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**International
Criminal
Court**

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No.: **ICC-01/14-01/18**

Date: **28 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 *THE PROSECUTOR v.*
*ALFRED ROMBHOT YEKATOM & PATRICE-EDOUARD NGAÏSSONA***

Public

Public redacted version of the “Yekatom Defence Response to the ‘Confidential redacted version of “Request for Reconsideration regarding In-Court Protective Measures for Prosecution Witness P-0888”, ICC-01/14-01/18-1241-Conf-Exp, 11 January 2022’, 12 January 2022, ICC-01/14/01/18-1241-Conf-Red”, 24 January 2022, ICC-01/14-01/18-1257-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”) hereby respond to the Confidential redacted version of “Request for Reconsideration regarding In-Court Protective Measures for Prosecution Witness P-0888”, notified on 12 January 2022.¹
2. The Defence opposes the request for reconsideration on the basis that the Prosecution does not provide any new or additional elements justifying the request. The information provided by the Prosecution does not demonstrate an objective justifiable risk for witness P-0888 that would legitimate the granting of in-court protective measures. Moreover, the measures sought are inconsistent with Mr Yekatom’s right to a fair trial and the principle of publicity of the proceedings.

PROCEDURAL BACKGROUND

3. On 26 August 2020, in the “Initial Directions on the Conduct of the Proceedings”, the Chamber instructed the Prosecution to submit its application for in-court protective measures by 7 December 2020.²
4. On 7 December 2020, the Prosecution filed *ex parte* its request for in-court protective measures, a confidential redacted version of the filing was made available to the Defence on 18 December 2020 (“First Request”). The Prosecution sought implementation of in-court protective measures for 72 witnesses.³
5. On 15 January 2021, the Defence responded to the Prosecution’s motion requesting the Chamber to assess each application on a case-by-case basis “in

¹ [ICC-01/14-01/18-1241-Conf-Red.](#)

² [ICC-01/14-01/18-631](#), para. 70.

³ [ICC-01/14-01/18-757-Conf-Red](#); Public redacted version: [ICC-01/14-01/18-757-Red2](#).

light of Mr Yekatom's concern that his right to a public trial remain at the forefront of the Chamber's consideration" and reject the implementation of in-court protective measures for specific witnesses.⁴

6. On 9 March 2021, the Single Judge issued its "Decision on the Prosecution Requests for In-Court Protective Measures for 73 Trial Witnesses" granting protective measures for 46 witnesses and rejecting 27 applications including that of P-0888 ("Decision").⁵
7. On 11 January 2022, the Prosecution submitted *ex parte* its "Request for Reconsideration regarding In-Court Protective Measures for Prosecution Witness P-0888" ("Second Request") seeking reconsideration of the Decision, specifically with respect to the implementation of voice and facial distortion and the use of a pseudonym for P-0888. A courtesy copy of the confidential redacted version of the Second Request was communicated to the Defence on the same day and formally notified on 12 January 2022.⁶
8. On 11 January 2022, in light of the heavy redactions applied to the Second Request, the Defence requested the Chamber to determine if a lesser redacted version could be made available in order to allow the Defence to fully assess its position and address the Prosecution's arguments.⁷
9. On 14 January 2022, Trial Chamber V found that the redactions applied were proportionate and warranted in the circumstances.⁸

APPLICABLE LAW

10. The Court's jurisprudence recognizes the power of a Chamber to reconsider its own decisions. However, reconsideration is exceptional and should be granted

⁴ [ICC-01/14-01/18-828-Conf](#); Public redacted version: [ICC-01/14-01/18-828-Red2](#).

⁵ [ICC-01/14-01/18-906-Conf-Red](#), p. 44-45; Public redacted version: [ICC-01/14-01/18-906-Red2](#).

⁶ [ICC-01/14-01/18-1241-Conf-Red](#).

⁷ Email sent by the Yekatom Defence to the Chamber and the parties and participants on 11 January 2022 at 17:38.

⁸ Email sent by the Trial Chamber V to the parties and participants on 14 January 2022 at 12:46.

if a clear error of reasoning has been demonstrated or if it is necessary to do so to prevent an injustice. New facts and arguments arising since the decision was rendered may be relevant to this assessment.⁹

11. Any rejection of requests for protective measures ruled in advance of the trial is without prejudice to reconsideration at a later stage should be new or additional information be made available.¹⁰

SUBMISSIONS

I. The Prosecution fails to provide any new or additional information justifying the reconsideration of the Decision

12. As a preliminary remark, the Defence submits that, on the basis of the information in its possession, no additional or new information has been provided warranting reconsideration. Considering that the version of the Prosecution's request available to the Defence is heavily redacted, it respectfully defers to the assessment of the Chamber concerning the *ex parte* information.
13. Contrary to the Prosecution's arguments, P-0888's personal situation does not appear to have materially changed since the First Request.
14. *First*, according to the Prosecution's allegation, the involvement of P-0888 in [REDACTED] places him at risk. However, P-0888 was already [REDACTED] at the time of the First Request.¹¹ The hypothetical risk arising from his

⁹ [ICC-01/14-01/18-206](#), para. 20; *Prosecutor v. Ntaganda*, [Decision on Defence request seeking partial reconsideration of the 'Decision on Defence request for admission of evidence from the bar table'](#), 22 February 2018, ICC-01/14-02/06-2241, para. 4; *Prosecutor v. Ruto, Kosgey and Sang*, [Decision on the 'Defence Request for Leave to Appeal the 'Urgent Decision on the 'Urgent Defence Application for Postponement of the Confirmation Hearing and Extension of Time to Disclose and List Evidence' \(ICC-01/09-01/11-260\)'](#), 29 August 2011, ICC-01/09-01/11-301, paras 19-20; *Prosecutor v. Ongwen*, [Decision on Request for Reconsideration of the Order to Disclose Requests for Assistance](#), 15 June 2016, ICC-02/04-01/15-468, para. 4; *Prosecutor v. Ruto and Sang*, [Decision on the Sang Defence's Request for Reconsideration of Page and Time Limits](#), 10 February 2015, ICC-01/09-01/11-1813, para. 19.

¹⁰ [ICC-01/14-01/18-906-Conf-Red](#), paras 1 and 21; Public redacted version: [ICC-01/14-01/18-906-Red2](#).

¹¹ [CAR-OTP-2030-0265](#) provided to the OTP in May 2016; See also [CAR-OTP-2110-0164](#).

association [REDACTED] is therefore not new and could have been raised in the First Request.

15. *Second*, as described by the Prosecution, P-0888 appears to reside in the same area where he was living at the time of the First Request.¹² His vicinity to and his acquaintance with [REDACTED] is therefore not new.
16. The Defence also submits that, in any event, the Prosecution's failure to bring before the Chamber documents or information already in its possession when the First Request was filed, cannot be qualified as a "new fact" warranting reconsideration of the initial decision.¹³

II. The Prosecution does not identify an objectively justifiable risk

17. The Defence submits that the elements provided by the Prosecution do not demonstrate that the measures sought are necessary in light of an objectively justifiable risk.
18. In the Decision, the Single Judge took into consideration the fear of retaliation and/or security concerns reported by the Prosecution in relation to P-0888's testimony and concluded that "these fears appear subjective and insufficient to warrant granting the requested protective measures".¹⁴
19. Being provided today with the same information by the Prosecution, the Defence respectfully submits that the findings of the Chamber should be similar.
20. The Prosecution's assumption that Mr Yekatom's relative's interests in the outcome of the proceedings would jeopardise the safety of the witness is both

¹² [ICC-01/14-01/18-1241-Conf-Red](#), para. 10: "P-0888 continues to reside (...)"; [ICC-01/14-01/18-757-Conf-Anx-Red](#), page 3, row 10.

¹³ *Prosecutor v. Ntaganda*, [Decision on Prosecution's requests relating to in-court protective and special measures for Witness P-0039](#), 10 December 2015, ICC-01/04-02/06-1049-Red, para. 13.

¹⁴ [ICC-01/14-01/18-906-Conf-Red](#), para 42; Public redacted version: [ICC-01/14-01/18-906-Red2](#).

entirely speculative and unsubstantiated. To the Defence knowledge, there has been no security incidents between Mr Yekatom's relatives and P-0888.¹⁵ The Defence contends that this argument, which appears to be based on a derogatory assumption that Mr Yekatom's relatives would use violence against witnesses in the case, does not demonstrate an objectively justifiable risk and should be entirely dismissed.

21. The Prosecution also assumes that the content of P-0888's upcoming testimony will be considered as a betrayal [REDACTED].¹⁶ Drawing speculative conclusions as to the consequences of the testimony of the witness and further assuming that the witness will be marked for retaliation cannot be considered as an objective risk.
22. Finally, on the Prosecution's argument regarding the deterioration of the situation in CAR, the Defence notes the recent decision of the Chamber regarding the implementation of protective measures for witness P-0889 and its findings on this aspect.¹⁷ However, the development of the situation in the country should be analysed in light of the specific characteristics of each witness.
23. The present situation is different from that of P-0889. P-0888 is not a high-profile witness¹⁸ and already resides in CAR.¹⁹ The Prosecution does not provide any example of incident that could potentially illustrate P-0888's fear. The recommendation report from the Victims and Witnesses Unit ("VWU") itself highlights that "its fails to see the correlation between the witness' testimony and the current general situation in CAR".²⁰ To the contrary the VWU indicates "that it might be in the interest of the witness to give a testimony in open court

¹⁵ [ICC-01/14-01/18-1241-Conf-Red](#), para. 12.

¹⁶ [ICC-01/14-01/18-1241-Conf-Red](#), para. 14.

¹⁷ [ICC-01/14-01/18-1245-Conf](#), para. 8.

¹⁸ *Contra* [ICC-01/14-01/18-1245-Conf](#), para. 8.

¹⁹ [ICC-01/14-01/18-1241-Conf-Red](#), para. 10.

²⁰ [ICC-01/14-01/18-1256-Conf](#), para. 6.

as it will take away any speculation about him testifying against other members of the Anti-Balaka movement”.²¹

24. Therefore, the Prosecution fails to identify any nexus between the deterioration of the situation in CAR and an objective risk that would impact P-0888 security in light of his expected testimony.
25. In addition, the Prosecution’s request, at least what appears from the redacted version, seems to be based only on the Prosecution’s own desire to have protective measures granted to P-0888 as opposed to following discussions held with the witness reporting any fear or security concerns.

III. The implementation of the measures would prejudice Mr Yekatom’s right to a fair trial and affect the fundamental principle of publicity of the proceedings

26. The principle of publicity of the proceedings, enshrined in Article 64(7) of the Statute and consecrated as a right of the accused in article 67(1). It follows that “any restriction to [this] principles must be viewed as an exception and therefore strictly limited to what is necessary to safeguard other interests also protected under the Statute.”²² Thus, measures such as in-court protective measures must remain the exception.
27. The Defence recalls the importance for the Central African Republic and its inhabitants to access and follow the trial. This has notably been expressed through the periodic reports of the Registry on the participation of the victims in the case, highlighting the crucially of the victim’s knowledge of the proceedings.²³

²¹ [ICC-01/14-01/18-1256-Conf](#), para. 7.

²² *Prosecutor v. Gbagbo & Blé Goudé*, [Decision on Mr. Gbagbo’s Request for Lifting of Redactions and Reclassification of Documents in the Record](#), ICC-02/11-01/15-1194, 05 July 2018, para. 7.

²³ [ICC-01/14-01/18-1085](#), pages 12 and 15; [ICC-01/14-01/18-1209](#), page 10.

28. Granting implementation of protective measures for the witness will have the unfortunate consequence to hold most of his testimony in closed sessions to prevent identifying information to be released publicly, *i.e.* his position [REDACTED] as well as his personal situation and background.
29. Furthermore, fair trial-related concerns generally lie in favor of the identity made known to the public²⁴ and witnesses “are neutral and only expected to tell the truth and appearing in public is part of the responsibilities attached to the role”.²⁵
30. Protective measures cannot be presented by the Prosecution as a guarantee that the witness will provide unfettered evidence that would assist the Court in establishing the truth.²⁶ To the contrary, the publicity of the witness’ identity may increase his commitment to tell truth and his feeling of public accountability.
31. The Defence is slightly concerned about the recent successive requests for reconsideration of protective measures especially given that the only objective argument advanced each time by the Prosecution remains the deterioration of the situation in CAR, as opposed to individual specific situation.²⁷ The Defence submits that the Prosecution’s approach appears to entail requesting protective measures for every Prosecution witnesses residing in CAR, regardless of any occurrence of security incidents. This position would have the unfortunate effect of rendering the fundamental principle of publicity of the proceedings an exception.

²⁴ *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.

²⁵ *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.

²⁶ [ICC-01/14-01/18-1241-Conf-Red](#), para. 17.

²⁷ [ICC-01/14-01/18-1232-Conf](#) filed on 31 December 2021, Public redacted version: [ICC-01/14-01/18-1232-Red2](#); [ICC-01/14-01/18-1241-Conf](#) and [ICC-01/14-01/18-1244-Conf](#) both filed on 12 January 2022.

32. This preoccupation arises together with the high number of Prosecution's witnesses entitled to protective measures since the beginning of the trial (out of 24 witnesses, only 7 testified without protective measures) and the direct impact this has on Mr Yekatom's right to a public trial.

CONFIDENTIALITY

33. The response is filed on a confidential basis corresponding to the classification of the Request. A public redacted version will be filed in due course.

RELIEF SOUGHT

34. In light of the above, the Defence respectfully requests the Chamber to:
- REJECT** the Prosecution's Second Request.

RESPECTFULLY SUBMITTED ON THIS 28th DAY OF JANUARY 2022²⁸



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²⁸ The assistance of Legal Intern, Victor-Louis Lapointe Saint-Pierre, to the draft of this motion is gratefully acknowledged.