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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’s Request for in-court protective measures”,
7 December 2020, (ICC-01/14-01/18-757-Conf-Exp)**

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

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I. INTRODUCTION

1. Pursuant to Trial Chamber V's ("Chamber") 26 August 2020 Initial Direction on the Conduct of Proceedings,¹ the Office of the Prosecutor ("Prosecution") requests in-court protective measures for 72 witnesses,² in accordance with articles 64 and 68, and rules 87 and 88 of the Rules of Procedure and Evidence ("Rules").

2. The protective measures requested concern the following categories of witnesses: (i) insider witnesses; (ii) witnesses who have been admitted into the ICC protection program ("ICCP"); (iii) witnesses who reside in the [REDACTED] refugee camp; (iv) victims of sexual violence; (v) former child soldiers; (vi) witnesses in particular professional circumstances; and (vii) other vulnerable witnesses.

3. As explained below, the measures sought are the least restrictive means necessary to appropriately balance the Accused's right to a fair and public trial against the Court's competing obligation to protect the physical and psychological well-being, dignity, and privacy, of victims and witnesses who appear before it. Moreover they do not unfairly prejudice the Accused.

4. The attendant risks to the witnesses in this case are substantial, particularly in the context of the volatile and fluid security situation in the Central African Republic ("CAR") where rebel groups control a substantial part of the territory. These include the Anti-Balaka, among which both Accused continue to hold influence. The protection of prospective trial witnesses warrants the Chamber's utmost vigilance.

¹ ICC-01/14-01/18-631, paras. 68-70.

² Hereinafter, "Request".

II. CONFIDENTIALITY

5. The Request and its Annex are filed as “Confidential, *ex parte* - only available to the Prosecution and the VWU” pursuant to regulation 23*bis*(1) of the Regulations of the Court as they provide bearing on witness security, [REDACTED]. The Prosecution will file a confidential redacted version, as well as a public redacted version, of this filing.

III. SUBMISSIONS

6. Witness testimony in this case is scheduled to begin in March 2021. The Prosecution currently intends to call 96 witnesses to testify *live*, including under rule 68(3). Some will testify via video-link. A considerable number of these witnesses face security risks, given the current security situation in CAR, the control of the Anti-Balaka over a substantial part of the territory, as well as the continuing influence of both the Accused over their supporters. In granting in-court protective measures, the Trial Chambers in *Ntaganda*,³ and *Ruto and Sang*⁴ held that the security situation in the region is a relevant factor when considered in relation to the circumstances of a specific witness.

7. A confidential, *ex parte* Annex contains the list of witnesses for which protective measures are requested, indicating for each witness: (i) the witness’s name; (ii) their pseudonym; (iii) the proposed order of appearance; (iv) the location of testimony (remote via video-link or at the headquarters); (v) the in-court protective measures requested (pseudonym, face distortion, and/or voice distortion); and (vi) key facts upon which the request is based.

³ ICC-01/04-02/06-824-Red, para. 14; ICC-01/04-02/06-1004-Conf-Red, para. 5.

⁴ ICC-01/09-01/11-902-Red2, para. 14.

8. This Request addresses the in-court protective measures that are reasonably foreseeable at this moment. Because of the evolving reality of the individual situation of the witnesses concerned, it already modifies the in-court protective measures identified in the Prosecution's 9 November 2020 Witness List.⁵ Similarly, the special measures the Prosecution indicated in its Witness List, albeit highly recommended, will be left to the independent assessment of the Victims and Witnesses Unit ("VWU"). The Prosecution cannot exclude, and even anticipates that further modifications to some of the requested measures may occur.

A. The current security situation of the witnesses

a. The current security situation in CAR

9. Over the past few years, there has been no significant improvement to the security situation in CAR. As noted by the Registry: "the security situation in CAR has remained precarious throughout 2019 and the beginning of 2020."⁶ The absence of strong state structures leave most of its territory insecure and prone to control by various rebel groups. The CAR authorities have recognised that 80% of the country's territory is under the control of armed groups, including the Anti-Balaka.⁷

10. The Anti-Balaka, which comprised over 70,000 elements in 2014 throughout the western CAR, with half of their members in Bangui,⁸ retains to-date a large influence in the capital and within the provinces. The Anti-Balaka was one of the key parties to

⁵ See Prosecution's Witness List ICC-01/14-01/18-724-Conf-AnxA.

⁶ ICC-01/14-01/18-470-Conf-AnxII-Red, para. 11.

⁷ ICC-01/14-01/18-478-Conf-AnxII, para. 8.

⁸ CAR-OTP-2109-0098, at 0099; CAR-OTP-2105-0086; CAR-OTP-2001-5026; CAR-OTP-2113-0430, at 0431; CAR-OTP-2109-0110, at 0110.

the Khartoum peace agreement in 2019.⁹ Its members still hold important positions within the state structures, including ministerial and parliamentary appointments.

11. The Registry and the CAR authorities already indicated that the political and security dynamics in the CAR have the potential to negatively impact the willingness of victims to participate in the Court's proceedings.¹⁰

12. Similarly, the Chamber noted on two occasions that:

“[REDACTED]”.¹¹

13. The Prosecution notes the Chamber's instruction to the Registry to provide an update on the political and security situation in the CAR until 7 December 2020,¹² and anticipates that the current request will continue to be justified after the submission of the Registry's report and in the context of the upcoming elections in CAR.

b. Influence of the Accused in the CAR

14. Both NGAISSONA and YEKATOM continue to hold influence over the Anti-Balaka and supporters in CAR.

NGAISSONA

15. NGAISSONA was the National General Coordinator of the Anti-Balaka throughout 2014. Following a split in the group, he led the NGAISSONA-branch of the group until his arrest. His arrest was heavily deplored by his supporters: the Anti-

⁹ See order of signatures in the Agreement, p. 28, <https://www.peaceagreements.org/viewdocument/3187>. [Last accessed: 07/12/2020].

¹⁰ ICC-01/14-01/18-470-Conf-AnxII-Red, para. 2; ICC-01/14-01/18-478-Conf-AnxII, paras. 10-11.

¹¹ ICC-01/14-01/18-485-Conf-Exp, para. 21; ICC-01/14-01/18-627-Conf, paras. 13-14, where the Chamber found that these circumstances have not changed.

¹² Email "RE: Order for Periodic Registry Reports on the Political and Security Situation in the CAR", dated 19 November 2020.

Balaka announced to leave the Disarmament, Demobilization, Rehabilitation, and Reintegration process (DDRR) and angry Anti-Balaka supporters gathered in the streets of Bangui. As the [REDACTED] Anti-Balaka [REDACTED] said upon NGAISSONA's arrest "[REDACTED]".¹³

16. In practice, NGAISSONA's influence in the field [REDACTED].¹⁴

[REDACTED]

The actions of NGAISSONA's supporters increase the risk to the physical security and safety of witnesses testifying openly on behalf of the Prosecution and who, after their testimony, will return to their homes in CAR, i.e. in the area of influence of the Accused.

17. In addition, NGAISSONA himself could harm Prosecution witnesses. [REDACTED]. Moreover, even in detention, the limited active monitoring of NGAISSONA's communications has demonstrated breaches of his contact restrictions.¹⁵

YEKATOM

18. YEKATOM led the Anti-Balaka group operating in the Lobaye Prefecture. He was also elected to represent this region in Parliament [REDACTED].¹⁶

19. In issuing the arrest warrant against YEKATOM, the Pre-Trial Chamber noted that *"YEKATOM (...) retains strong influence over his (former and current) Anti-Balaka subordinates, in particular in Lobaye Prefecture, which could allow him to reach, intimidate,*

¹³ [REDACTED].

¹⁴ [REDACTED].

¹⁵ ICC-01/14-01/18-357-Conf-Exp-Red, paras. 48-49; ICC-01/14-01/18-413-Conf-Exp-Red, paras. 82-86.

¹⁶ ICC-01/14-01/18-478-Conf-AnxII, para. 10.

*or harm (potential) witnesses, their families or other individuals cooperating with the Court”.*¹⁷

More recently, in its decision on YEKATOM’s application for interim release, the Chamber also held that YEKATOM “*continue[s] to exercise influence over his supporters in his immediate and extended community in the CAR*”,¹⁸ circumstances which remained unchanged at the time of the Chamber’s September 2020 decision on YEKATOM’s interim release.¹⁹

20. In practice, YEKATOM’s influence in the field [REDACTED].²⁰

[REDACTED].

The actions of YEKATOM’s supporters increase the risk to the physical security and safety of witnesses testifying openly on behalf of the Prosecution and who, after their testimony will return to their homes in CAR, i.e. in the area of influence of the Accused.

21. In addition, YEKATOM himself could harm Prosecution witnesses. Prior to his arrest, YEKATOM intimidated, through his supporters, members of an entire family,²¹ and personally intimidated [REDACTED].²² Moreover, even in detention, the limited active monitoring of YEKATOM’s communications has demonstrated breaches of his contact restrictions.²³

22. A significant number of Prosecution witnesses reside within the sphere of influence of the two Accused.²⁴ Their open testimony at the Court will bring their

¹⁷ ICC-01/14-01/18-1-Red, para. 22.

¹⁸ ICC-01/14-01/18-495-Red3, para. 25.

¹⁹ ICC-01/14-01/18-643-Red, paras. 19, 22-33.

²⁰ As mentioned, the Prosecution is disposed to provide additional information to the Chamber should it so require.

²¹ CAR-OTP-2088-0747.

²² [REDACTED].

²³ ICC-01/14-01/18-62-Conf-Red, paras. 10-11; ICC-01/14-01/18-592-Conf-Exp-Red, paras. 10-16; ICC-01/14-01/18-467-Conf-Exp, para. 26; ICC-01/14-01/18-673-Conf-Red, paras. 12-13.

²⁴ 66 of the 96 witnesses who will to testify *live*, including under rule 68(3), reside in CAR.

identities into the public eye, in particular since the trial is bound to receive substantial public attention in CAR.

23. In this broad context of instability, in-court protective measures are justified for witnesses living within the areas of influence of the Anti-Balaka and its supporters, to ensure their safety once they return to their respective communities.

B. Witnesses for whom protective measures are requested

a. Insider witnesses

24. The Prosecution requests in-court protective measures in the form of pseudonyms, and face and voice distortion for [REDACTED] insider witnesses. These insider witnesses are at risk and susceptible to retaliation from other Anti-Balaka members or supporters for several reasons. *First*, as members of the Anti-Balaka, their testimony as Prosecution witnesses will be seen as a betrayal of the group. *Second*, they are known to the Accused and other Anti-Balaka members, who know how and where to locate them and their families. *Third*, their testimony will concern the inner workings of the Anti-Balaka organisation, the conduct of the Accused and of other Anti-Balaka members, which will attract attention. *Further*, in the current security context of CAR and the repeated failed peace negotiations, their cooperation with the Prosecution risks being seen as working contrary to the peace process.

25. *Finally*, the majority of these insider witnesses have conditioned their cooperation with the Court on the premise that it does not expose their identities to the local communities in CAR. The protective measures sought will enable them to provide full accounts of the events at issue without reticence, and thus contribute to the truth-seeking mission of the Court. Additional information regarding each witness concerned and the specific measures requested are set forth in the Annex.

b. Witnesses in the Court's protection program ("ICCPP")

26. The Prosecution seeks protective measures for [REDACTED] witnesses who have been admitted into the ICCPP and one witness [REDACTED].²⁵ All of these witnesses are in the Court's protection programme because of the risks to their personal safety which have been carefully and objectively assessed by the VWU. Further in-court protection measures will ensure that the witnesses can give evidence without fear for their personal safety and without compromising the security they have been afforded under the terms of the ICCPP.

27. Trial Chamber I in the *Lubanga* case has previously authorized similar measures to protect the safety of witnesses in the ICCPP.²⁶ In doing so, it considered that:

"If any of their identities were to become known, the whole purpose of their protection which has been afforded to the witnesses would be undermined, and they, together with their families would be at risk for an indefinite period of time. The accused has been given the full identifying details for these and is able, therefore, to deal with their evidence without restriction."²⁷

c. Witnesses residing in the [REDACTED] refugee camp

28. Several Prosecution witnesses reside in the [REDACTED] refugee camp, [REDACTED], [REDACTED]. The Prosecution requests in-court protective measures in the form of pseudonyms and face distortion for three of these witnesses. They are at risk and susceptible to retaliation for several reasons. [REDACTED].²⁸ *Second*, at least one witness reported receiving threats [REDACTED].²⁹ *Third*, the witnesses living in the camp are vulnerable witnesses. They have been displaced from their original

²⁵ See the Annex.

²⁶ ICC-01/04-01/06-T-104-ENG ET, p. 4, l. 4 – p. 5, l. 1.

²⁷ ICC-01/04-01/06-T-104-ENG ET, p. 4, l. 4 – 18.

²⁸ [REDACTED].

²⁹ [REDACTED].

communities [REDACTED], they were unable to leave the camp nor to return to their respective home towns, and face a heightened risk of stigmatisation upon their return should their cooperation with the Prosecution become public. Additional information regarding each witness concerned and the specific measures requested are set forth in the Annex.

d. Victims of sexual violence

29. The Prosecution requests in-court protective measures for [REDACTED] victims of sexual violence, one of which is also a former child soldier and two of which also reside in the aforementioned refugee camp. Some of them have requested in-court protective measures or have specifically indicated in their interactions with the Prosecution that they fear that public disclosure of their identities will stigmatise them and compromise their security, dignity and privacy. The measures will enable these witnesses, who the Office has determined are highly vulnerable, to provide full accounts with minimal re-traumatisation, to protect their privacy and the privacy of their family members, and to avoid the stigma that is associated with rape. Having to testify openly in Court will likely result in the witness being forced to repeat or discuss their traumatic experiences after they return home from testifying, or at least live with the anxiety of possibly having to do so. Additional information regarding each witness concerned and the specific measures requested are set forth in the Annex.

e. Former child soldiers

30. The Prosecution requests in-court protective measures for [REDACTED] former child soldiers. The measures will enable these witnesses, who the Office has determined are highly vulnerable, to provide full accounts with minimal re-traumatisation, and to protect their privacy and the privacy of their family members. Withholding their identity from the public will avoid having to face judgment, stigma, questions, or remarks from members of the public, or friends, who learn about them

as a result of their testimony. Further, [REDACTED] witnesses expressed fear of retaliation if they would testify publicly, especially since they live within the area of influence of supporters of both Accused. Additional information regarding each witness concerned and the specific measures requested are set forth in the Annex.

f. Witnesses in particular professional circumstances

31. The Prosecution requests in-court protective measures for six witnesses, in particular professional circumstances. The measures requested are set forth below and in the Annex.

P-1974 and P-2018

32. P-1974 and P-2018 work [REDACTED]. Their ability, [REDACTED] to perform professional activities in CAR may be affected if they were publicly identified as Prosecution witnesses.

33. Further security reasons justify granting their protective measures. [REDACTED]. Moreover, in this period, the [REDACTED] office [REDACTED] was attacked and pillaged by the Anti-Balaka on three occasions, [REDACTED]. [REDACTED].

34. To preserve the physical safety and professional interests of P-1974, P-2018 but also [REDACTED], the Prosecution requests in-court protective measures for both witnesses in the form of a pseudonym and face distortion.

P-1819 and P-1558

35. P-1819 and P-1558 are two freelance journalists who are called to testify about their work with armed groups in CAR during the conflict, [REDACTED].

36. [REDACTED]. The publicity [REDACTED] cooperation with the Prosecution may have an impact on (i) [REDACTED] security in CAR, and (ii) [REDACTED] to information, which largely depends on the trust [REDACTED] with different actors, [REDACTED]. P-1819 expressed concern that public disclosure [REDACTED] will compromise [REDACTED] professional opportunities in CAR.

37. P-1558 is [REDACTED] residing in [REDACTED]. [REDACTED]. The publicity of his cooperation with the Prosecution may have an impact on P-1558 capacity to work as a journalist in CAR, especially since [REDACTED]. P-1558 also expressed concern regarding the need to protect his professional opportunities, his sources and his reputation.

P-2926

38. P-2926 works as a private consultant for NGOs on issues and topics related to CAR, [REDACTED]. The publicity of his cooperation with the Prosecution may affect (i) P-2926's ability to perform his professional activities in the CAR, since the individuals with whom he interacts for research purposes may refuse to talk to him, (ii) his safety, and (iii) the safety of third parties, [REDACTED]. Further, P-2926 has expressed concern that public disclosure of his identity will compromise his future professional opportunities in CAR.

39. To preserve his physical safety and professional interests, the Prosecution requests in-court protective measures in the form of a pseudonym, as well as face distortion.

P-0314

40. Since 2012, P-0314 has been [REDACTED]. P-0314 expressed concerns regarding a public testimony in Court, as he fears retaliation against him and the people working for him [REDACTED]. Further, P-0314 lives [REDACTED].

41. In order to preserve his physical safety, neutrality, and professional interests, the Prosecution requests in-court protective measures in the form of a pseudonym, as well as face distortion.

g. Other vulnerable witnesses

42. Protective measures are also requested for crime-based witnesses which meet a number of objective risk factors. These factors generally come in combination with the witness's fear of retaliation should their testimony be made public, especially since they live within an area of influence of the Accused's supporters. Information regarding each witness in this group and the specific measures requested are set forth in the Annex.

C. The requested measures are consistent with the rights of the Accused

43. Although the Prosecution requests that the identities of 72 witnesses be withheld from the public, the impact on the public nature of the proceedings is mitigated and justified in the circumstances of this case.

44. *First*, the measures requested are needed to ensure that the witnesses are able to provide unfettered evidence, and in so doing, assist the Court in establishing the truth. The identities of all witnesses, but three, are known to both Accused and their Defence teams, and have been for some time. The Accused will have the same opportunity and ability to question these witnesses as if their identities were publicly known and are not prevented from conducting its own enquiries to test the prospective evidence.

45. *Second*, although the public will not know the identities of the affected witnesses, most of their testimony will be given in public session. Notably, the Prosecution has not (at this point) requested total closed session for any witness, notwithstanding the vulnerability of many of them, in an effort to limit the impact on the publicity of the proceedings as much as possible. Under the requested measures, closed or private session will be used only for limited portions of testimony to protect the identities of witnesses or information that is particularly private or sensitive and therefore likely to affect the psychological well-being, dignity, or privacy of the witness if broadcast publicly.

46. *Finally*, the number of witnesses requiring protective measures in this case is a direct consequence of the nature and breadth of the crimes perpetrated by both Accused in the CAR, the general security situation in the country, and the continuing influence of the Accused, the Anti-Balaka, and their supporters in areas wherein Prosecution witnesses and their relatives reside.

IV. CONCLUSION

47. For the foregoing reasons and those set out in the Annex, the Prosecution requests the in-court protective measures for 72 witnesses identified in the said Annex.



James Stewart, Deputy Prosecutor

Dated this 18th day of January 2021
At The Hague, The Netherlands