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TRIAL CHAMBER V

Before:

Judge Bertrand 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 AND PATRICE-EDOUARD
NGAISSONA***

PUBLIC

**Lesser Public Redacted Version of the “Defence response to Confidential redacted
version of ‘Prosecution’s Request for in-court protective measures’ 7 December 2020,
(ICC-01/14-01/18-757-Conf-Exp)”, 15 January 2021.**

Source: Defence of Patrice-Edouard Ngaïssona

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

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I. Introduction

1. On 18 December 2020, the Prosecution requested in-court protective measures for 72 out of the 96 Prosecution witnesses who are scheduled to testify live (“the Request”).¹ The Defence for Mr Ngaïssona (“the Defence”) hereby responds to the Request based on two arguments. The first is that granting protective measures for 72 out of the 96 witnesses will be against Mr Ngaïssona’s right to a public trial. The second is that the Prosecution has failed to demonstrate that the protective measures sought are necessary in light of an objectively justifiable risk.

2. The Defence requests Trial Chamber V (“the Chamber”) to reject the Request in relation to the 29 insider witnesses: [REDACTED], P-2841, P-2251, P-2673, [REDACTED], [REDACTED], P-0458, P-0306, P-2233, P-0888, P-0627, P-0487, P-1786, P-2027, P-0975, P-0954, [REDACTED], P-2602, P-2556, P-1647, P-1858, P-1077, P-0876, P-0446, [REDACTED], P-0889, P-0884, P-1193, P-2843; and witnesses in particular professional circumstances: P-1819, P-1158, P-2926, P-0314; as well as P-2682. The Defence defers to the Defence for Mr Yekatom in relation to witnesses who, according to the Prosecution, will give evidence against Mr Yekatom. The Defence defers to the Chamber’s discretion with respect to the following categories of witnesses: witnesses who have been admitted into the ICC protection program, witnesses who reside in a refugee camp and victims of sexual violence.

II. Confidentiality

3. This response is filed as confidential pursuant to Regulation 23 (1) *bis* of the Regulations of the Court (the “Regulations”), because it responds to a filing of

¹ “Confidential redacted version of ‘Prosecution’s Request for in-court protective measures’ 7 December 2020, (ICC-01/14-01/18-757-Conf-Exp)” ICC-01/14-01/18-757-Conf-Red.

a similar classification. The Defence will file a public redacted version as soon as possible.

III. Applicable Law

4. The general rule at the Court is that trial should be public. In this regard, Article 67(1) of the Statute, provides that accused persons have the fundamental right to a public hearing. This principle of publicity is further emphasised in Regulation 20 of the Regulations of the Court, which provides that “[a]ll hearings shall be held in public, unless otherwise provided in the Statute, Rules, these Regulations or ordered by the Chamber”.
5. The legal framework of the Court provides for exceptions to this rule in Article 68(1) and (2) of the Statute which is to be read together with Article 64 (2) and (6)(e) of the Statute as well as Rule 87 of the Rules. Article 68(1) permits the Trial Chamber to grant protective measures “to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses”. However, it also provides that the protective measures put in place by the Trial Chamber “shall not be prejudicial to or inconsistent with the rights of the accused to a fair and impartial trial”.
6. According to the jurisprudence of the Court, the protective measures which the Prosecution seeks in the Request, “should be granted only 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”.²

² *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

IV. Submissions

7. The party requesting in-court protective measures must demonstrate that the measures sought are: (i) necessary in light of an objectively justifiable risk; and (ii) proportionate to the rights of the accused.³ The Defence submits that these two criteria are not satisfied as illustrated further below.

A. The measures requested are disproportionate to the rights of the accused to a public trial

8. The right to a public trial is a fundamental right enshrined in Article 67 of the Statute and in ordering protective measures the Chamber must ensure that they are proportionate to the rights of the accused. The Defence submits that the granting of the Request to provide protective measures by way of pseudonym, and/or facial and voice distortion for 72 out of 96 witnesses to testify live would have the effect of hiding the trial from the public.

9. The Defence submits that if such an extensive request is granted, Mr Ngaissona will be unable to avail himself of the protection inherent in a public trial, which is an internationally recognised right. Any deviation from this right should be granted only on an exceptional basis. Granting protective measures by way of pseudonym, voice and or facial distortion to 72 witnesses will have the effect of removing significant evidence of witnesses from the public domain and the protections inherent in a public trial will be lost to Mr Ngaissona. The Defence submits that public anonymity makes it less likely that lies are uncovered by the process of public scrutiny through which

Prosecutor and the Chamber (Rules 87 and 88 of the Rules of Procedure and Evidence) ICC-01/04-01/07-1667-Red-tENG (9 December 2009) paras 8-9.

³ See the Applicable law section above.

persons may come forward to controvert evidence that has come to their attention through a public trial.

10. This would also affect the ability of the Chamber to fulfil its truth-seeking mandate. In fact, making a witness' identity known to the public increases the witness' commitment to tell the truth as well as their feeling of public accountability. A manual published by the United Nations Office on Drugs and Crime (UNODC) in 2008 indicated that the possibility for a witness to benefit from protective measures is considered by some countries to entail a risk that such measures may become an incentive for the witness to give false testimony that they believe the Prosecution wants or needs.⁴ The Defence submits that making a witness' identity known to the public increases the witness' commitment to tell the truth as well as their feeling of public accountability.

B. The Prosecution fails to demonstrate that the measures requested are necessary in light of an objectively justifiable risk

11. One of the general arguments presented in support of the Request is the security situation in Central African Republic (CAR) which, as noted by the Registry, "has remained precarious throughout 2019 and the beginning of 2020"⁵. The Defence submits that the security situation in CAR does not amount to an objectively justifiable risk in relation to specific witnesses, albeit that some Chambers have considered the security situation of a region in the decision to grant protective measures. However, it is not to be considered in isolation, rather, the Chamber must enquire about the effect of the security situation on the circumstances of a specific witness. In this regard, the

⁴ United Nations Office on Drugs and Crime, Good Practices for the Protection of Witnesses in Criminal Proceedings Involving Organized Crime, 2008, page 45.

⁵ The Request, para 9.

Chamber in *Ntaganda* held that: “the situation in a region may be relevant when considered in relation to the circumstances of a specific witness.”⁶

12. The second general argument relates to the alleged influence of Mr Ngaïssona over the Anti-Balaka and their supporters in CAR.⁷ The Defence submits that this allegation is irrelevant to the issue of protective measures. This is especially because Mr Ngaïssona is in detention at the ICC Detention Centre in the Hague, thousands of kilometres away from CAR, and his visits and calls are actively monitored by the Registry. The alleged breaches of contact restrictions which the Prosecution referred to in the Request are contested by the Defence⁸ and were not related to the substance of the case. The Prosecution also stated in the Request that the alleged influence of Mr Ngaïssona has led to threats against witnesses for their perceived cooperation with the Prosecution.⁹ However, further details on this allegation are redacted and, therefore, the Defence is not in a position to investigate these claims to establish their veracity and whether they have currency or connection to the present case.

i. Classification as an “insider witness” does not amount to an objectively justifiable risk

13. The Prosecution requests protective measures in terms of pseudonym, face and voice distortion for 29 insider witnesses. However, the prosecution does not demonstrate the existence of an objectively justifiable risk as required by the legal framework of the Court and the established jurisprudence. Trial

⁶ *The Prosecutor v. Bosco Ntaganda* (Public redacted version of Decision on request for in-court protective measures relating to the first Prosecution witness) ICC-01/04-02/06-824-Red (15 September 2015) para 14.

⁷ The Request, paras 15-17.

⁸ ICC-01/14-01/18-300-Conf-Exp, paras 17-28 ; CC-01/14-01/18-373-Conf-Exp, paras 27-40 ; ICC-01/14-01/18-397-Conf-Exp, paras 27-35 ; ICC-01/14-01/18-408-Conf-Exp, paras 21-33

⁹ The Request, para 16.

Chamber I's holding in *Gbagbo and Blé Goudé* is instructive in this regard. It was held that "the following factors are all unsuitable to trigger the application of Rule 87: one, generic references to a social context in Ivory Coast, including its alleged polarisation or to the level of attention reserved to this trial by media, social media and ordinary citizens; and two, speculative and hypothetical scenarios"¹⁰

14. Going by this decision, the Prosecution's arguments with regard to insider witnesses are unsuitable to trigger the application of Rule 87. The Prosecution argues that the witnesses are at risk and susceptible to retaliation because: i) as members of the Anti-Balaka their testimony will be seen as a betrayal to the group; ii) the witnesses are known to the accused, other Anti-Balaka members and their supporters who know where to locate them; iii) their testimony will concern the inner working of the Anti-Balaka and the acts and conducts of the accused and therefore will attract attention; iv) their cooperation with the ICC might be seen as risking the peace process; and v) a majority of these insiders have conditioned their testimony on the granting of protective measures to keep their identity from the public.¹¹ These are all generic and speculative reasons none of which relate to the individualised circumstances of the witnesses. Therefore, they should not be accepted for the purpose of granting of protective measures.

15. Arguments (i) and (iv) relating to how the witness testimonies might be perceived by the Anti-Balaka as a betrayal, or the potential influence of the testimonies on the peace process are both speculative. As stated in *Gbagbo and Blé Goudé* decision above, speculative arguments do not trigger the application of Rule 87.

¹⁰ *Gbagbo and Blé Goudé* case, transcript of hearing on 17 October 2016, ICC-02/11-01/15-T-86-Red-ENG, page 18 paras 1-6.

¹¹ The Request para 24 and 25.

16. With regard to arguments (ii) and (iii) the Defence submits as follows: the very reason why the Prosecution classified these witnesses as “insiders” is due to their purported knowledge of the Mr Ngaïssona as well as the inner workings of the Anti-Balaka. It follows therefore that some of these witnesses might be known to Mr Ngaïssona, to other Anti-Balaka members as well as their supporters. However, this alone cannot be a reason to grant protective measures especially where the accused is in detention as is the case of Mr Ngaïssona. If the Chamber were to grant protective measures on the basis that the witness is known to the accused, or to the Anti-Balaka or their supporters, then all insider witnesses might fall into that bracket, which would lead to an absurd outcome. Besides, as held in *Gbagbo and Blé Goudé* decision above, the level of attention reserved for a trial in the media cannot justify the granting of protective measures.

17. In response to argument (v), the Defence submits that witnesses should not condition their appearance on the condition that they testify with protective measures. A person who wilfully accepts to testify before a criminal court accepts that their testimony will be the object of media attention which is a necessary component of the publicity of criminal proceedings. As held in *Gbagbo and Blé Goudé* “all 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.”¹² The Defence submits that the insider witnesses in this case should bear that responsibility and should not condition their appearance on the granting of protective measures. This is especially because the decision to order protective measures is at the discretion of the trial chamber taking into consideration the rights of the accused. As stated by the

¹² *Gbagbo and Blé Goudé* case, transcript of hearing on 17 October 2016, ICC-02/11-01/15-T-86-Red-ENG, page 18 paras 13-14.

trial chamber in *Lubanga*: “requests for protective measures should not be routinely made in the expectation that they will be routinely granted”.¹³

18. In the Annex to the Request¹⁴ the Prosecution presents arguments, which may be divided into five categories and each will be dealt with in turn below.

ii. Possible knowledge of a witness by the accused or other Anti-Balaka members is not an objectively justifiable risk

19. First, the Prosecution argues that witnesses [REDACTED] are at risk because they are allegedly personally known to Mr Ngaïssona and/or to Anti-Balaka members and their supporters, [REDACTED]. These witnesses are alleged to be personally known to Mr Ngaïssona - [REDACTED], P-0975, [REDACTED]; these individuals are alleged to be known to particular Anti-Balaka members – P-2841 [REDACTED], while [REDACTED] and P-2027 [REDACTED]; these individuals are alleged to be known to general Anti-Balaka members and their supporters [REDACTED]; P-2251, [REDACTED], [REDACTED], P-0458, P-0306, P-2233, P-0888, P-0627, P-0487, P-1786, P-0954, [REDACTED], P-2602, P-2556, P-1647, P-1858, P-1077, P-0876, P-0446, P-0889, P-0884, P-1193, and P-2843.

20. The Defence submits that the mere fact that a witness is known by the accused and/or members of the Anti-Balaka, even if proven, does not amount to an objectively justifiable risk and therefore cannot be a basis of granting protective measures. This situation is markedly different from the *Ruto and Sang* case, cited by the Prosecution, where both accused persons were appearing before the Court on the basis of summons to appear. Unlike these two, Mr Ngaïssona is in prison where his contacts are actively monitored by

¹³ Lubanga case. Transcript of hearing on 24 March 2009, ICC-01/04-01/06-T-153-Red2-ENG, page 63, lines 19-21.

¹⁴ ICC-01/14-01/18-757-Conf-Anx-Red.

the Registry and therefore is not in a position to cause harm to witnesses, even if he knows them. Protective measures should therefore not be granted to these witnesses on the basis of the alleged knowledge of the accused.

iii. Alleged threats against witnesses do not amount to an objectively justifiable risk unless substantiated and related to the case

21. The second argument presented in the Annex to the Request is that some witnesses have allegedly received threats from Mr Ngaïssona or someone allegedly close to Mr Ngaïssona. P-2251 [REDACTED]; [REDACTED]; P-2673 [REDACTED]; P-2233 [REDACTED]; P-0627 [REDACTED]; P-0876 [REDACTED] and P-0889 [REDACTED]; in July 2016, P-0876 [REDACTED]. [REDACTED].

22. It is noteworthy that the details of these alleged incidents as well as the source of information are redacted, therefore, the Defence is unable to establish the veracity of the allegations or respond specifically to them. The Defence is not in a position to verify whether the alleged threats were actually issued, when they occurred and/or whether they are related to Mr Ngaïssona or to the case generally. The Defence refers to the ruling of the Chamber in the *Gbagbo and Blé Goudé* case where it was held that “past isolated incidents even when serious cannot trigger the application of Rule 87”.¹⁵ The Defence submits that alleged threats against witnesses, even if proven, do not amount to an objectively justifiable risk unless they are substantiated and are related to the case.

¹⁵ *Gbagbo and Blé Goudé* case, transcript of hearing on 17 October 2016, ICC-02/11-01/15-T-86-Red-ENG, page 19, paras 1-9.

iv. A witness's potential subjective fears and concerns or preferences are not objectively justifiable risks unless substantiated

23. The third argument the Prosecution presents in the Annex to the Request is that most of the witnesses have expressed fear of retaliation from Anti-Balaka if they would testify publicly. The Prosecution argues that this fear is exacerbated by the current situation in CAR. This argument is presented with regard to the following witnesses: P-2251, [REDACTED], [REDACTED], [REDACTED], P-0306, P-2233, P-0888, P-0627, P-1786, P-0975, P-1437, P-2082, and P-0475. Further information on this issue is redacted, therefore, the Defence is unable to determine whether the fear is subjective or objective. The Defence relies on the jurisprudence of Trial Chamber I which stated that “a witness's potential subjective fears and concerns or preferences not substantiated by objective verifiable circumstances”¹⁶ are not sufficient justification for protective measures. The Defence leaves the determination of the issue whether the fear is objective to the determination of the Chamber.
24. The Prosecution also relies on a similar argument for other witnesses with regard to their professional circumstances. P-1819 and P-1558 are both journalists, P-2629 is a private consultant for NGOs, while P-0314 is [REDACTED]. All four witnesses have expressed fear that the disclosure of their identity to the public would compromise their ability to work in their respective professions and their future professional opportunities. The Defence submits that protective measures are granted “to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses”.¹⁷ Potential loss of future professional opportunities is not a category protected by these measures. Furthermore, as Trial Chamber I stated in *Gbagbo and Blé Goudé* witnesses who appear before the Court are neutral

¹⁶ Ibid, page 19 paras 7-8.

¹⁷ Article 68 (1) of the Statute.

and their role is to tell the truth - appearing in public is a responsibility attached to that role. Therefore, the Defence submits that the Request should be denied with regard to witnesses P-1819, P-1558, P-2629 and P-0314.

v. Merely living in a certain area is not an objectively verifiable risk

25. The fourth argument the Prosecution presents in the Annex to the Request is that certain witnesses and/or members of their family live [REDACTED]. This argument is presented with regard to the following witnesses: P-2251, [REDACTED], P-2841, P-2673, [REDACTED], [REDACTED], P-0458, P-2233, P-0888, P-0627, P-0487, P-1786, P-0954, [REDACTED], P-2602, P-2556, P-1647, P-1858, P-1077, P-0876, P-0446, P-0884, P-1193, P-2843, P-1558, P-2682, P-2082, P-3014 and P-0475. Further information on this issue is consistently redacted with regard to all these witnesses; therefore, the Defence is not in a position to present a comprehensive response or determine whether the risk is objectively justifiable. The Defence wishes to state however, that the mere fact that a witness and/or their family live in certain location does not amount to an objectively justifiable risk and therefore is not a ground for issuance of protective measures.

vi. Having a public profile does not justify the granting of protective measures

26. The last argument the Prosecution makes in the Annex, for the purpose of this submission, relates to witnesses with a public profile. First, the Prosecution argues that some witnesses [REDACTED] have given interviews in a variety of media platforms on issues related to the Anti-Balaka and the situation in CAR. This argument is fronted for the following witnesses: P-0458, [REDACTED], P-2841, [REDACTED], P-0487, [REDACTED], P-0876, [REDACTED], P-0889, P-0884, P-1193. The other category of witnesses for

whom a similar argument is fronted are those who have a public profile as a result of [REDACTED]. These are: P-1819 [REDACTED]; P-1558 [REDACTED]; P-0314 [REDACTED]; P-2082 [REDACTED]; and P-0475 [REDACTED].

27. Contrary to the Prosecution's argument, the Defence submits that these witnesses' public profile is a factor against granting them protective measures. A similar issue was dealt with by Trial Chamber I in the *Gbagbo and Blé Goudé* case where the Chamber held that: "the fact that the witness has not only already publicly appeared on the stand in Ivory Coast in the trial against Simone Gbagbo, but also featured in the Ivorian press in connection with other events contradicts the Prosecutor's and the VWU's submissions both as to the existence of a risk and as to the suitability of the requested protective measures to neutralise it. First, no significant adverse consequence has materialised in the month following the witness exposure in the media, either for him or for his family."¹⁸ The Defence submits that a similar argument applies to witnesses who have public profiles as [REDACTED]. According to the Prosecution these witnesses appeared several times on various media platforms to express themselves on matters relating to the conflict or their work product was widely publicised for a similar reason. No significant consequence has materialized as a result of their public appearance; therefore, there is no objectively justifiable risk.

28. In a similar vein, the trial chamber in *Gbagbo and Blé Goudé* further held that: "the previous exposure of the witness in the Ivorian media makes it highly likely that even if protective measures were to be adopted, the very nature and subject matter of testimony would allow the identification of the witness

¹⁸ *Gbagbo and Blé Goudé* case, transcript of hearing on 17 October 2016, ICC-02/11-01/15-T-86-Red-ENG, page 19 paras 7-13.

and therefore neutralise them.”¹⁹ The Defence submits that a similar reasoning should be applied in this case to deny protective measures to witnesses with a public profile because their identity together with their views on the conflict in CAR are already in public domain which would neutralise the effect of protective measures if granted.

29. A similar, but separate, argument applies to P-2682. The Prosecution argues in the Annex to the Request that protective measures are justified for this witness because [REDACTED].²⁰ The [REDACTED], which a witness is expected to receive is not a factor which can trigger Rule 87. In this regard, Trial Chamber I held that the level of attention reserved for the trial by the media, social media or ordinary citizens is not be a basis for granting protective measures.²¹ The Defence submits that the current Chamber should apply the same reasoning.

30. For the foregoing reasons, the Defence requests that the Request be rejected. As Trial Chamber I held in *Gbagbo and Blé Goudé*: “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.”²² The Defence submits that the Prosecution has failed to demonstrate the existence of such risk and that the request is disproportionate to the rights of Mr Ngaïssona therefore it should be rejected.

¹⁹ Ibid, page 19, paras 23-24 – page 20, para 1-4.

²⁰ Annex to the Request, page 19.

²¹ *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.

²² Ibid, page 18, paras 10-12.

V. Relief sought

31. The Defence respectfully requests the Chamber to reject the Request in relation to the [REDACTED] insider witnesses: [REDACTED], P-2841, P-2251, P-2673, [REDACTED], [REDACTED], P-0458, P-0306, P-2233, P-0888, P-0627, P-0487, P-1786, P-2027, P-0975, P-0954, [REDACTED], P-2602, P-2556, P-1647, P-1858, P-1077, P-0876, P-0446, [REDACTED], P-0889, P-0884, P-1193, P-2843; and persons in witnesses in particular professional circumstances: P-1819, P-1158, P-2926, P-0314; as well as P-2682.

Respectfully submitted,



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