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**International
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Court**

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TRIAL CHAMBER V

Before: Judge Bertram Schmitt, Presiding Judge
Judge Péter Kovács
Judge Chang-ho Chung

**SITUATION IN THE CENTRAL AFRICAN REPUBLIC II
IN THE CASE OF *THE PROSECUTOR v.*
*ALFRED ROMBHOT YEKATOM & PATRICE-EDOUARD NGAÏSSONA***

Public
**with Confidential *Ex Parte* Annex A only available to the Yekatom Defence and
the Prosecution**

**Public Redacted Version of “Yekatom Defence Response to the
Prosecution’s “Confidential redacted version of “Request
for Reconsideration regarding In-Court Protective Measures for
Prosecution Witness P-1786”, 27 September 2022”, ICC-01/14-01/18-1585-
Conf-Red, 27 September 2022” ICC-01/14-01/18-1603-Conf, 10 October 2022**

Source: Defence for Mr. Alfred Rombhot Yekatom

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

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INTRODUCTION

1. The Defence for Mr Alfred Rombhot Yekatom (“Defence”) hereby responds to the Prosecution’s Confidential redacted version of “Request for Reconsideration regarding In-Court Protective Measures for Prosecution Witness P-1786”, notified on 27 September 2022.¹
2. The Defence opposes the request for reconsideration on the basis that (i) the Prosecution does not provide new elements justifying the request; (ii) the Prosecution fails to demonstrate an objective justifiable risk for P-1786 should he testify publicly, and; (iii) the measures sought are inconsistent with Mr Yekatom’s right to a fair trial and the principle of publicity of the proceedings.

PROCEDURAL HISTORY

3. On 18 December 2020, the Defence was notified of the Confidential redacted version of the “Prosecution’s Request for in-court protective measures”, originally filed *ex parte* on 7 December 2020.² The Prosecution sought implementation of in-court protective measures for 72 witnesses, including P-1786 (“First Request”).³
4. On 9 March 2021, the Single Judge rejected the Prosecution’s First Request in relation to P-1786 in its “Decision on the Prosecution Request for In-Court Protective Measures for 73 Trial Witnesses” (“Decision”).⁴
5. On 27 September 2022, the Prosecution’s filed an *ex parte* “Request for Reconsideration regarding In-Court Protective Measures for Prosecution

¹ ICC-01/14-01/18-1585-Conf-Red.

² ICC-01/14-01/18-757-Conf-Red.

³ ICC-01/14-01/18-757-Conf-Anx-Red, pages 3-4, witness n°13.

⁴ ICC-01/14-01/18-906-Conf-Red, paras 41-42.

Witness P-1786". A Confidential redacted version was notified to the Defence on the same day ("Second Request").⁵

APPLICABLE LAW

6. The Court's jurisprudence recognizes the power of a Chamber to reconsider its own decisions. However, reconsideration is exceptional and should be granted if a clear error of reasoning has been demonstrated or if it is necessary to do so to prevent an injustice. New facts and arguments arising since the decision was rendered may be relevant to this assessment.⁶
7. Any rejection of requests for protective measures ruled in advance of the trial is without prejudice to reconsideration at a later stage should be new or additional information be made available.⁷

SUBMISSIONS

I. The Prosecution fails to provide any new or additional information justifying reconsideration of the Decision

8. The Defence submits that, contrary to the Prosecution's assertions, P-1786's situation does not appear to have materially changed to the point that reconsideration of the Decision is necessary. Indeed, the arguments raised in the Second Request were already known to the Single Judge when he first rejected P-1786's protective measures.

⁵ ICC-01/14-01/18-1585-Conf-Red.

⁶ [ICC-01/14-01/18-206](#), para. 20; *Prosecutor v. Ntaganda*, [Decision on Defence request seeking partial reconsideration of the 'Decision on Defence request for admission of evidence from the bar table'](#), 22 February 2018, ICC-01/14-02/06-2241, para. 4; *Prosecutor v. Ruto, Kosgey and Sang*, [Decision on the 'Defence Request for Leave to Appeal the 'Urgent Decision on the 'Urgent Defence Application for Postponement of the Confirmation Hearing and Extension of Time to Disclose and List Evidence' \(ICC-01/09-01/11-260\)'](#)", 29 August 2011, ICC-01/09-01/11-301, paras 19-20; *Prosecutor v. Ongwen*, [Decision on Request for Reconsideration of the Order to Disclose Requests for Assistance](#), 15 June 2016, ICC-02/04-01/15-468, para. 4; *Prosecutor v. Ruto and Sang*, [Decision on the Sang Defence's Request for Reconsideration of Page and Time Limits](#), 10 February 2015, ICC-01/09-01/11-1813, para. 19.

⁷ ICC-01/14-01/18-906-Conf-Red, paras 1 and 21; Public redacted version: [ICC-01/14-01/18-906-Red2](#).

9. The Prosecution particularly alleges that protective measures are necessary due to “[t]he fact that, [REDACTED], an area where members of the Anti-Balaka loyal to YEKATOM still live, was not known to the Chamber”.⁸ This argument appears to be reiterated at paragraph 17 of the Second Request.
10. While the Defence is not privy to the *ex parte* information, and defers to the Chamber’s assessment regarding its relevance and weight, it nevertheless highlights that in its First Request the Prosecution already relied on the fact that “P-1786 lives in an area of influence of Anti-Balaka supporters [REDACTED]”.⁹ The Single Judge was therefore already informed about the geographical proximity, or overlap, between locations where P-1786 is susceptible to be present and locations where Anti-Balaka members are also present, when rejecting the First Request.
11. The Defence recalls the Single Judge’s decision in relation to P-0888 which, *inter alia*, rejected the implementation of in-court protective measures on the basis that the existence of an objectively justifiable risk was not demonstrated, “without more”, when only the place of residence and encounters with Mr Yekatom’s family members were mentioned by the Prosecution.¹⁰ While the Second Request seems to indicate that P-1786 is susceptible to find himself [REDACTED],¹¹ it is submitted that this information in itself is insufficient to demonstrate the existence of an objectively justifiable risk. Therefore, the Prosecution failed to present any new argument to the Chamber that would warrant reconsideration of the Decision on this point.
12. The Chamber should similarly dismiss the Prosecution’s argument regarding an alleged higher risk to P-1786 due to the fact that he “declined an offer from

⁸ ICC-01/14-01/18-1585-Conf-Red, para. 7.

⁹ ICC-01/14-01/18-757-Conf-Anx-Red, page 4, witness #13 ; see also ICC-01/14-01/18-1585-Conf-Red, para. 13.

¹⁰ ICC-01/14-01/18-1268-Conf, para. 10.

¹¹ ICC-01/14-01/18-1585-Conf-Red, para. 7.

[REDACTED], a member of the YEKATOM's Defence team, to testify in favor of YEKATOM".¹² Indeed, the Defence contacted P-1786 in December 2019, six months before the Prosecution disclosed his statement.¹³ As shown in the document signed by P-1786 at the time the witness ticked the box "*non*" to the questions "*J'ai été rencontré auparavant par un représentant du Procureur de la Cour Pénale Internationale*" and "*J'ai donné une déclaration écrite et/ou enregistrée au représentant du Procureur de la Cour Pénale Internationale*", he merely indicated that a team from the ICC twice contacted him but that he did not meet them, and that he was not ready to testify but would think about it.¹⁴

13. Nothing in this interaction between P-1786 and the Defence should lead to the conclusion that his safety is at risk and, in any event, as this occurred approximately one year before the First Request, the Prosecution was in a position to have this information from P-1786 when filing its First Request. Therefore, either P-1786 did not mention this interaction to the Prosecution when contacted for the First Request or the Prosecution was informed and did not consider this interaction relevant to support its argument that there is objective justifiable risk to P-1786's safety warranting protective measures. In any event, the fact that the Prosecution was at the very least in a position to obtain this information, and failed to bring it to the attention of the Chamber, should prevent its qualification as a "new fact" warranting reconsideration.

II. The Prosecution does not identify an objectively justifiable risk

14. The Defence submits that the elements provided by the Prosecution in its Second Request, irrespective of their qualification or not as "new" facts, do not demonstrate the presence of an objectively justifiable risk should P-1786 testify without protective measures.

¹² ICC-01/14-01/18-1585-Conf-Red, para. 18.

¹³ P-1786's statement (CAR-OTP-2058-0200-R01) was first disclosed on 26 June 2020 in Pre-Trial INCRIM Package 36.

¹⁴ See Annex A.

15. Indeed, the Second Request limits itself to speculation on potential risks that allegedly arise from the general security situation in the Central African Republic ("CAR"), without providing any information on concrete threats or security incidents experienced by P-1786. None of the information provided in the Confidential redacted version of the Second Request is susceptible to reverse the initial assessment of the Single Judge in relation to P-1786, to the effect that "these fears appear subjective and insufficient to warrant granting the requested protective measures".¹⁵
16. *First*, the Prosecution argues that the deterioration of the security situation in CAR justifies the implementation of protective measures for P-1786's testimony.¹⁶ However, no correlation has been demonstrated between the general security situation in CAR and the testimony of P-1786. It is recalled that with respect to witness P-0888, the Single Judge took into account the fact that VWU did not identify any link between the witness' testimony and the general security situation of the country.¹⁷ The Defence argues that in absence of a VWU report that clearly establishes a specific link between the general security situation in CAR and P-1786's testimony, this argument should be dismissed by the Chamber.
17. *Second*, the Prosecution avers that the presence of [REDACTED] might jeopardize P-1786's safety should he testify without protective measures.¹⁸ The Defence notes that P-1786 has always been identified as an insider witness; that information alleging that aides de camp of Mr Yekatom are [REDACTED] was already known at the time of the First Request; and that the link between P-1786, [REDACTED] and [REDACTED] is not clearly explained in the Second Request. In the absence of any specific threat or security incident that

¹⁵ ICC-01/14-01/18-906-Conf-Red, para. 42.

¹⁶ ICC-01/14-01/18-1585-Conf-Red, para. 8.

¹⁷ ICC-01/14-01/18-1268-Conf, para. 9.

¹⁸ ICC-01/14-01/18-1585-Conf-Red, paras 9-10.

materialized, the Prosecution's assertion that P-1786 could be recognized and targeted by either Anti-Balaka members or [REDACTED] should be dismissed as speculative.

18. *Third*, the Prosecution also avers that P-1786 might "expose P-1786 to victims of Anti-Balaka's crimes, who may easily associate the witness with the perpetrators of the serious crimes committed against their community and families".¹⁹ This argument is purely speculative and does not appear to be founded on any concrete threats or incidents arising between P-1786 and "victims of Anti-Balaka's crimes". Without any specific further information on a possible correlation between the perception of those victims and the safety of P-1786, considering this argument would amount to conferring a *de facto* right to protective measures to all former Anti-Balaka members who are also witnesses in this case.

19. In light of the above the Defence respectfully submits that the Prosecution has failed to demonstrate an objectively justifiable risk against P-1786 or his family should he testify publicly. Consequently, the measures sought in the Second Request should be rejected.

III. The implementation of the measures would prejudice Mr Yekatom's right to a fair trial and affect the fundamental principle of publicity of the proceedings

20. For the sake of efficiency and judicial economy the Defence hereby respectfully refers the Chamber to its previous submissions on the impact that the implementation of protective measures has on the publicity of the proceedings and the fair trial rights to which Mr Yekatom is entitled.²⁰

¹⁹ ICC-01/14-01/18-1585-Conf-Red, para. 14.

²⁰ See the previous Yekatom Defence's submissions in ICC-01/14-01/18-1257-Red paras 26-32.

21. The Defence further submits that the Prosecution's argument that, should protective measures be granted, "much of P-1786's testimony will be given in public in any event" is misplaced.²¹ Indeed, P-1786's status as both an insider witness and [REDACTED] will inevitably lead to most, if not all, of his examination being conducted in closed session to protect his identity.
22. P-1786 will not be able to provide in public session information on his alleged [REDACTED],²² [REDACTED],²³ his function as [REDACTED],²⁴ his presence in [REDACTED],²⁵ or his account of an incident involving an individual named [REDACTED],²⁶ as the mere narration of the events by P-1786, as he described them in his statement, could potentially lead to his identity being discovered by other members of the group.
23. A parallel can be drawn between P-1786's and P-1339's situation as both were insider witnesses allegedly part of Mr Yekatom's group. P-1339's recent testimony and examination demonstrated that examination of a protected insider witness in public session is challenging. In order to properly conceal the identities of such witnesses, reliance on private session throughout their testimony is necessary on most of the topics discussed, which deprives the public from meaningfully understanding the scope of the case and evidence presented against Mr Yekatom.
24. Consequently, the Defence argues that granting the sought protective measures to P-1786 would irremediably lead to a substantial infringement of the principle of publicity of the debates. An objective, holistic assessment of the impact of such measures on P-1786's testimony, compared with the absence of concrete

²¹ ICC-01/14-01/18-1585-Conf-Red, para. 21.

²² P-1786 : CAR-OTP-2058-0200-R02, para. 26.

²³ P-1786 : CAR-OTP-2058-0200-R02, para. 32.

²⁴ P-1786 : CAR-OTP-2058-0200-R02, para. 35.

²⁵ P-1786 : CAR-OTP-2058-0200-R02, para. 49.

²⁶ P-1786 : CAR-OTP-2058-0200-R02, para. 53.

threats or safety concerns, militates in favor of the rejection of the Prosecution's Second Request.

CONFIDENTIALITY

25. The present response is filed on a confidential basis corresponding to the classification of the Second Request. Annex A is classified as confidential *ex parte* only available to the Yekatom Defence and the Prosecution as it consists of a document which originate from the Defence's investigations. A public redacted version of the response will be filed in due course.

RELIEF SOUGHT

26. In light of the above, the Defence respectfully requests Trial Chamber V to:
- REJECT** the Prosecution's Second Request.

RESPECTFULLY SUBMITTED ON THIS 28th DAY OF OCTOBER 2022



Me Mylène Dimitri
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