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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 PROSECUTOR *v.* ALFRED YEKATOM AND
PATRICE-EDOUARD NGAÏSSONA**

Public

Public redacted version of "Prosecution Response to the 'Yekatom Defence Request for In-Court Protective Measures for Witness CAR-D29-P-6036' (ICC-01/14-01/18-2268-Conf)", ICC-01/14-01/18-2281-Conf, 21 December 2023

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I. INTRODUCTION

1. Trial Chamber V (“Chamber”) should dismiss the ‘Yekatom Defence Request for In-Court Protective Measures for Witness CAR-D29-P-6036’ (“Request”) *in limine*.¹ The Request is a contrivance. D29-6036 does not seek the measures sought by the Defence, and the Request otherwise fails to satisfy the requirements of Rule 87(1) of the Rules of Procedure and Evidence (“Rules”), or to substantiate any concrete and objectifiable risk to D29-P-6036 warranting protection pursuant to article 68(1).

II. CONFIDENTIALITY

2. Pursuant to regulation 23*bis*(2) of the Regulations of the Court (“RoC”), this document is filed as “Confidential” because it responds to a filing of the same classification. A public redacted version will be filed as soon as practicable.

III. SUBMISSIONS

A. Protective Measures are not Warranted

3. Despite the Defence’s attempt to skirt perhaps the most salient issue in respect of establishing an objective basis for the protective measures sought, the fact is that D29-6036 does not consider them necessary.

4. Although the Request posits that “[a] witness’s own perception (or non-perception) of risk is not determinative of whether an objectively justifiable risk exists”,² the fact is that the circumstances – even with the artistic license the Request takes in characterising them – do not concretely demonstrate that D29-6036 is at any risk in this specific case.

¹ ICC-01/14-01/18-2268-Conf.

² ICC-01/14-01/18-2268-Conf, para. 22.

5. Instead, a sober assessment of the Defence assertions shows that (a) the witness's assessment of his own security risk is well-informed and should carry the day; and (b) the grounds advanced in the Request are largely speculative and unsubstantiated.

a. D29-P-6036's own risk assessment is dispositive

6. As noted, the Request acknowledges – as it must – that “the Witness has not yet identified the potential impact that his testimony could have on his security and safety.”³ To blunt the potentially dispositive impact of this concession on the Chamber's determination of the necessity of protective measures, the Defence further argues that the witness “is not himself in a position to express any concern nor to identify the source of a potential threat should his testimony be public.”⁴ However, this assertion is not only unfounded, but contradicted by the facts alleged which, if true, would place D29-P-6036 in a position to definitively assess the risk to his and/or his family's security as a result of his public testimony.

7. The Defence avers that [REDACTED]⁵ [REDACTED];⁶ [REDACTED]⁷ [REDACTED].⁸

8. However, it is telling that D29-P-6036 does not allege [REDACTED],⁹ [REDACTED]¹⁰ [REDACTED],¹¹ [REDACTED]¹² [REDACTED].¹³

9. Even if, as the Defence contends, D29-P-6036 [REDACTED].

³ ICC-01/14-01/18-2268-Conf, para. 12.

⁴ ICC-01/14-01/18-2268-Conf, para. 22.

⁵ ICC-01/14-01/18-2268-Conf, para. 20 (emphasis added).

⁶ See ICC-01/14-01/18-2268-Conf, paras. 15, 21.

⁷ ICC-01/14-01/18-2268-Conf, paras. 15, 20.

⁸ ICC-01/14-01/18-2268-Conf, para. 18.

⁹ ICC-01/14-01/18-2268-Conf, para. 20.

¹⁰ ICC-01/14-01/18-2268-Conf, para. 21.

¹¹ ICC-01/14-01/18-2268-Conf, para. 21.

¹² ICC-01/14-01/18-2268-Conf, para. 20.

¹³ ICC-01/14-01/18-2268-Conf, para. 20.

10. To the contrary, it is clear that despite D29-P-6036's [REDACTED].

b. The grounds advanced are largely speculative and unsubstantiated

11. The Defence relies on grounds wholly unconfirmed by D29-P-6036 to support the Request, asserting that [REDACTED]¹⁴.

12. *First*, the legal threshold to grant an application for protective measures is not met by the mere assertion of the *possibility* of a risk — in this case an alleged 'potential threat', but instead, by concretely demonstrating an actual risk, not a theoretical one. Here, the Request fails, in alleging unsubstantiated conduct which does not even involve the witness, nor is necessarily tied to the import of the witness's expected public testimony.

13. On the one hand, the Defence argues that confidential information in the record of the case has become known outside the courtroom.¹⁵ On the other hand it seems to suggest that granting protective measures would somehow mitigate this concern. The Request thus conflates these two distinct issues, and otherwise fails to explain how the protective measures sought would impact the improper leaking of confidential information. Clearly, confidential information should not be leaked. However, the Chamber's duty to ensure the confidentiality of the proceedings as appropriate is an entirely separate concern than its assessment of the specific risks to a specific witness for article 68 purposes. In Court protective measures are not meant to address the broader risk, but those associated with a particular witness appearing before the Court. The Request unpersuasively attempts to extrapolate from general considerations to specific risks in an attempt to tie-in D29-P-6036, where it otherwise

¹⁴ ICC-01/14-01/18-2268-Conf, para. 22.

¹⁵ See ICC-01/14-01/18-2268-Conf, para. 19.

fails to establish any link between the witness's prospective testimony and any concrete threat.

14. *Second*, the assertion [REDACTED]¹⁶ [REDACTED]¹⁷

15. Significantly, the Request does not address [REDACTED]¹⁸ [REDACTED].

16. *Third*, the Request's reference to [REDACTED]¹⁹.

17. It is unclear how the Defence proposes that the in-Court protective measures sought would address [REDACTED]²⁰ In this respect, the Request is not only contrived, but confused.

18. *Fourth*, the Defence's contention that "public testimony would inevitably expose the Witness and his family to actions endangering their safety, physical or psychological well-being, or privacy"²¹ is conclusory. No substantiated fact alleged in the Request reasonably establishes this assertion either directly or inferentially.

19. *Fifth*, the summary of D29-P-6036's anticipated testimony belies the Defence's claim that the witness is not aware that his testimony [REDACTED].²²

20. The Request fails to justify the granting of any of the three measures sought, namely, face and voice distortion, and the use of a pseudonym. None is warranted, much less proportionate here, particularly given D29-P-6036's express assessment that he does not require any protection. On the assertions advanced in the Request,

¹⁶ ICC-01/14-01/18-2268-Conf, para. 16.

¹⁷ Code of Professional Counsel, ICC-ASP/4/Res.1, Article 28.

¹⁸ ICC-01/14-01/18-2268-Conf, para. 20.

¹⁹ ICC-01/14-01/18-2268-Conf, para. 20.

²⁰ ICC-01/14-01/18-2268-Conf, para. 20.

²¹ ICC-01/14-01/18-2268-Conf, para. 21.

²² ICC-01/14-01/18-2212-Conf-AnxC, p.21, paras.21, and 23-30.

whether discretely or cumulatively, there exists no objectively justifiable risk to the witness's legitimate interests protected under article 68.

IV. CONCLUSION

21. For the foregoing reasons, the Prosecution requests that the Chamber dismiss the Request in all respects.

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

Karim A. A. Khan KC, Prosecutor

Dated this 17th day of January 2024
At The Hague, The Netherlands