

**Cour
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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 ‘Confidential redacted version of “Request for Reconsideration regarding In-Court Protective Measures for Prosecution Witness P-1416, ICC-01/14-01/18-1244-Conf-Exp”, 12 January 2022’, ICC-01/14/01/18-1244-Conf-Red”, 24 January 2022, ICC-01/14-01/18-1258-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. The Defence for Mr Yekatom ('Defence') hereby responds to the Confidential redacted version of "Request for Reconsideration regarding In-Court Protective Measures for Prosecution Witness P-1416".¹
2. The Defence opposes the request for reconsideration considering that the Prosecution fails to introduce any new or additional information. The requirements justifying the implementation of protective measures are not met for witness P-1416 and their granting would unduly prejudice Mr Yekatom's right to a fair trial.

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 ("First Request") through which sought implementation of in-court protective measures for 72 witnesses. A confidential redacted version of the filing was made available to the Defence on 18 December 2020.³
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 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

¹ [ICC-01/14-01/18-1244-Conf-Red.](#)

² [ICC-01/14-01/18-631](#), para. 70.

³ [ICC-01/14-01/18-757-Conf-Anx-Red.](#)

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

6. On 9 March 2021, the Single Judge issued its “Decision on the Prosecution Requests for In-Court Protective Measures for 73 Trial Witnesses” (‘Initial Decision’) granting protective measures for 46 witnesses and rejecting 27 applications including that of P-1416.⁵
7. On 12 January 2022, the Prosecution submitted a confidential redacted version of its “Request for Reconsideration regarding In-Court Protective Measures for Prosecution Witness P-1416” (“Second Request”) seeking reconsideration of the First Request and implementation of in-court protective measures in the form of voice and facial distortion and the use of a pseudonym.⁶

APPLICABLE LAW

8. The Court’s jurisprudence recognizes the power of a Chamber to reconsider its own decisions. However, reconsideration is exceptional and should be granted 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.⁷
9. 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.⁸

⁵ [ICC-01/14-01/18-906-Conf-Red](#), paras 101-103 and p. 44-45; Public redacted version: [ICC-01/14-01/18-906-Red2](#).

⁶ [ICC-01/14-01/18-1244-Conf-Red](#).

⁷ [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.

⁸ [ICC-01/14-01/18-906-Conf-Red](#), paras 1 and 21; Public redacted version: [ICC-01/14-01/18-906-Red2](#).

SUBMISSIONS

I. The Prosecution does not provide the Chamber with any new or additional information justifying reconsideration of the Initial Decision

10. The Defence submits that the Prosecution's request for reconsideration does not provide the Chamber with any additional or new information. The Prosecution relies only on the evolution of the situation in CAR and reiterates the same information provided in its First Request.
11. The Prosecution provided the following information in the First Request to support the implementation of the protective measures for P-1416:
 - P-1416 is a crime-base witness who will provide evidence against YEKATOM;
 - P-1416 reports having a high public profile locally due to [REDACTED];
 - In November 2019, P-1416 told the OTP that there was [REDACTED], during the confirmation proceedings; he also heard [REDACTED];
 - In September 2020, P-1416 expressed fear of retaliation if he would testify publicly;
 - P-1416 [REDACTED].⁹
12. The Defence notes that paragraph 13 of the Second Request is essentially duplicating the above facts and no new elements are introduced to the Chamber.
13. The Prosecution claims that the proximity of P-1416 and his family to the Anti-balaka who allegedly murdered his sister is an element not previously before the Chamber, that would characterize an objective risk.
14. The kidnapping and murder of P-1416's sister allegedly committed by [REDACTED] and his elements¹⁰ is collected from P-1416's statement¹¹ and from the evidence of a dropped witness, P-1342.¹²

⁹ [ICC-01/14-01/18-757-Conf-Anx-Red](#), page 9, row 56.

¹⁰ [ICC-01/14-01/18-1244-Conf-Red](#), para.14.

¹¹ [CAR-OTP-2045-0150-R03](#).

15. Witness P-1416 was interviewed in December 2016 and former witness P-1342 met with the Prosecution's investigators in October 2016 and September 2019. The information in relation to the alleged killing of P-1416's sister by [REDACTED] was already in the possession of the Prosecution well before the submission of the First Request and could have been brought to the Chamber's attention at that time.
16. Thus, this is not *per se* new information. Its absence in the First Request rather raises questions as to its importance as regards P-1416's alleged security risk.
17. The Defence recalls that the Prosecution's failure to bring before the Chamber documents or information already in its possession when the First Request was filed, cannot qualify as a 'new fact' warranting reconsideration of the initial decision.¹³

II. The requirements justifying the implementation of protective measures are not met for P-1416

18. 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.
19. In its Initial Decision, the Single Judge found that no objectively justifiable risk has been established for P-1416.¹⁴ Being provided with similar information, the Defence submits that reconsideration should be denied and protective measures be rejected.
20. The Defence notes, in addition to the previous measures sought, that the Prosecution is also requesting the implementation of voice distortion.¹⁵

¹² [CAR-OTP-2040-0778-R03](#) and [CAR-OTP-2116-0304-R02](#).

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](#), paras 103; Public redacted version: [ICC-01/14-01/18-906-Red2](#).

¹⁵ [ICC-01/14-01/18-757-Conf-Anx-Red](#) (First Request), page 9, row 56 : use of pseudonym and face distortion; [ICC-01/14-01/18-1244-Conf](#) (Second Request) : page 9 : use of pseudonym, voice and facial distortion.

Given no additional information is reported to justify a reconsideration, nothing explains the additional measure sought.

21. Further, the Prosecution fails to substantiate any relation between the fact that P-1416 [REDACTED] and P-1416's cooperation with the court, and that this comprises a potential risk for the witness, especially given the Prosecution's concession that there have been no security incidents to date. The assumption that the content of his testimony would be considered as a betrayal is speculative, as is the prejudicial allegation that the so-called supporters would be motivated to harm P-1416 or his family.
22. P-1416's sister's alleged kidnapping and murder by [REDACTED] is unrelated to Mr Yekatom and his elements.
23. However, if the only fear of the witness relates to his testimony on this incident, the Defence suggests that examination in relation to this specific matter be held in closed session. This will guarantee as far as possible the publicity of the proceedings, of which the witness' identity is a part, while ensuring that the witness will be able to testify about this incident without any fear.
24. 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 observations on this aspect. However, the evolution of the situation in the country should be analysed in light of the specific characteristics of each witness. In this case the Prosecution does not provide any example of an incident that might potentially illustrate P-1416's fear. In addition, absent any correlation between the witness' testimony and the current general security situation in CAR, the latter is insufficient to trigger protective measures.

25. The Defence also notes the absence of any references for the Prosecution's allegation according to which P-1416 fears that members of the *Coalition des patriotes pour le changement* ("CPC") would retaliate against him or his family. According to the metadata disclosed, the last meeting between the Prosecution and P-1416 occurred in 2016, while the CPC was created in 2020. Given this discrepancy and the lack of supporting references provided by the Prosecution, this appears to be an unsubstantiated speculative allegation.
26. Therefore, the Prosecution fails to identify any nexus between the deterioration of the situation in CAR and an objective risk that would impact P-1416's security in light of his expected testimony.

III. The implementation of protective measures would unduly prejudice Mr Yekatom's right for a fair and public trial

27. The principle of publicity of the proceedings is 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".¹⁶ Thus, measures such as in-court protective measures must remain the exception.
28. 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 importance of the victims' knowledge of the proceedings.¹⁷

¹⁶ *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.

¹⁷ [ICC-01/14-01/18-1085](#), pages 12 and 15; [ICC-01/14-01/18-1209](#), page 10.

29. Furthermore, fair trial-related concerns generally lie in favor of the identity of witnesses being made known to the public;¹⁸ further, witnesses “are neutral and only expected to tell the truth and appearing in public is part of the responsibilities attached to the role”.¹⁹
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.²⁰ To the contrary, the publicity of the witness’ identity may increase his commitment to tell the 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 on each occasion by the Prosecution remains the deterioration of the situation in CAR, as opposed to individual-specific circumstances.²¹ 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.
32. This preoccupation arises together with the high number of Prosecution witnesses who have been accorded 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.

¹⁸ *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.

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-01/14-01/18-1244-Conf-Red](#), para. 19.

²¹ [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.

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 Trial Chamber V to:
REJECT the Prosecution's Second Request.

RESPECTFULLY SUBMITTED ON THIS 28th DAY OF JANUARY 2022



Me Mylène Dimitri
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