejudicial to or inconsistent with the rights of the Defence. The proposed non-standard redactions are limited to identifying information of the witnesses. The redactions nevertheless allow the Defence to sufficiently comprehend the evidence of the Witness and prepare for the confirmation of charges hearing. Further, the Prosecution recalls that the scope of the confirmation of charges hearing is limited.¹⁹

30. The Prosecution submits that no other less intrusive and expeditious measures are available to mitigate the risk inherent to the disclosure of these materials. The disclosure of the Witnesses' interview materials with redactions to their identities will

¹⁹ See e.g., ICC-01/14-01/18-273-Red2, para.29-30 ; ICC-01/12-01/18-1562-Red, para.92.

best balance the interests of protecting the safety and security of the witnesses, the rights of the Defence and the fairness of the proceedings.

VI. REQUEST FOR DELAYED DISCLOSURE OF WITNESS P-0481 RELATED MATERIALS

A. *Witness P-0481 justifies delayed disclosure*

31. Witness P-0481 is an [REDACTED] witness to establish the Prosecution's case against Mr SAID related to the crimes at OCRB for the confirmation of charges hearing. [REDACTED].

32. Witness P-0481 meets a high number of objective risk criteria: [REDACTED].

33. [REDACTED]:²⁰ [REDACTED].

34. More recently, the witness expressed [REDACTED], including:

- [REDACTED].
- [REDACTED].
- [REDACTED].
- [REDACTED].
- [REDACTED].

²⁰ CAR-OTP-2018-0530 at 0551 (ENG), at 0551.

35. On account of [REDACTED] vulnerable security situation, and as stated in the *Prosecution's Fourth Report on Disclosure and Related Matters*,²¹ the Prosecution submitted [REDACTED].²² [REDACTED].

36. Due to [REDACTED] position at the time of the events, P-0481's detailed evidence and his currently vulnerable security situation, redacting the identity information of the witness is not viable. The Prosecution submits that the most proportionate measure would be to delay until 30 August 2021, the disclosure of [REDACTED] unredacted evidence. [REDACTED]. The Prosecution considered anonymising [REDACTED] evidence as an interim measure; however, such measure would not be feasible since the redactions would be too extensive for the Defence and Mr SAID to understand and appreciate his evidence. Without such extensive redactions, Witness P-0481 would be placed at high risk of physical harm if [REDACTED] cooperation with the Prosecution became known.

B. The delayed disclosure of Witness P-0481's statement and annexes does not prejudice the rights of the Defence

37. The Defence will not be unduly prejudiced by the delayed disclosure of P-0481's materials. *First*, out of the [REDACTED] witnesses to be relied upon at the confirmation of charges hearing, P-0481 will be the only witness whose identity and statement would be disclosed after the 16 August 2021 deadline. *Second*, the Prosecution recognises the potential impact of the request and is therefore only requesting a short period of two weeks for delayed disclosure. The Defence will receive, in the meantime, the Document Containing the Charges which will set out clearly the charges against Mr SAID and the corresponding List of Evidence. The proposed date of 30 August also coincides with the deadline for the submission of the Pre-Confirmation Brief and will allow the Defence ample time to prepare for the

²¹ ICC-01/14-01/21-135-Conf-Exp.

²² ICC-01/14-01/21-135-Conf-Exp, paras. 12-13.

Confirmation Hearing. The materials related to P-0481 include [REDACTED]. Given the extraordinary situation in which P-0481 finds himself, delayed disclosure here is proportionate as the overall least intrusive measure.

VII. RELIEF SOUGHT

38. For the above reasons, the Prosecution respectfully requests:

- (i) The Chamber's authorisation to temporarily withhold the identities of Witnesses P-2478, P-0776 and P-2283 under Rule 81(4) as proposed in Confidential, *ex parte* Annexes A to D and until such time their identities can safely be disclosed and;
- (ii) The Chamber's authorisation to disclose the evidence of Witness P-0481 by 30 August 2021.

A handwritten signature in blue ink, consisting of a stylized 'K' followed by a horizontal line and a dot.

Karim A. A. Khan QC, Prosecutor

Dated this 10th day of December 2021
At The Hague, The Netherlands