

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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Date: 2 April 2015

TRIAL CHAMBER VI

Before: Judge Robert Fremr, Presiding Judge
Judge Kuniko Ozaki
Judge Chang-ho Chung

**SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO
IN THE CASE OF
*THE PROSECUTOR v. BOSCO NTAGANDA***

Public

Public redacted version of 'Decision on Prosecution application for delayed disclosure'

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

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Mr James Stewart
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Legal Representatives of Victims

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**Victims Participation and Reparations
Section**

Others

Trial Chamber VI ('Chamber')¹ of the International Criminal Court ('Court'), in the case of *The Prosecutor v. Bosco Ntaganda*, having regard to Articles 64, 67, 68(1) and (5) of the Rome Statute ('Statute') and Rules 76, 77, 81 and 84 of the Rules of Procedure and Evidence ('Rules'), issues the following 'Decision on Prosecution application for delayed disclosure'.

I. Procedural History

1. On 9 October 2014, the Chamber issued an order directing the Office of the Prosecutor ('Prosecution') to disclose all incriminatory material in the form of witness statements and any other material to be relied on at trial, as well as disclosure of all Article 67(2) and Rule 77 material by 2 March 2015, save where delayed disclosure had been requested and authorised. In that same order, the Chamber set 16 February 2015 as the deadline for Prosecution applications for delayed disclosure and 23 February 2015 as the deadline for responses thereto.²
2. On 16 February 2015, the Prosecution filed an application for delayed disclosure ('Application'), whereby it sought to delay the disclosure of the identity of 12 witnesses upon whom it intends to rely at trial.³
3. On 18 February 2015, by way of email, the Chamber invited the Victims and Witnesses Unit ('VWU') to respond to the Application by 25 February 2015.⁴
4. On 25 February 2015, the Prosecution filed the 'Prosecution request for authorisation to provide a summary of P-0901's statement' ('Prosecution

¹ Where 'Chamber' is used in this decision it refers to both Trial Chamber VI as composed by the Presidency's 'Decision replacing a judge in Trial Chamber VI', 18 March 2015, ICC-01/04-02/06-521 and to the chamber in its previous composition.

² Order Scheduling a Status Conference and Setting the Commencement Date for the Trial, ICC-01/04-02/06-382. A corrigendum was filed on 28 November 2014 (ICC-01/04-02/06-382-Corr).

³ Prosecution application for delayed disclosure, ICC-01/04-02/06-461-Conf-Exp, with confidential, *ex parte*, annexes A-C3. A confidential redacted version and a public redacted version were filed on 17 February 2015 (respectively, ICC-01/04-02/06-461-Conf-Red and ICC-01/04-02/06-461-Red2). A corrigendum of Annex A was filed on 19 February 2015 (ICC-01/04-02/06-461-Conf-Exp-AnxA-Corr). The relevant witnesses were: P-0758, P-0761, P-0773, P-0806, P-0887, P-0888, P-0898, P-0901, P-0907, P-0911, P-0914 and P-0918.

⁴ Email from Legal Officer of the Chamber to the VWU on 18 February 2015 at 11:58.

Amendment'), by which it amended its request in respect of witness P-0901, in particular by seeking authorisation to disclose a summary of the witness's interview instead of a redacted version of the transcription itself.⁵

5. Also on 25 February 2015, the Prosecution filed a motion whereby it informed the Chamber that it withdraws, or amends, the Application with regard to witnesses P-0758, P-0761, P-0773, P-0887, P-0898, P-0907, P-0914 and P-0918 ('Partial Withdrawal of the Application').⁶
6. Further on 25 February 2015, the VWU filed its observations on the Application ('VWU Observations').⁷
7. On 2 March 2015, the Prosecution filed the 'Prosecution proposed redactions to three documents relevant to P-0911' ('Supplementary Application').⁸
8. On 3 March 2015, the Chamber issued a decision in which it granted the defence team for Mr Ntaganda ('Defence') an extension of page and time limits for responding to, amongst other filings, the Application, Prosecution Amendment and Supplementary Application.⁹
9. On 9 March 2015, having, as noted above, previously been granted an extension of time in which to do so,¹⁰ the Defence filed its consolidated response to the

⁵ Prosecution request for authorisation to provide a summary of P-0901's statement, ICC-01/04-02/06-473-Conf-Exp. A confidential redacted version and a public redacted version were filed on that same date (respectively, ICC-01/04-02/06-473-Conf-Red and ICC-01/04-02/06-473-Red2).

⁶ Prosecution withdrawal of its application for delayed disclosure in relation to P-0758, P-0761, P-0773, P-0887, P-0898, P-0907, P-0914 and P-0918, 25 February 2015, ICC-01/04-02/06-475-Conf-Exp (notified on 26 February 2015). A confidential redacted version and a public redacted version were filed on 26 February 2015 (respectively, ICC-01/04-02/06-475-Conf-Red and ICC-01/04-02/06-475-Red2).

⁷ Victims and Witnesses Unit's observations on the "Prosecution application for delayed disclosure" ICC-01/04-02/06-461-Conf-Exp, ICC-01/04-02/06-476-Conf-Exp. A confidential redacted version was filed simultaneously (ICC-01/04-02/06-476-Conf-Red), and a second confidential redacted version (ICC-01/04-02/06-476-Conf-Red2) was filed on 12 March 2015.

⁸ ICC-01/04-02/06-493, with confidential, *ex parte*, Annex A.

⁹ Decision on the Defence's urgent motion for an extension of page limit to respond to the Prosecution's delayed disclosure and non-standard redactions requests, ICC-01/04-02/06-495. *See also* Expedited Request on Behalf of Mr NTAGANDA Seeking an Extension of the Page Limit in Responding to the Prosecution Application and Prosecution Request, 2 March 2015, ICC-01/04-02/06-490-Conf.

¹⁰ *See* Urgent Motion on Behalf of Mr NTAGANDA Requesting an Extension of Time Limit to Respond to the "Prosecution request for redactions" and the "Prosecution application for delayed disclosure", 19 February 2015,

Application, Prosecution Amendment and Supplementary Application ('Response').¹¹

10. On 12 March 2015, the Chamber issued an order setting a deadline of 23 March 2015 for the Defence to provide any additional observations, following receipt of further disclosure relating to, amongst others, witness P-0901.¹²
11. On 19 March 2015, the Prosecution filed the 'Prosecution withdrawal of its application for delayed disclosure for P-0901'.¹³
12. On 20 March 2015, the Defence filed its additional observations, supplementing the Response ('Supplemental Response').¹⁴
13. On 31 March 2015, the VWU advised the Chamber that it was not yet in a position to provide any further update in relation to the status of relevant witnesses.¹⁵

II. Applicable Law

14. In considering the Application, the Chamber must balance the rights of the accused under Article 67 of the Statute, particularly to have adequate time and facilities for the preparation of his defence, with the requirement laid down in Article 68(1) of the Statute to take appropriate measures to protect the safety, well-being and privacy of witnesses.

ICC-01/04-02/06-466-Conf; Decision on the Defence's urgent motion for an extension of time to respond to the Prosecution's delayed disclosure and non-standard redactions requests, 27 February 2015, ICC-01/04-02/06-481 (granting an extension until 4 March 2015); Decision on the Defence's urgent motion for an extension of page limit to respond to the Prosecution's delayed disclosure and non-standard redactions requests, 3 March 2015, ICC-01/04-02/06-495 (extending the response deadline further to 9 March 2015).

¹¹ Consolidated response on behalf of Mr Ntaganda to Prosecution Application and Prosecution Request and seven additional related submissions, ICC-01/04-02/06-502-Conf. Corrigenda were filed on 11 March 2015 and 17 March 2015 (ICC-01/04-02/06-502-Conf-Corr and ICC-01/04-02/06-502-Conf-Corr2). Following a direction from the Chamber (e-mail from a Legal Officer of the Chamber to the Defence on 19 March 2015 at 11:14) an amended public redacted version was filed on 19 March 2015 (ICC-01/04-02/06-502-Corr2-Red).

¹² Order on the disclosure of material related to Witnesses P-0871, P-0876, P-0882, P-0013, P-0816 and P-0901, ICC-01/04-02/06-506.

¹³ ICC-01/04-02/06-523-Conf. A public redacted version was filed on the same day (ICC-01/04-02/06-523-Red).

¹⁴ Supplemental observations on behalf of Mr Ntaganda following the Chamber's Order on the disclosure of material related to Witnesses P-0871, P-0876, P-0882, P-0013, P-0816 and P-0901, ICC-01/04-02/06-530.

¹⁵ E-mail from VWU to the Chamber on 31 March 2015 at 15:47.

15. Under Article 64(3)(c) of the Statute, the Chamber, 'subject to any other relevant provisions', shall 'provide for disclosure of documents or information not previously disclosed, sufficiently in advance of the commencement of the trial to enable adequate preparation for trial'.¹⁶ Article 67(2) of the Statute and Rules 76 and 77 of the Rules elaborate on the Prosecution's duty of disclosure to the defence. In particular, Rule 76(1) requires that the Prosecution provide the names of the witnesses it intends to call at trial and copies of any prior statements of those witnesses, 'sufficiently in advance to enable the adequate preparation of the defence'. As set out in Rule 76(4), this is subject, however, to the protection and privacy of victims and witnesses as provided for in the Statute and Rules 81 and 82 of the Rules. Rule 81(4) authorises measures, including non-disclosure of the identity of witnesses, victims and members of their families prior to the commencement of the trial, in order to protect their safety.
16. The Chamber notes that delayed disclosure of witness identities is established in the jurisprudence of the Court,¹⁷ as well as at the *ad hoc* Tribunals.¹⁸ The Court's jurisprudence has consistently held that all restrictions on disclosure shall be justified by a showing of: i) the existence of an 'objectively justifiable risk' to the safety of the person concerned or which may prejudice further or ongoing investigations; ii) the risk must arise from disclosing the particular information to the Defence; iii) the infeasibility or insufficiency of less restrictive protective

¹⁶ See also Rule 84 of the Rules.

¹⁷ See for example: *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Public Redacted version of the 'Decision on the Protection of Prosecution Witnesses 267 and 353' of 20 May 2009 (ICC-01/04-01/07-1156-Conf-Exp), 28 May 2009, ICC-01/04-01/07-1179-tENG, para. 44; *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Decision on Prosecution's 'Urgent request for reconsideration pursuant to Trial Chamber V's 'Decision on the second and third Prosecution requests for delayed disclosure of witness identities'', ICC-01/09-01/11-578-Red.

¹⁸ See for example: ICTY, Appeals Chamber, *Prosecutor v. Šešelj*, Decision on Vojislav Šešelj's appeal against the Trial Chamber's oral decision of 7 November 2007, IT-03-67-AR73.6, 24 January 2008, paras 15-16; ICTR, Appeals Chamber, *Prosecutor v. Bagosora*, Judgement, ICTR-98-41-A, 14 December 2011, paras 79-85 (this Judgment overturned, in part, the *Bagosora* jurisprudence relied on by the Prosecution at footnote 32 of the Application, although it is noted the relevant rule at the ICTR was amended subsequent to the Trial Chamber's decision).

measures; iv) an assessment as to whether the redactions sought are 'prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial'; and v) the obligation to periodically review the decision authorising the redactions should circumstances change.¹⁹

17. In assessing whether or not to authorise delayed disclosure, the Chamber will look to the specific circumstances of each witness. When evaluating security risks to individual witnesses, the Chamber may consider the potential for interference and intimidation once disclosure is made to the Defence and to the accused. Furthermore, while the subjective fear of each witness may be taken into consideration, it is not determinative.²⁰
18. Full consideration must also be given to the impact of any delayed disclosure on the Defence's preparation for trial. Such impact may be assessed by measuring the effect of withholding the identity not just of any single witness but also the cumulative effect where delayed disclosure is requested for a number of witnesses. The Chamber may, if appropriate and feasible, also consider mitigating measures to diminish the prejudicial impact on the accused.

III. Submissions and Analysis

19. The Chamber will first briefly summarise the overarching submissions of the parties before turning to an individual assessment in respect of each relevant witness for whom delayed disclosure requests remain outstanding.

Prosecution

20. The Prosecution submits that the requests for delayed disclosure are justified on the basis that there is an objectively justifiable risk to the safety of each of the

¹⁹ Decision on the Protocol establishing a redaction regime, 12 December 2014, ICC-01/04-02/06-411, para. 15 (and jurisprudence cited therein).

²⁰ See for example: ICTY, Trial Chamber, *Prosecutor v Karadžić*, Decision on protective measures for witnesses, IT-95-5/18-PT, 30 October 2008, para. 19(a).

witnesses arising from disclosure of their identities to the accused.²¹ It supports its request with individual security assessments for each of the relevant witnesses,²² and also submits that [REDACTED], especially in the case of insider witnesses.²³ The Prosecution contends that no lesser restrictive measures are feasible as the security risks arise from the accused and 'his network of supporters'.²⁴ [REDACTED].²⁵

21. The Prosecution submits that the delayed disclosure requested would not unduly prejudice the accused, including because the Defence has already received either the material relating to the witness with 'limited redactions to their identity' or summaries of expected testimony,²⁶ and the expected delay in disclosure will be short and is for 'a limited number of witnesses'.²⁷

Defence

22. The Defence raises eight principal issues, as follows, that: (i) due to the 'extensive redactions' in the Application, and *ex parte* nature of the annexes, insufficient information has been provided to enable the Defence to respond;²⁸ (ii) the Prosecution has failed to adequately distinguish between risks arising from disclosure to the public at large and to the Defence or the accused;²⁹ (iii) [REDACTED];³⁰ (iv) at the trial phase of proceedings any delayed disclosure can only be 'exceptional';³¹ (v) priority must be given to the rights of the accused above the protection of victims and witnesses;³² (vi) the risks must arise to the safety of the witness, it is submitted that risks to well-being, dignity and privacy

²¹ Application, ICC-01/04-02/06-461-Red2, paras 3, 18-19.

²² ICC-01/04-02/06-461-Conf-Exp-AnxA-Corr.

²³ Application, ICC-01/04-02/06-461-Conf-Red, paras 19-23.

²⁴ Application, ICC-01/04-02/06-461-Red2, paras 45-46.

²⁵ Application, ICC-01/04-02/06-461-Conf-Exp, para. 46.

²⁶ Application, ICC-01/04-02/06-461-Red2, para. 49. *See also* ICC-01/04-02/06-517.

²⁷ Application, ICC-01/04-02/06-461-Red2, paras 50-51.

²⁸ Response, ICC-01/04-02/06-502-Corr2-Red, paras 4 and 26-31.

²⁹ Response, ICC-01/04-02/06-502-Corr2-Red, paras 5-6 and 32-40.

³⁰ Response, ICC-01/04-02/06-502-Conf, paras 7 and 41-43.

³¹ Response, ICC-01/04-02/06-502-Corr2-Red, paras 8 and 44-47.

³² Response, ICC-01/04-02/06-502-Corr2-Red, paras 9 and 50-53.

are insufficient;³³ (vii) delayed disclosure should not be granted where the need arises from the failure of the Prosecution to ensure that protection assessments, or transcriptions and translations, were completed within the disclosure deadlines, or, if granted, the trial schedule should 'be adjusted accordingly';³⁴ and (viii) the fair trial rights of the accused would be unduly prejudiced by the delayed disclosure requested, highlighting, in particular, the cumulative impact of the requests and the importance of insider witnesses for the Defence's understanding of the case.³⁵

23. The Defence objects specifically to the Prosecution's request to disclose summaries *in lieu* of transcripts or statements, submitting that the summaries are 'inevitably subjective' and 'incomplete', and 'not permissible at trial'.³⁶ Finally, the Defence submits that the Prosecution has not considered whether less restrictive measures are feasible.³⁷

Preliminary Issues

24. The Chamber notes that, in respect of the first principal issue raised by the Defence, the Defence additionally requests the Chamber to 'review and pronounce on' the appropriateness of the redactions applied in the Application and related filings.³⁸ The Chamber observes that it is constantly mindful of the classification of information between the parties and participants, in particular in the context of enabling a participant to meaningfully respond. It considers that the redactions applied to the Application, and related filings, were appropriate and necessary in the context of the requests being made. Noting

³³ Response, ICC-01/04-02/06-502-Corr2-Red, paras 10 and 54-58.

³⁴ Response, ICC-01/04-02/06-502-Corr2-Red, paras 11 and 59-60. *See also* para. 46.

³⁵ Response, ICC-01/04-02/06-502-Corr2-Red, paras 12-13, 66-81 and 85-86.

³⁶ Response, ICC-01/04-02/06-502-Corr2-Red, para. 48. It is noted that a Defence request to 'delay adjudication' pending the Defence having an opportunity to review the proposed summaries (para. 49) was addressed by way of the Chamber's 'Order on the disclosure of material related to Witnesses P-0871, P-0876, P-0882, P-0013, P-0816 and P-0901', 12 March 2015, ICC-01/04-02/06-506.

³⁷ Response, ICC-01/04-02/06-502-Corr2-Red, para. 14.

³⁸ Response, ICC-01/04-02/06-502-Corr2-Red, para. 31.

also that copies of the relevant redacted underlying materials and/or proposed summaries were provided to the Defence,³⁹ the Chamber considers that the Defence had adequate information to be in a position to respond meaningfully to the Application. Nonetheless, the Chamber acknowledges that certain information, relating especially to the security situation of the individual witnesses concerned or of an identifying nature, is necessarily *ex parte*.

25. The Chamber also considers it appropriate to address, as a preliminary matter, the Defence's submission regarding [REDACTED].⁴⁰ [REDACTED].⁴¹[REDACTED].⁴² [REDACTED].
26. The remaining issues have, where appropriate, been incorporated into the Chamber's analysis in the individual assessments below.

Witness P-0806

27. The Prosecution submits that witness P-0806, who provides corroborating evidence to P-0758, [REDACTED].⁴³ It is submitted that [REDACTED].⁴⁴ It is stated, however, that P-0806 has [REDACTED].⁴⁵ The Prosecution requests delayed disclosure of P-0806's identity until [REDACTED] complete an assessment for any [REDACTED] protective measures.⁴⁶
28. The VWU states that P-0806 [REDACTED], [REDACTED].⁴⁷ It is stated that [REDACTED].⁴⁸

³⁹ The Chamber notes in this regard that it provided the Defence with an opportunity to provide any additional submissions it may have following receipt of certain underlying materials which had not been disclosed by the Prosecution within the original disclosure deadlines, ICC-01/04-02/06-506.

⁴⁰ [REDACTED].

⁴¹ [REDACTED].

⁴² [REDACTED].

⁴³ Application, ICC-01/04-02/06-461-Conf-Exp, para. 24.

⁴⁴ Application, ICC-01/04-02/06-461-Conf-Exp, para. 26.

⁴⁵ ICC-01/04-02/06-461-Conf-Exp-AnxA-Corr, pages 15-16.

⁴⁶ Application, ICC-01/04-02/06-461-Red2, paras 3 and 28; ICC-01/04-02/06-461-Conf-Exp-AnxA-Corr, page 16; Partial Withdrawal of the Application, ICC-01/04-02/06-475-Conf-Exp, paras 5-6.

⁴⁷ VWU Observations, ICC-01/04-02/06-476-Conf-Exp, para. 7.

⁴⁸ VWU Observations, ICC-01/04-02/06-476-Conf-Red2, para. 7.

29. The Defence opposes the request on the basis, *inter alia*, that the Prosecution has failed to establish an objectively justifiable risk and the non-disclosure would 'seriously hamper' Defence investigations.⁴⁹
30. The Chamber is not persuaded that an objectively justifiable risk continues to exist in respect of P-0806. It appears that the recommendation for non-disclosure of P-0806's identity [REDACTED],⁵⁰ who is described as a [REDACTED] insider witness [REDACTED].⁵¹ The [REDACTED] has now been disclosed to the Defence, following implementation of protective measures, and therefore would no longer provide a basis for non-disclosure [REDACTED]. Although P-0806 [REDACTED], the witness is [REDACTED] and provides evidence only of a corroborating nature. The Chamber has carefully considered, amongst other things, [REDACTED]. However, noting also that [REDACTED], the Chamber considers that on the basis of the information before it, an objectively justifiable risk would not arise from disclosure of the witness's identity to the Defence.
31. The Chamber nonetheless recommends that the [REDACTED].

*Witness P-0888*⁵²

32. The Prosecution submits that witness P-0888 is a former UPC/FPLC child soldier, who was abducted in 2002 when 14 years old and who participated in UPC-FLPC attacks. [REDACTED]. The Prosecution completed its interview with P-0888 [REDACTED]. The Prosecution submits that once P-0888's identity is disclosed, [REDACTED] to mitigate the increased risk arising from the disclosure. It therefore requests that the non-standard redactions applied to the

⁴⁹ Response, ICC-01/04-02/06-502-Conf, para. 183.

⁵⁰ ICC-01/04-02/06-461-Conf-Exp-AnxA-Corr, page 16.

⁵¹ Application, ICC-01/04-02/06-461-Conf-Exp, paras 25-26; ICC-01/04-02/06-461-Conf-Exp-AnxA-Corr, pages 2-4 and 16.

⁵² The Chamber has noted that a request for non-standard redactions on material relating to P-0888 was also made on 16 February 2015 in the 'Prosecution request for redactions', ICC-01/04-02/06-462-Conf-Exp. That request will be ruled upon by way of a separate decision.

material pertaining to this witness be authorised and maintained until [REDACTED] by 30 April 2015.⁵³

33. The VWU informs the Chamber that [REDACTED].⁵⁴ It further indicates that [REDACTED].⁵⁵
34. The Defence opposes the request in respect of P-0888 on the basis that the Prosecution has failed to establish an objectively justifiable risk and the request, if granted, would impede Defence investigations into victim and insider witnesses and unduly prejudice the rights of the accused.⁵⁶
35. As a preliminary matter, the Chamber notes that no explanation was provided for why the witness was only [REDACTED], which appears to be approximately three months after both completion of the interview [REDACTED]. [REDACTED].
36. Nonetheless, the Chamber is satisfied that an objectively justifiable risk to the safety of the witness arising from disclosure of the witness's identity to the accused has been established. In reaching this conclusion the Chamber has considered, amongst other things, the particular status of the witness as an insider and former child soldier,⁵⁷ and the fact that P-0888 [REDACTED].⁵⁸
37. The Chamber further notes that P-0888 [REDACTED].⁵⁹ [REDACTED].⁶⁰
38. In the circumstances, the Chamber is satisfied that non-disclosure of P-0888's identity until [REDACTED] is appropriate and appears to be the least restrictive measure available.

⁵³ Application, ICC-01/04-02/06-461-Conf-Exp, paras 29-30; ICC-01/04-02/06-461-Conf-Exp-AnxA-Corr, pages 19-22.

⁵⁴ VWU Observations, ICC-01/04-02/06-476-Conf-Red2, para. 6.

⁵⁵ VWU Observations, ICC-01/04-02/06-476-Conf-Red2, paras 3-4.

⁵⁶ Response, ICC-01/04-02/06-502-Corr2-Red, para. 179, referring to paras 54-58, 66-77 and 79-81.

⁵⁷ Application, ICC-01/04-02/06-461-Red2, para. 29; ICC-01/04-02/06-461-Conf-Exp-AnxA-Corr, pages 19-22.

⁵⁸ ICC-01/04-02/06-461-Conf-Exp-AnxA-Corr, pages 19-22.

⁵⁹ ICC-01/04-02/06-461-Conf-Exp-AnxA-Corr, page 19.

⁶⁰ Application, ICC-01/04-02/06-461-Conf-Exp, para. 22; ICC-01/04-02/06-461-Conf-Exp-AnxC2.

39. Regarding potential prejudice, the Chamber observes that long portions of the witness's statement are not redacted and the redacted information is strictly limited to obviously identifying information. The Chamber notes that the redacted statement was disclosed to the Defence on 2 March 2015, and a further summary of P-0888's expected testimony was provided on 13 March 2015.⁶¹ Further, the Chamber observes that the delay in disclosing the witness's identity is expected to be relatively short, with a provisional estimate of 30 April 2015 having been provided.⁶² Consequently, including with regard to the cumulative impact of the delayed disclosure requested, the Chamber considers that the delayed disclosure of the identity of this witness strikes an appropriate balance between the rights of the accused and the need to ensure the safety of P-0888.

Witness P-0911

40. The Prosecution submits that, as a former UPC-FPLC soldier, P-0911 [REDACTED].⁶³ [REDACTED].⁶⁴ It is stated that P-0911 has [REDACTED].⁶⁵ The Prosecution requests authorisation to delay disclosure of the audio-recording, transcript and translation of the witness's interview until [REDACTED], namely until 30 April 2015.⁶⁶ In the alternative, the Prosecution requests authorisation to delay their disclosure until the transcriptions and translations have been completed.⁶⁷

41. The VWU indicates that P-0911 [REDACTED], [REDACTED].⁶⁸ The VWU further indicates that [REDACTED].⁶⁹

⁶¹ Prosecution's Provision of the Current Status of Disclosure, 16 March 2015, ICC-01/04-02/06-517, paras 16-17.

⁶² VWU Observations, ICC-01/04-02/06-476-Conf-Exp, paras 3-4.

⁶³ Application, ICC-01/04-02/06-461-Conf-Exp, para. 37.

⁶⁴ ICC-01/04-02/06-461-Conf-Exp-AnxA-Corr, pages 43-47.

⁶⁵ ICC-01/04-02/06-461-Conf-Exp-AnxA-Corr, pages 43-47.

⁶⁶ Supplementary Application, ICC-01/04-02/06-493, paras 1-2. *See also* Application, ICC-01/04-02/06-461-Red2, para. 4(iii) and 38.

⁶⁷ Application, ICC-01/04-02/06-461-Red2, para. 53.

⁶⁸ VWU Observations, ICC-01/04-02/06-476-Conf-Exp, para. 7.

⁶⁹ VWU Observations, ICC-01/04-02/06-476-Conf-Exp, paras 3-4.

42. The Defence opposes the request on the basis that the Prosecution has failed to demonstrate an objectively justifiable risk and that the request, if granted, would 'seriously hamper' Defence investigations, particularly with regard to insider witnesses. It submits that the request unduly prejudices the rights of the accused to have the necessary time and facilities to prepare for trial.⁷⁰
43. The Chamber notes that [REDACTED].⁷¹ Nonetheless, in the circumstances, the Chamber considers that the status of P-0911 as an insider witness and alleged former UPC/FPLC member, together with the fact that [REDACTED] sufficiently establishes an objectively justifiable risk in the event of disclosure of P-0911's identity prior to [REDACTED]. In this regard, the Chamber recalls that it has already [REDACTED].⁷² The Chamber is further satisfied that non-disclosure of the witness's identity is the least restrictive measure available to adequately address the risk.
44. Regarding prejudice, the Chamber notes that on 2 March 2015 the Prosecution disclosed two redacted interview notes, as well as a document provided by P-0911,⁷³ and, on 13 March 2015, also disclosed a summary of P-0911's expected testimony.⁷⁴ The Chamber understands that the reason the redacted audio-recording and transcript have not been disclosed is that the transcription has not yet been completed.⁷⁵ The Chamber underlines that the Prosecution was obliged to make every effort to ensure that investigations were completed in a sufficiently timely manner to enable any transcriptions and translations to be prepared in advance of the disclosure deadline. However, the Chamber understands that the Prosecution only obtained the witness's contact details

⁷⁰ Response, ICC-01/04-02/06-502-Corr2-Red, para. 197, referring to paras 54-58, 66-77 and 81.

⁷¹ ICC-01/04-02/06-461-Conf-Exp-AnxA-Corr, page 44.

⁷² See paragraph 25 above.

⁷³ Supplementary Application, ICC-01/04-02/06-493, para. 3; Response, ICC-01/04-02/06-502-Corr2-Red, para. 195; ICC-01/04-02/06-517, para. 16.

⁷⁴ ICC-01/04-02/06-517, para. 17.

⁷⁵ Supplementary Application, ICC-01/04-02/06-493, para. 2.

[REDACTED],⁷⁶ and that its duties under Article 54(1) of the Statute may have obliged it to pursue this lead notwithstanding the short time remaining until the disclosure deadline.

45. Noting the information which has been provided and the limited nature of the cumulative delayed disclosure being granted - comprising the identities of only two of the 75 intended Prosecution trial witnesses - the Chamber does not consider that granting the request would result in undue prejudice to the accused.
46. In this regard, the Chamber considers it appropriate to also note it does not consider that any adjustment to the trial schedule is warranted on the basis of the delayed disclosure authorised in this decision. However, the Chamber notes that it has not been provided with P-0911's interview transcript. Should the interview notes and summary provided to the Defence ultimately prove to insufficiently represent P-0911's interview transcript, it is within the Chamber's power to take measures where late disclosure results in significant prejudice to the accused, including, for example, excluding reliance by the Prosecution on material for incriminatory purposes or directing that it be taken into consideration in witness scheduling.
47. The Chamber grants the delayed disclosure requested in relation to P-0911 pending completion of the [REDACTED]. Noting, however, that should the Prosecution be in possession of a transcribed version of the interview before that time, it shall apply to the transcript both standard redactions and redactions to the identity and identifying information of the witness and disclose it promptly to the Defence.

⁷⁶ Application, ICC-01/04-02/06-461-Conf-Exp, para. 38.

Request for an extension of time to disclose the materials related to P-0907

48. In its Application, the Prosecution had requested authorisation to delay disclosure of all material relating to witness P-0907, including the witness's identity.⁷⁷ On 25 February 2015, noting [REDACTED],⁷⁸ the Prosecution withdrew its Application with regard to this witness, informing the Chamber that the identity could be disclosed to the Defence.⁷⁹ However, the Prosecution maintained its request for a variation of time limit until the end of April 2015 to disclose the audio-recording, transcription and translation of P-0907's interview,⁸⁰ which had not been completed when scheduled [REDACTED].⁸¹
49. The Prosecution submits that even if the audio-recording is in its possession, it needs to complete the transcription first to be able to apply standard redactions in order to reduce the risk of inadvertent disclosure. It is submitted that the transcription is also necessary in order to produce the Kinyarwanda translation of the interview.⁸²
50. The Defence opposes the request, arguing that: (i) it would impede investigations into insider witnesses, which are of particular importance to Defence preparations; and (ii) the summary provided by the Prosecution is insufficient to enable effective investigations.⁸³ The Defence argues that, consequently, undue prejudice to the fair trial rights of the accused would arise if the request was granted.⁸⁴

⁷⁷ Application, ICC-01/04-02/06-461-Red2, paras 42-44.

⁷⁸ Partial Withdrawal of the Application, ICC-01/04-02/06-475-Conf-Exp, para. 10. *See also* VWU Observations, ICC-01/04-02/06-476-Conf-Red2, para. 6.

⁷⁹ Partial Withdrawal of the Application, ICC-01/04-02/06-475-Red2, para. 10.

⁸⁰ Partial Withdrawal of the Application, ICC-01/04-02/06-475-Red2, para. 11.

⁸¹ Application, ICC-01/04-02/06-461-Conf-Exp.

⁸² Partial Withdrawal of the Application, ICC-01/04-02/06-475-Conf-Red, para. 12.

⁸³ Response, ICC-01/04-02/06-502-Corr2-Red, para. 175, referring to paras 48 and 81.

⁸⁴ Response, ICC-01/04-02/06-502-Corr2-Red, para. 175, referring to paras 66-77.

51. The Chamber recalls that it has already found that the delay in completion of certain interviews arose from reasons outside the Prosecution's control.⁸⁵ Additionally, the Chamber accepts that the practical difficulties of applying redactions to the 'raw' audio material without having read the transcription first, mindful of the risk of inadvertent disclosure, establishes good cause not to disclose the audio-recording before the transcription is completed. The Chamber notes that the prejudice to the Defence is mitigated by the fact that the Prosecution disclosed, on 2 March 2015, the witness's identity, together with detailed draft interview notes.⁸⁶ However, the Prosecution shall not withhold the audio-recording and the transcription while the Kinyarwanda translation is being prepared. Instead, the audio and transcription must be disclosed as soon as the appropriate standard redactions have been applied, with the translation to follow no later than 30 April 2015.

Request for extension of time for disclosure of the Kinyarwanda translation of witness P-0901's interview

52. The Chamber notes that, on 19 March 2015, the Prosecution withdrew its request for delayed disclosure of material relevant to witness P-0901, including of P-0901's identity. The Prosecution stated that [REDACTED]⁸⁷ and consequently disclosure to the Defence of P-0901's identity and interview was being effected 'without delay'.⁸⁸ The Prosecution maintains a request for delayed disclosure of the Kinyarwanda translation of the interview, which it submits will be completed by 2 April 2015.⁸⁹

⁸⁵ See Decision on 'Prosecution's request pursuant to regulation 35 to vary the time limit for disclosure of the Pre-Trial Brief', 19 February 2015, ICC-01/04-02/06-467, para. 9.

⁸⁶ The Chamber observes, however, that in the absence of the interview transcript it cannot fully verify the comprehensiveness of the draft notes.

⁸⁷ ICC-01/04-02/06-523-Conf, para. 7.

⁸⁸ ICC-01/04-02/06-523-Red, paras 6-7.

⁸⁹ ICC-01/04-02/06-523-Red, para. 8. See also Application, ICC-01/04-02/06-461-Red2, paras 54-56.

53. The Defence did not make specific submissions regarding the delayed disclosure of the Kinyarwanda translation.⁹⁰ The Chamber has noted, however, the Defence's general submissions, including in particular that the inability on the part of the Prosecution to complete transcription or translation within the disclosure deadlines 'cannot serve as justification for the non-disclosure of material concerning witnesses'.⁹¹
54. The Chamber recalls that, pursuant to Rule 76(3) of the Rules, the statements of Prosecution witnesses are to be made available 'in original and in a language which the accused fully understands and speaks'. As noted above, the Chamber agrees, as a matter of principle, that any required transcription and translation ought to be completed within disclosure deadlines in order to facilitate timely discharge of the Prosecution's full disclosure obligations. Nonetheless, as previously acknowledged by the Appeals Chamber,⁹² the Chamber recognises that the Rule 76(3) translation requirement can give rise to significant difficulties, which may need to be managed within the Chamber's discretionary trial management powers. In that context, a translation burden may provide good cause for an extension of deadline, provided the Chamber is satisfied that the fairness and expeditiousness of the proceedings would not be unduly impacted. In this case, the Chamber notes that a copy of the transcription of P-0901's interview was disclosed to the Defence on 20 March 2015,⁹³ with formal disclosure of all material, except the Kinyarwanda translation, to be provided by 27 March 2015.⁹⁴ In the circumstances, the Chamber finds that no undue

⁹⁰ Supplemental Response, ICC-01/04-02/06-530, paras 3-4.

⁹¹ Response, ICC-01/04-02/06-502-Corr2-Red, paras 11, 59-60.

⁹² See, for example, Appeals Chamber, *Prosecutor v Abdallah Banda Abakaer Nourain & Saleh Mohammed Jerbo Jamus*, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber IV of 12 September 2011 entitled 'Reasons for the Order on translation of witness statements (ICC-02/05-03/09-199) and additional instructions on translation', 17 February 2012, ICC-02/05-03/09-295, para. 29.

⁹³ ICC-01/04-02/06-523-Red, footnote 8; Supplemental Response, ICC-01/04-02/06-530, footnote 11. It is additionally noted that the Prosecution submits that a summary of non-identifying portions of P-0901's interview was provided to the Defence on 2 March 2015, and a summary of expected testimony on 13 March 2015 (see ICC-01/04-02/06-517, para. 15).

⁹⁴ ICC-01/04-02/06-523-Red, footnote 8.

prejudice will result from the envisaged delay in disclosure of the Kinyarwanda translation of the interview.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

REJECTS the request for delayed disclosure in respect of P-0806;

ORDERS the Prosecution to disclose the materials related to P-0806, applying only standard redactions, within five days of notification of this decision;

AUTHORISES the delayed disclosure of P-0888's identity, and associated redaction of identifying material, until [REDACTED];

AUTHORISES, in accordance with paragraph 47 above, the delayed disclosure of P-0911's identity, and associated redaction of identifying material, until [REDACTED];

AUTHORISES, in accordance with paragraph 51 above, an extension of time to disclose the audio, transcript and translation of P-0907's interview;

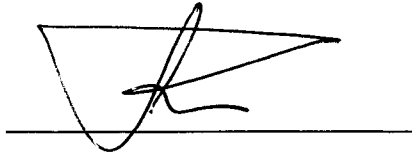
AUTHORISES an extension of time for the disclosure of the Kinyarwanda translation of P-0901's interview until 2 April 2015;

DIRECTS the [REDACTED];

ORDERS the Prosecution to disclose the identity of P-0888 and P-0911, and associated lesser redacted materials covered by the Application and this decision, within two days of [REDACTED]; and

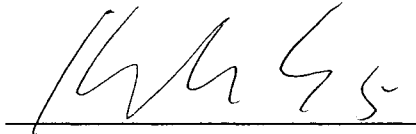
REJECTS all other requests.

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



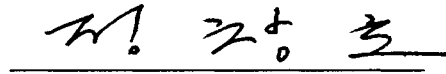
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Judge Robert Fremr, Presiding Judge



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Judge Kuniko Ozaki



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Judge Chang-ho Chung

Dated this 2 April 2015

At The Hague, The Netherlands