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Date: 18 January 2022

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

**with Confidential, *EX PARTE*, only available to the Prosecution and the VWU
Annex**

**Public Redacted version of “Request for Reconsideration regarding In-Court
Protective Measures for Prosecution Witness P-0889”, 31 December 2021,
ICC-01/14-01/18-1232-Conf-Exp**

Source: Office of the Prosecutor

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 the Chamber's Initial Directions on the Conduct of Proceedings,¹ and its Decision on the Prosecution Requests for In-Court Protective Measures for 73 Trial Witnesses ("Decision on In-Court Protective Measures"),² the Prosecution seeks the Chamber's reconsideration of its decision regarding P-0889 and to grant protective in the form of voice and facial distortion, and the use of a pseudonym ("Requested Measures").

2. Reconsideration of the Requested Measures pursuant to articles 64(2) and 67 is necessary to secure the witness's testimony and to prevent an injustice.³ In particular, new facts have arisen since the Decision on In-Court Protective Measures was rendered: (i) the security situation in the Central African Republic ("CAR") has further deteriorated; and (ii) [REDACTED]. The scope of the present circumstances therefore justify the Chamber's reconsideration.

3. Granting the Requested Measures will ensure that P-0889 is able to give evidence without fear for his own security, and without jeopardising that of his family.

4. The Requested Measures are the least restrictive means to appropriately balance the right to a public against the mandate to protect witnesses appearing before the Court, and to prevent a disproportionate risk of harm on account of those who assist it.⁴ As such, the measures sought do not unfairly prejudice the Accused.

II. CONFIDENTIALITY

5. Pursuant to regulation 23*bis* of the Regulations of the Court ("RoC"), this Request and its Annex are filed as "Confidential, ex parte - only available to the Prosecution

¹ ICC-01/14-01/18-631, paras.68-69.

² ICC-01/14-01/18-906-Conf-Red.

³ See ICC-01/12-01/18-734, para. 11.

⁴ See e.g., ICC-01/05-01/13-1481-Red-Corr, para. 18 (noting that the Chamber's duty under article 68(1) also "encompasses refraining from actions ... that would in all likelihood entail negative consequences for the witness").

and the VWU”, as they bear on confidential witness security issues, and concern previous filings of the same classification. A confidential redacted version will be filed contemporaneously.

III. SUBMISSIONS

A. Reconsideration is necessary and justified

6. Reconsideration of the Decision on In-Court Protective Measures concerning P-0889 is necessary and justified. In the Decision, the Chamber reiterated its intention to rule on applications for in-court protective measures in advance of trial whenever possible, without prejudice to reconsideration at a later time should this be warranted, and in particular in light of further information provided by the Victims and Witnesses Unit (“VWU”).⁵ The Decision does not expressly or impliedly preclude reconsideration on the basis of ‘further information’ that is provided by other sources, including the Parties and Participants. Nor, does it impede such appropriate recourse, as the Court’s jurisprudence otherwise establishes.⁶

7. A substantial period has elapsed since the Prosecution’s timely application regarding P-0889 was filed.⁷ Since then, circumstances concerning his security interests have changed: (i) the security situation in the CAR has further substantially deteriorated; and (ii) [REDACTED]. The change of circumstances justifies the Chamber’s reconsideration.

⁵ ICC-01/14-01/18-906-Conf-Red, para.1.

⁶ Reconsideration is appropriate in a number of circumstances under the Court’s jurisprudence. See ICC-01/04-01/07-3833, para 25; ICC-02/04-01/15-1547, para 7; ICC-02/04-01/15-711, para 4; ICC-02/04- 01/15-468, para 4 (when necessary to prevent an injustice); see ICC-01/04-01/06-2705, paras 13-18; ICC-02/04-01/05-50, para 18; ICC-01/04-01/06-772 OA4, paras 36-39 (when the consequences of a decision are manifestly unsatisfactory) ; and see ICC-01/04-01/07-3833, para 25; ICC-01/09-01/11-1813, para 19; ICC-01/09-02/11-863, para 11; ICC-02/04- 01/15-1210, para 6; ICC-02/04-01/15-1259, para 12; and ICC-01/12-01/18-734, para. 11 (when new facts and arguments arise).

⁷ ICC-01/14-01/18-757-Conf-Anx-Red, p. 5, entry 26.

i. The security situation in the CAR has further deteriorated

8. As confirmed in the Sixth Periodic Report of the Registry on the Political and Security situation in the CAR (“Sixth Registry Report”), [REDACTED].⁸ The situation in the CAR is unlikely to improve in the short to medium term.⁹ Consequently, domestic authorities have a diminished capacity to protect and secure the interests of witnesses in this case, especially given the necessary deployment of a substantial portion of their limited resources to stabilise the country. The capacity to ensure that P-0889 and third-parties (such as his family) can be adequately protected in CAR, should his testimony be received publicly, is clearly reduced relative to when the initial application for protective measures was made well-over a year ago.

ii. [REDACTED]

9. Concurrently, [REDACTED].¹⁰ [REDACTED],¹¹ [REDACTED].

10. [REDACTED]. Regardless of when this eventuality may occur, the risk alone warrants reassessment of the witness’s security concerns in the context of his prospective public testimony. Should this materialise – and there is every indication that it will – the witness will be [REDACTED] (as the Chamber may have previously assessed), will not exist. Without reconsideration, the witness’s cooperation in these proceedings absent protective measures would expose him to an elevated *risk* of harm.¹²

11. Granting the Requested Measures would in no way derail the proceedings or unduly prejudice the Accused. Rather, it would ensure [REDACTED] during the course of these proceedings his security (and that of his family’s) is managed as best as practicable.

⁸ See ICC-01/14-01/18-1192-Conf, para.8.

⁹ *Id.*

¹⁰ CAR-OTP-2127-0655 at 0658.

¹¹ [REDACTED].

¹² See paragraph 4, and corresponding note, above.

B. Protective measures for Witness P-0889 are necessary and justified

- i. The Requested Measures are necessary to protect P-0889 and his family

12. P-0889 [REDACTED].

13. In addition, [REDACTED] concerns about the risk of retaliation should his identity as a Prosecution witness become public.

14. The Requested Measures are a direct consequence of the deteriorated security situation in CAR. As mentioned in the Sixth Registry Report, the situation in the CAR is unlikely to improve in the short to medium term.¹³

15. Testifying without in-court protective measures will expose P-0889 to NGAISSONA's and Anti-Balaka supporters. [REDACTED], who see his testimony or otherwise become aware of it, will consider it a profound betrayal and will be motivated to harm him or his family. In addition, testifying publicly might further expose P-0889 to the Anti-Balaka *victims*, who may also see the witness as representing the perpetrators of the crimes committed against their community and families. They similarly may be motivated to take action against him or his family.

16. The Requested Measures are necessary and proportionate to mitigate the risks arising from P-0889's anticipated trial testimony. [REDACTED], voice¹⁴ and face distortion, as well as the use of a pseudonym, are the minimum necessary to ensure the adequate and proportional protection of his and his family's safety and security.

- ii. The Requested Measures do not unfairly prejudice the Defence

17. The impact of the Requested Measures on the publicity of the proceedings is mitigated and justified in the circumstances of this case. *First*, the Requested Measures

¹³ See ICC-01/14-01/18-1192-Conf, para. 8.

¹⁴ As correctly noticed by the Chamber, the Prosecution erroneously omitted to request voice distortion in its original application ICC-01/14-01/18-757-Conf-Anx-Red, p. 5, entry 26. See CC-01/14-01/18-906-Conf-Red, p. 12, fn. 39.

are needed to ensure that P-0889 is able to provide unfettered evidence, and in so doing, assist the Court in establishing the truth. The identity of P-0889 has been known to the Defence since March 2019, and the Requested Measures in no way impede the Accused's opportunity and ability to question the witness and to fully test his prospective evidence. *Second*, although the public will not know P-0889's identity, much of his testimony will be given in public session. Private sessions will thus be used only for limited portions of his testimony to protect the identity of P-0889, and in any case, their use will be appropriately moderated by the Chamber as it has done effectively and fairly with other protected witnesses.

18. Finally, in respect of the right to publicity, the Prosecution notes that the Requested Measures would remain in effect to the extent necessary to protect the witness. However, should the risks abate, the possibility of releasing lesser redacted material into the public domain may be appropriate in the future, thus accommodating the interests of articles 64(2), 68, and 67(1).

IV. RELIEF SOUGHT

19. For the above reasons, the Prosecution seeks reconsideration of its Decision on In-Court Protective Measures, and requests that the Chamber grant in-court protective measures in the form of voice and facial distortion, and the use of a pseudonym for P-0889.



Karim A. A. Khan QC, Prosecutor

Dated this 18th day of January 2022

At The Hague, The Netherlands