

**Cour
Pénale
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**International
Criminal
Court**

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No: *ICC-01/14-01/18*

Date: 18 July 2023

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 YEKATOM AND PATRICE-EDOUARD
NGAISSONA***

Public

Public Redacted Version of “Ngaïssona Defence response to the ‘Prosecution’s submission pursuant to regulation 35 to vary the time limit and request for in-court protective measures for Witness P-1576’ (ICC-01/14-01/18-1946-Conf)”, 3 July 2023, ICC-01/14-01/18-1955-Conf

Source: Defence of Patrice-Edouard Ngaïssona

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

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I. INTRODUCTION

1. The Defence of Mr Ngaïssona ('the Defence') hereby presents its response to the "Prosecution's submission pursuant to regulation 35 to vary the time limit and request for in-court protective measures for Witness P-1576" ('Prosecution's Request') dated 26 June 2023.¹
2. The Defence opposes the Prosecution's Request, as it fails to demonstrate that there exist an objectively justifiable risk justifying the putting in place of protective measures. Granting the requested measures would violate Mr Ngaïssona's fundamental right to a public hearing under Article 67(1) of the Rome Statute ('Statute').

II. CONFIDENTIALITY

3. The present response is filed on a confidential basis pursuant to Regulation 23(1)*bis* of the Regulations of the Court ('Regulations') since it responds to a filing of a similar classification. The Defence will file a public redacted version as soon as possible.

III. SUBMISSIONS

4. The Defence incorporates by reference its prior submissions on the law applicable to the granting of protective measures pursuant to Article 68 (1) and (2) of the Statute.² Notably, the Defence recalls that according to the jurisprudence of the Court, the protective measures sought in the Prosecution's Request, "should be granted only on an exceptional basis, following a case-by-case assessment of

¹ ICC-01/14-01/18-1946-Conf.

² ICC-01/14-01/18-827-Conf, paras 4-6.

whether they are necessary in light of an objectively justifiable risk and are proportionate to the rights of the accused”.³

5. The Prosecution’s Request fails to demonstrate that there exists an objectively justifiable risk which would warrant the putting in place of the requested measures. While the Prosecution goes to great lengths to describe the dire security situation in CAR, it falls short of identifying concrete risks faced by P-1576, which would be heightened by his public testimony before the Court.
6. First, the Prosecution claims that the witness would be at heightened security risk should he return to CAR, given that [REDACTED]. According to the Prosecution, the witness may be targeted as well, should his association with the Prosecution and the ICC be known.⁴ This is an entirely speculative and hypothetical scenario based on unfounded assumptions, such as the one that by mere virtue of him appearing as a witness for the Prosecution, P-1576 could be assimilated with the Prosecution and therefore targeted. Besides, [REDACTED],⁵ which begs the question as to whether it is legitimate to assume that [REDACTED].
7. Second, the Prosecution claims that should the witness testify publicly, he would be at risk by virtue of the fact that his testimony refers to [REDACTED].⁶ Similarly, the Prosecution vaguely suggests that the witness may be at risk of being targeted by supporters of Mr Yekatom or Mr Ngaïssona.⁷ Apart from being speculative in

³ The Prosecutor v. William Ruto and Joshua Arap Sang (Public redacted version of Decision on 'Prosecution's First Request for In-Court Protective Measures for Trial Witnesses') ICC-01/09-01/11-902- Red2 (3 September 2013) para. 13. See also the Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui (Public redacted version of 'Order on protective measures for certain witnesses called by the Prosecutor and the Chamber (Rules 87 and 88 of the Rules of Procedure and Evidence) ICC-01/04-01/07-1667-RedtENG (9 December 2009) paras 8-9. See also Gbagbo and Blé Goudé case, transcript of hearing on 17 October 2016, ICC-02/11-01/15-T-86-Red-ENG, page 18, paras 3-5: “protective measures resulting in limiting the right of the accused to a public trial can only be granted in the presence of a concrete, objective, identifiable risk suitable to be neutralized or mitigated by the specific requested measure.”

⁴ Prosecution’s Request, paras 13, 21.

⁵ [REDACTED].

⁶ Prosecution’s Request, para. 20.

⁷ Ibid, para. 23.

nature, the Prosecution's submissions ignore that P-1576's written statement and expected testimony are neutral vis-à-vis these three individuals. Insofar as [REDACTED] and Mr Yekatom are concerned, the Defence notes that the witness simply stated that they were among the names of the Anti-Balaka leaders who would often be mentioned in 2014.⁸ As to Mr Ngaïssona, the witness simply said that he was an Anti-Balaka leader who [REDACTED].⁹ In light of the neutral nature of this information, even assuming that "supporters" of [REDACTED], Mr Yekatom or Mr Ngaïssona would be willing to engage in retaliatory actions against Prosecution witnesses, it can hardly be discerned how the witness would ever constitute a potential target.

8. Third, the Prosecution suggests that should P-1576's testimony take place in public, this "may" endanger retaliatory actions against [REDACTED].¹⁰ This concern is, once more, speculative and hypothetical in nature, especially absent concrete information on [REDACTED]. The fact that [REDACTED]¹¹ certainly does not raise to the threshold of demonstrating the existence of an objectively justifiable risk. Further, the Defence recalls its prior submissions that [REDACTED].¹²
9. Fourth, the Prosecution's Request extensively focuses on the volatile nature of the security situation in CAR, particularly acute for [REDACTED]¹³ and [REDACTED].¹⁴ Whether these circumstances will ever pose a threat to the witness security is at present unknown, given that he is currently in [REDACTED]¹⁵ and not certain as to whether he will return to [REDACTED] CAR.¹⁶ As such, the

⁸ CAR-OTP-2060-0280-R01, para. 42.

⁹ Ibid, para. 41

¹⁰ Prosecution's Request, para. 22.

¹¹ Ibid.

¹² ICC-01/14-01/18-865-Conf, para. 21.

¹³ Ibid, para. 14.

¹⁴ Ibid, para. 24.

¹⁵ Ibid, para. 18.

¹⁶ Ibid, para. 21.

security situation in CAR does not currently constitute an objectively justifiable risk to the witness' safety. Should the witness decide to return to [REDACTED] CAR in the future, that will likely come with some risks, [REDACTED]. However, as elaborated above, him testifying publicly will not lead to a heightening of these risks.

10. Lastly, the Prosecution's submissions that testifying openly would jeopardize [REDACTED],¹⁷ are similarly speculative. Besides, the Defence recalls his prior submissions that [REDACTED].¹⁸ It further recalls that the Single Judge rejected the application of protective measures in the past, when merely based on similar grounds.¹⁹
11. In light of the above, the Defence submits that the Prosecution has failed to demonstrate the existence of an objectively justifiable risk should the witness testify publicly. What is more, the witness has [REDACTED].²⁰ [REDACTED], which also supports the conclusion that the witness will not be at heightened security risk by virtue of his public testimony. Further, the Defence recalls that as stated by Trial Chamber I in Gbagbo and Blé Goudé "[a]ll witnesses before the Court are neutral and only expected to tell the truth, and appearing in public is part of the responsibility attached to the role".²¹ This applies to all witnesses, regardless of [REDACTED]
12. Lastly, the Defence notes that the witness' testimony is likely to be centered on [REDACTED]. Should protective measures be granted, most of the testimony will have to be conducted in private session, so as not to lead to the public identification of the witness via the [REDACTED]. This will result in removing the majority of

¹⁷ Ibid, para. 24.

¹⁸ ICC-01/14-01/18-827-Conf, para. 24.

¹⁹ ICC-01/14-01/18-906-Conf-Red, paras 79-84 concerning witnesses P-1819, P-1558 and P-2926.

²⁰ [REDACTED]

²¹ The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé, Transcript, 17 October 2016, ICC-02/11-01/15-T-86-Red-ENG, page 18, lns 13-14.

the witness testimony from the public sphere. The vague and speculative concerns recounted above should not be allowed to override Mr Ngaïssona's fundamental right to a public hearing.

IV.RELIEF SOUGHT

In light of the above, the Defence respectfully requests the Chamber to

REJECT the Prosecution's Request.

Respectfully submitted,



Mr Knoop, Lead Counsel for Patrice-Edouard Ngaïssona

Dated this 18 July 2023

At The Hague, the Netherlands.