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**International
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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

**Public Redacted Version of “Yekatom Defence Response to the Prosecution’s
Request for in court protective measures”, 15 January 2021, ICC-01/14-01/18-
828-Conf**

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. Counsel representing Mr. Alfred Rombhot Yekatom (“Defence and “Mr. Yekatom”, respectively) hereby submit this response to the ‘Confidential redacted version of “Prosecution’s Request for in-court protective measures” 7 December 2020, (ICC-01/14-01/18-757-Conf-Exp)’ filed on 18 December 2020 (the “Request”).¹
2. The Defence voices its concern in view of the high number of witnesses for whom the Prosecution is seeking protective measures in the Request. While it will defer to the discretion of the Chamber regarding proposed protective measures on the majority of witnesses, the Defence does oppose such measures for some specific witnesses.

PROCEDURAL BACKGROUND

3. On 26 August 2020, the Chamber in its “Initial Directions on the Conduct of the Proceedings” instructed the Prosecution to file its application for in-court protective measures by 7 December 2020.²
4. On 10 November 2020, the Prosecution filed the “Prosecution’s List of Witnesses and Evidence”³ containing its intention to call *viva voce* or under Rule 68 (3) a total of 96 witnesses.⁴
5. On 7 December 2020, the Prosecution filed an *ex parte* version of their “Prosecution’s Request for in-court protective measures”. On 18 December 2020, a confidential redacted version of the Request was made available to the Defence,⁵ indicating that the Prosecution is seeking implementation of in-court

¹ [ICC-01/14-01/18-757-Conf-Red.](#)

² [ICC-01/14-01/18-631](#), para. 70.

³ [ICC-01/14-01/18-724.](#)

⁴ [ICC-01/14-01/18-724-Conf-AnxA.](#)

⁵ [ICC-01/14-01/18-757-Conf-Red](#)

protective measures for a total of 72 witnesses.⁶

6. On 21 December 2020, the Ngaïssona Defence requested a variation of time limit to respond to the Request.⁷ On the same day, the Chamber granted the variation of time-limit and decided that any responses to the Prosecution Request shall be filed by 15 January 2021.⁸
7. On 6 January 2021, the Defence engaged the Prosecution in *inter partes* discussions regarding the redactions contained in paragraphs 20 and 28 of the Request. On 7 January 2021, the Prosecution confirmed that none of the redacted information pertained to acts or conduct of Mr. Yekatom. The Defence takes the opportunity of this response to express its gratitude to the Prosecution for its prompt response and cooperation on the issue raised.

SUBMISSIONS

8. The Defence wishes to first present its general remarks on the principles which need to be taken into account when ruling on the option of granting in-court protective measures (I). It will then make specific submissions for witnesses for whom the Defence opposes implementation of the measures sought in the Request (II).

I. On the Defence's preliminary remarks on in-court protective measures

9. The principle of publicity is inextricably linked to any criminal proceedings, national or international. In the case of the International Criminal Court this principle is enshrined in various texts such as article 64 (7) of the Statute ("the trial shall be held in public") and regulation 20 (1) of the Regulations of the Court ("all hearings shall be held in public [...]"). The European Court of Human Rights recognizes the importance of this principle, indicating that:

⁶ [ICC-01/14-01/18-757-Conf-Anx-Red.](#)

⁷ [ICC-01/14-01/18-789-Conf.](#)

⁸ E-mail from the Chamber dated 21 December 2020 at 16:39.

The public character of proceedings before the judicial bodies referred to in Article 6 para. 1 (art. 6-1) protects litigants against the administration of justice in secret with no public scrutiny; it is also one of the means whereby confidence in the courts, superior and inferior, can be maintained. By rendering the administration of justice visible, publicity contributes to the achievement of the aim of Article 6 para. 1 (art. 6-1) namely a fair trial, the guarantee of which is one of the fundamental principles of any democratic society, within the meaning of the Convention.⁹

This importance is reflected in the Rome Statute by the consecration of this principle as a right of the accused in article 67 (1).

10. In-court protective measures with the effect of concealing the identity, face and voice of witnesses to the public are exceptions to this principle of publicity. As such, the various Chambers of this Court have developed in their jurisprudence strict conditions for their implementation, generally accepting that those measures should be exceptional.¹⁰
11. The exceptional nature of those measures is justified due to the fact that fair trial concerns “generally lie in favour of the identity of witnesses being made known to the public”,¹¹ and that witnesses “are neutral and only expected to tell the truth and appearing in public is part of the responsibilities attached to the role”.¹²
12. With that in mind, the Defence expresses its concern about the high number (and percentage) of witnesses for whom the Prosecution is seeking implementation of protective measures. Out of the 96 witnesses scheduled to appear before the Chamber either *viva voce* or through a rule 68 (3)

⁹ ECHR, [Case of Axen v. Germany](#), 8 December 1983, 8273/78, para. 25.

¹⁰ *Prosecutor v. Ruto & Sang*, [Decision on ‘Prosecution’s First Request for In-Court Protective Measures for Trial Witnesses’](#), ICC-01/09-01/11-902-Red2, 11 September 2013, para. 13 ; *Prosecutor v. Bemba at al*, [Decision on Prosecution Request for In-Court Protective Measures](#), ICC-01/05-01/13-1306, 28 September 2015, para. 3.

¹¹ *Prosecutor v. Ntaganda*, [Decision on request for in-court protective measures relating to the first Prosecution witness](#), ICC-01/04-01/06-824-Red, 16 September 2015, para. 16.

¹² *Prosecutor v. Gbagbo & Blé Goudé*, [Decision on the Prosecutor’s application for protective measures for Witness P-0428](#), ICC-02/11-01/15-1155-Red, 20 April 2018, para. 8.

application,¹³ 72 - (75% of the total) - are intended to benefit from measures concealing their identities to the public.¹⁴ Moreover, the measures sought are the more extreme of those available: use of pseudonym and combined face and voice distortion for 45 of those witnesses, with the remaining 27 witnesses all intending to use pseudonyms and have their faces hidden. The Defence can only express its doubt about the reception and value for the Central African Republic and its inhabitants of a trial composed almost entirely of anonymous sources and faceless witnesses.

13. An additional concern arising from the disproportionate use of pseudonyms and face distortion would be the correspondingly disproportionate amount of closed session testimony that would result. This could in turn disincentivize witnesses, safe in the knowledge that public testimony is the exception rather than the rule in these proceedings, and that they have been partly absolved of their responsibility as witnesses, including appearing in public.¹⁵
14. While the Defence defers to the discretion of the Chamber on the appropriate implementation of such stringent protective measures for the majority of witnesses, it wishes to underline the important aspects recognized by the jurisprudence: the Chamber should only grant the request “on an exceptional basis, following a case-by-case assessment of whether they are necessary in light of an objectively justifiable risk and are proportionate to the rights of the accused”.¹⁶
15. In addition, for each witness the Chamber should also take into account their expected testimony and favour the publicity of their identity if the testimony

¹³ [ICC-01/14-01/18-724-Conf-AnxA](#).

¹⁴ [ICC-01/14-01/18-757-Conf-Anx-Red](#).

¹⁵ *Prosecutor v. Gbagbo & Blé Goudé*, [Decision on the Prosecutor’s application for protective measures for Witness P-0428](#), ICC-02/11-01/15-1155-Red, 20 April 2018, para. 8.

¹⁶ *Prosecutor v. Ruto & Sang*, [Decision on ‘Prosecution’s First Request for In-Court Protective Measures for Trial Witnesses’](#), ICC-01/09-01/11-902-Red2, 11 September 2013, para. 13.

does not relate to the accused directly,¹⁷ or if it is technical in nature.¹⁸

16. The Chamber should not take into consideration speculative and “hypothetic scenarios; a witness’s personal subjective fears and concerns, or preferences, not substantiated by objective, verifiable circumstances, and isolated past episodes, even when serious”.¹⁹
17. In addition to those general remarks regarding the criteria to assess while deciding on the propriety of the measures sought, the Defence will now set out its specific opposition to parts of the Prosecution’s Request.

II. On the witnesses who should not be granted in-court protective measures

18. While the Defence takes no position on the majority of the Prosecution’s Request, despite expressing its general position on protective measures in the section above, the Defence however is arguing against the Request for the witnesses below.

A. Witnesses [REDACTED] and [REDACTED]

19. In its Request the Prosecution seeks in-court protective measures consisting of the use of pseudonyms and the combination of voice and face distortion for Witnesses [REDACTED] and [REDACTED].²⁰
20. The Defence opposes the protective measures sought in light of the supporting evidence linked to both witnesses which prevent, in large measure, the testimony of [REDACTED] and [REDACTED] in open-session.
21. The Prosecution obtained for both witnesses [REDACTED] messages they exchanged with various people during the events and which contain crucial

¹⁷ *Prosecutor v. Niaganda*, [Decision on Prosecution’s request for in-court protective measures for Witness P-0039](#), ICC-01/04-02/06-956-Red, 28 October 2015, para. 8.

¹⁸ *Prosecutor v. Niaganda*, [Decision on Prosecution’s request for in-court protective measures for Witness P-0551](#), ICC-01/04-02/06-1786, 15 February 2017, para. 12.

¹⁹ *Prosecutor v. Gbagbo & Blé Goudé*, [Decision on the Prosecutor’s application for protective measures for Witness P-0428](#), ICC-02/11-01/15-1155-Red, 20 April 2018, para. 8.

²⁰ [ICC-01/14-01/18-757-Conf-Anx-Red](#), page 2, witnesses n°3 and n°4 respectively.

information.²¹ The questions put to both witnesses will necessarily be supported by their contemporaneous messages, however mentioning their contents would seriously compromise the protection of their identity as their correspondents would be able to guess the identity of the witnesses by recognizing the messages. The protective measures would thus be inadequate and the only solution would be to proceed with the questions in closed session for a majority of their testimony, unduly infringing on Mr. Yekatom's right to be tried publicly.

22. In addition, regarding Witness [REDACTED], the Defence stresses that no objectively justifiable risk has been demonstrated. The witness only mentioned his fear to the Prosecution without concrete justification except for his area of residence, but at no point mentioned any threats or incidents. The witness's fear appears to amount to preferences not substantiated by objective, verifiable circumstances.²²
23. In light of the above, the Defence respectfully requests the Chamber to reject the Prosecution's Request for in-court protective measure for Witnesses [REDACTED] and [REDACTED].

B. Witness [REDACTED]

24. In its Request, the Prosecution seeks in-court protective measures consisting of the use of a pseudonym and the combination of voice and face distortion for Witness [REDACTED].²³
25. The Defence opposes the protective measures sought for this witness in light of the public knowledge of his role during the events, as appearing publicly

²¹ For [REDACTED] see [CAR-OTP-2100-3494](#), [CAR-OTP-2101-8109](#), [CAR-OTP-2101-9735](#), [CAR-OTP-2102-8436](#), [CAR-OTP-2102-9862](#) ; for [REDACTED] see [CAR-OTP-2100-3030](#), [CAR-OTP-2101-6897](#), [CAR-OTP-2101-8524](#), [CAR-OTP-2102-5143](#), [CAR-OTP-2102-9507](#), [CAR-OTP-2103-4779](#).

²² *Prosecutor v. Gbagbo & Blé Goudé*, [Decision on the Prosecutor's application for protective measures for Witness P-0428](#), ICC-02/11-01/15-1155-Red, 20 April 2018, para. 8.

²³ [ICC-01/14-01/18-757-Conf-Anx-Red](#), page 3, witness n°12.

could be an incentive for [REDACTED] to say only the truth, being aware of the public scrutiny.

26. *First*, as mentioned by the Prosecution [REDACTED] has a “high public profile” and appeared in the media. Those media interventions are inextricably linked to his testimony due to their importance.²⁴ If the measures are granted any questions in relation to his contemporaneous speech will have to be done in closed session which is not consistent with Mr. Yekatom’s right to be tried publicly; nor proportionate in light of the importance of [REDACTED] expected testimony against Mr. Yekatom.²⁵
27. *Second*, the past behaviour of [REDACTED] with the Prosecution indicates that the witness might not be totally truthful with his answers.²⁶ The Defence contends that appearing publicly is an incentive for the witness to say only the truth, being aware of the public scrutiny of his testimony in light of his previous contemporaneous media interventions. In this instance, granting the protective measures would remove this safeguard and would not be proportionate with the rights of Mr. Yekatom in light of the incriminating nature of the expected testimony.
28. In light of the above, the Defence respectfully requests the Chamber to reject the Prosecution’s Request for in-court protective measure for Witness [REDACTED].

C. Witnesses [REDACTED], [REDACTED] and [REDACTED]

29. In its Request the Prosecution seeks in-court protective measures consisting of the use of pseudonyms and the combination of voice and face distortion for Witnesses [REDACTED],²⁷ [REDACTED] and [REDACTED].²⁸

²⁴ See as an example, [CAR-OTP-2027-0191](#) ; [CAR-OTP-2001-5112](#).

²⁵ [ICC-01/14-01/18-724-Conf-AnxA](#), page 15, witness n°6.

²⁶ [REDACTED]: [CAR-OTP-2076-0325-R01](#), at 0327-0328, lns 77-113.

²⁷ [ICC-01/14-01/18-757-Conf-Anx-Red](#), page 2, witness n°2.

30. Mindful of the classification of [REDACTED], [REDACTED] and [REDACTED] as insider witnesses, the Defence opposes the protective measures sought for them in light of [REDACTED].
31. The Defence contends that [REDACTED], it is in the interest of fairness to have the identities of these witnesses known while they testify. Appearing publicly could be an incentive for those witnesses to say only the truth, being aware of the public scrutiny, since any voluntary omission or deception will be readily reported.
32. In addition, their level of public recognition in CAR makes their identification all the more easier even if the measures requested are implemented. To prevent any identification, the majority of the testimony would need to be held in closed session, a prejudicial solution inconsistent with Mr. Yekatom's right to be tried publicly.
33. Regarding the security incidents mentioned by [REDACTED], the Defence notes that those incidents occurred during the 2014-2016 period. Given that five years have passed since these past episodes, the weight to be given to them should not outweigh Mr. Yekatom's right to an open public trial.
34. Regarding [REDACTED], it should be noted that he only [REDACTED] at an unknown date, and that [REDACTED]. The Defence contends these concerns do not rise to the level of an objectively justifiable risk to the witness sufficient to limit Mr. Yekatom's fair trial rights. In any event, this isolated past episode is insufficient to trigger the requested protective measures.²⁹
35. In light of the above, the Defence respectfully requests the Chamber to reject the Prosecution's Request for in-court protective measures for Witnesses

²⁸ [ICC-01/14-01/18-757-Conf-Anx-Red](#), page 5, witnesses n°23 and 27 respectively.

²⁹ *Prosecutor v. Gbagbo & Blé Goudé*, [Decision on the Prosecutor's application for protective measures for Witness P-0428](#), ICC-02/11-01/15-1155-Red, 20 April 2018, para. 8.

[REDACTED], [REDACTED] and [REDACTED].

D. Witness [REDACTED]

36. In its Request the Prosecution seeks in-court protective measures consisting of the use of a pseudonym and the combination of voice and face distortion for Witness [REDACTED].³⁰
37. The Defence opposes the protective measures sought for [REDACTED] in light of his status as a public figure in CAR which led him to have, as the Prosecution mentions, “media exposure”, [REDACTED].
38. The Defence submits that [REDACTED] previous media exposure, and specifically his previous public statements, may act to motivate him to provide a truthful account, given that deviation from or inconsistencies with such previous statements would be easily discernible, including by members of the public and the media.
39. The Defence notes that no objectively justifiable risk has been presented to support the request. [REDACTED] only expressed to the Prosecution his concerns but did not substantiate them, explicitly mentioning that the only [REDACTED] predate his cooperation with OTP and thus do not appear to be connected to his expected testimony in the present case.
40. In light of the above, the Defence respectfully requests the Chamber to reject the Prosecution’s Request for in-court protective measure for Witness [REDACTED].

E. Witnesses P-1974 and P-2018

41. In its Request the Prosecution seeks in-court protective measures consisting of

³⁰ [ICC-01/14-01/18-757-Conf-Anx-Red](#), page 5, witness n°25.

the use of pseudonyms and face distortion for Witnesses P-1974 and P-2018.³¹

42. The Defence opposes the protective measures, which are sought for the two witnesses on the ground that public testimony would impede their professional activities.³² The request appears to amount to the witnesses' preferences due to their professional activities. When balanced against the right of Mr. Yekatom to have a public trial, the latter should prevail.
43. The Defence contends that due to the exceptional nature of the protective measures and their impact on the protected rights of Mr. Yekatom, these particular professional circumstances should not be taken into account when assessing whether or not they are justified.
44. In addition, no concrete risk warranting the implementation of the measures has been demonstrated. While P-1974 mentions [REDACTED], no clear link has been shown between this incident and his cooperation with the Prosecution; the only [REDACTED] and not directed against his person. P-1974 also mentions that [REDACTED], who is P-2018, has been [REDACTED], an event that is not at all mentioned by P-2018 himself.
45. In light of the above, the Defence respectfully requests the Chamber to reject the Prosecution's Request for in-court protective measures for P-1974 and P-2018.

F. Witness P-1819

46. In its Request the Prosecution seeks in-court protective measures consisting of the use of a pseudonym and face distortion for Witness P-1819.³³
47. The Defence opposes the protective measures sought for P-1819, who does not

³¹ [ICC-01/14-01/18-757-Conf-Anx-Red](#), page 8, witnesses n°48 and 49 respectively ; see also [ICC-01/14-01/18-757-Conf-Red](#), paras. 32-34.

³² [ICC-01/14-01/18-757-Conf-Red](#), para. 32.

³³ [ICC-01/14-01/18-757-Conf-Anx-Red](#), page 8, witness n°50.

claim the existence of an objectively justifiable risk for [REDACTED] safety should [REDACTED] identity be disclosed during [REDACTED] testimony. The basis of the request for this witness is [REDACTED] concern regarding future professional opportunities,³⁴ which should not be taken into account when assessing whether protective measures, which should remain exceptional and proportionate to the rights of the accused as mentioned before, are warranted.

48. Moreover, even if the professional opportunities were taken into account, it should be noted that they are entirely speculative in this instance. P-1819 mentioned during [REDACTED] interview with the Prosecution [REDACTED] that, [REDACTED].³⁵ The lack of any concrete details on the witness's intention to work in CAR renders the claim that disclosure [REDACTED] identity "will compromise [REDACTED] future professional opportunities" speculative and thus inoperative in the assessment on the appropriateness of protective measures.³⁶
49. In addition, the Prosecution has not demonstrated that revealing Witness P-2926's identity to the public would pose a risk to his safety.³⁷
50. Finally, the Defence stresses that the majority of questions for P-1819 will be about [REDACTED]³⁸ in which [REDACTED]. The Defence fails to see how the witness will be able to testify in open session [REDACTED] without being identified, as [REDACTED].³⁹ The Prosecution disclosed a total of [REDACTED] videos provided by Witness P-1819, out of which it intends to

³⁴ See also, [ICC-01/14-01/18-757-Conf-Red](#), para. 36.

³⁵ P-1819 : [CAR-OTP-2065-0003-R01](#), para. 48.

³⁶ *Prosecutor v. Gbagbo & Blé Goudé*, [Decision on the Prosecutor's application for protective measures for Witness P-0428](#), ICC-02/11-01/15-1155-Red, 20 April 2018, para. 8 ; *Prosecutor v. Al Hassan*, [Public redacted version of 'Third decision on in-court protective measures'](#), ICC-01/12-01/18-1113-Red2, 5 January 2021, paras 34-35.

³⁷ *Prosecutor v. Ntaganda*, [Decision on in-court protective measures for Witness D-0243](#), ICC-01/04-02/06-2136, 1 December 2017, para. 12

³⁸ P-1819 : [CAR-OTP-2012-0523](#)

³⁹ See the translation [REDACTED], [CAR-OTP-2118-5507](#), lines 13-16.

use [REDACTED].⁴⁰ The Defence also intends to use a large portion of the disclosed material in cross examination. Given that one of the principal purposes of this witness's testimony is the video [REDACTED] captured,⁴¹ protecting the identity of Witness P-1819 would force the parties to conduct most, if not all, the questioning in closed session, infringing the right of Mr. Yekatom to be tried publicly.

51. In light of the above, the Defence respectfully requests the Chamber to reject the Prosecution's Request for in-court protective measure for Witness P-1819.

G. Witness P-2926

52. In its Request the Prosecution seeks in-court protective measures consisting of the use of a pseudonym and face distortion for Witness P-2926.⁴²
53. The Defence opposes the protective measures sought for P-2926 in light of the absence of any objectively justifiable risk and the nature of his expected testimony.
54. P-2926 is a [REDACTED],⁴³ expected to testify as an "overview/background" expert witness for the Prosecution.⁴⁴ While it is indicated that the witness [REDACTED], the Prosecution has not demonstrated that revealing Witness P-2926's identity to the public would pose a risk to his safety;⁴⁵ instead, during his communication with the Prosecution the witness indicated that his concern was about professional opportunity in CAR. The Defence reiterates its position that such a consideration should not be taken into account for the purpose of the assessment of protective measures, especially in light of the status of P-2926 as an expert overview witness.

⁴⁰ Disclosed as INCRIM.

⁴¹ See, [ICC-01/14-01/18-724-Conf-AnxA](#), page 44, witness n°88 : [REDACTED]

⁴² [ICC-01/14-01/18-757-Conf-Anx-Red](#), page 9, witness n°52.

⁴³ P-2926 : [CAR-OTP-2127-4327](#)

⁴⁴ [ICC-01/14-01/18-724-Conf-AnxA](#), page 40, witness 75.

⁴⁵ *Prosecutor v. Ntaganda*, [Decision on in-court protective measures for Witness D-0243](#), ICC-01/04-02/06-2136, 1 December 2017, para. 12

55. In addition, the Defence stresses that P-2926 is scheduled to testify as an expert on background information on CAR and the conflict. The fact that his testimony is not expected to relate to the accused directly should be taken into account,⁴⁶ and also poses no bar for the identity of P-2926 being known to the public.
56. In light of the above, the Defence respectfully requests the Chamber to reject the Prosecution's Request for in-court protective measures for Witness P-2926.

CONFIDENTIALITY

57. In application of regulation 23 *bis* of the Regulations of the Court, the present response is filed on a confidential basis which corresponds to the classification of the Request for which no public redacted version has yet been filed and due to the identification of witnesses. The Chamber is respectfully requested to issue a public redacted version of its decision and order the parties to file public redacted versions of its submissions.

RELIEF SOUGHT

58. In light of the above, the Defence respectfully requests the Chamber to:
- ASSESS** the individual applications for protective measures on a case-by-case basis in light of Mr. Yekatom's concern that his right to a public trial remain at the forefront of the Chamber's consideration;
- REJECT** the implementation of in-court protective measures for Witnesses [REDACTED], [REDACTED], [REDACTED], [REDACTED], [REDACTED], [REDACTED], [REDACTED], P-1974, P-2018, P-1819 and P-2926.

⁴⁶ *Prosecutor v. Ntaganda*, [Decision on Prosecution's request for in-court protective measures for Witness P-0039](#), ICC-01/04-02/06-956-Red, 28 October 2015, para. 8.

RESPECTFULLY SUBMITTED ON THIS 25TH DAY OF JANUARY 2021⁴⁷



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⁴⁷ The assistance of Legal Intern Camille Gillain in the research for this motion is gratefully acknowledged.