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**International
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Date: **7 April 2022**

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

Public Redacted Version of “Ngaïssona Defence Response to ‘Confidential redacted version of “Request for Reconsideration regarding In-Court Protective Measures for Prosecution Witness P-0954”, 21 March 2022’ (ICC-01/14-01/18-1319-Conf-Red)”, ICC-01/14-01/18-1327-Conf, 24 March 2022

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. The Defence team of Mr Ngaïssona (“the Defence”) hereby responds to the Prosecution’s ‘Confidential redacted version of “Request for Reconsideration regarding In-Court Protective Measures for Prosecution Witness P-0954” dated 21 March 2022 (“Request”).¹
2. The Defence opposes the Request, as the Prosecution has failed to demonstrate changed circumstances establishing the existence of an objectively identifiable risk that would warrant reconsideration of Trial Chamber V’s (“ Chamber”) decision rejecting in-court protective measures for P-0954 in its “Decision on the Prosecution Requests for In-Court Protective Measures for 73 Trial Witnesses” (“Protective Measures Decision”).²

II. Procedural history

3. On 7 December 2020, the Prosecution filed *ex parte* a request for in-court protectives measures for 73 trial witnesses, including for Witness P-0954. A confidential redacted version was made available to the Defence on 18 December 2020 (“First Request”).³
4. On 9 March 2021, the Chamber issued the Protective Measures Decision, rejecting the Prosecution’s request to grant protective measures to P-0954 on the grounds that no objectively justifiable risk had been established by the Prosecution.⁴
5. On 21 March 2022, the Prosecution filed the Request *ex parte*, requesting reconsideration of the Chamber’s decision, and the application of protective

¹ ICC-01/14-01/18-1319-Conf-Red (“Prosecution’s Request”).

² ICC-01/14-01/18-906-Conf-Red.

³ ICC-01/14-01/18-757-Conf-Red.

⁴ ICC-01/14-01/18-906-Conf-Red, paras 41, 101.

measures in the form of voice and face distortion, and the use of a pseudonym.⁵ A confidential redacted version was made available to the Defence on the same day.⁶

6. On 22 March 2022, noting that Witness P-0954 was scheduled to start testifying six days later, the Chamber shortened the deadline for responding to the Request to 24 March 2022 and instructed the VWU to file observations by the same deadline.⁷

III. Applicable Law

7. The principle of publicity of hearings is a cornerstone of international justice and is embedded in the Court's statutory framework. It is enshrined in article 67(1) of the Statute, which provides that accused persons have the fundamental right to a public hearing. It 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".
8. The legal framework of the Court provides for limited exceptions to this rule in order to "protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses", as provided in article 68(1) of the Rome Statute. It also provides that the protective measures put in place by a Trial Chamber "shall not be prejudicial to or inconsistent with the rights of the accused to a fair and impartial trial". According to the jurisprudence of the Court, in-court protective measures "should be granted only on an exceptional basis, following a case-by-case assessment of whether they are necessary in

⁵ Prosecution Request, para. 17.

⁶ ICC-01/14-01/18-1241-Conf-Red.

⁷ Email of 22 March 2022, at 10:39, from Trial Chamber V to the parties and participants.

light of an objectively justifiable risk and are proportionate to the rights of the accused”.⁸

9. While the Court’s jurisprudence recognises the power of a Chamber to reconsider its own decisions, reconsideration is exceptional and should be granted only in the event that there was a clear error of reasoning, or if it is necessary to prevent an injustice.⁹

IV. Confidentiality

10. Pursuant to Regulation 23bis(1) of the Regulations of the Court, the present submissions are filed as “confidential”, as they contain information on Prosecution witnesses that are not known to the public. The Defence will file a public redacted version in due course.

V. Submissions

11. As a preliminary issue, the Prosecution’s Request is redacted to such an extent that it prevents the Defence from providing observations on certain aspects of the risk of harm alleged by the Prosecution. The information made available to the Defence, however, clearly does not support reconsideration of the Protective Measures Decision relating to Witness P-0954.
12. *First*, the Prosecution, as in previous requests, relies on the general situation in Central African Republic (“CAR”) to argue that P-0954 faces an objective risk of harm. Rather than detailing how the general security context in CAR affects

⁸ *Prosecutor v. Ruto and 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 *Prosecutor v. Katanga and Ngudjolo Chui*, Public redacted version of 'Order on protective measures for certain witnesses called by the 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, para. 9.

⁹ ICC-01/14-01/18-206, para 20; *Prosecutor v. Al Hassan*, Decision on Defence request for reconsideration and, in the alternative, leave to appeal the ‘Decision on witness preparation and familiarisation’, ICC-01/12-01/18-734, 9 April 2022, para. 11 and footnote 24.

P-0954's specific circumstances, the Prosecution merely relies on the conclusion of the "Sixth Period Report of the Registry on the Political and Security situation in the CAR", that the security context in CAR *continued* to be shaped by political tensions, on-going clashes across large swathes of the country between armed groups and the *Forces armées centrafricaines* and bilateral forces, and a dire socio-economic and humanitarian situation.¹⁰ This general reference to the overall security context of CAR, which must be weighed in light of P-0954's specific circumstances, is clearly insufficient to warrant the granting of in-court protective measures in this case.

13. In other words, any potential degradation of the security situation in CAR since the filing of the Prosecution's First Request does not constitute, absent any evidence pointing to the existence of an objectively justifiable risk faced by witness P-0954 specifically, sufficient change in circumstances justifying the granting of protective measures.
14. Accepting the Prosecution's reasoning would amount to a blanket acceptance of in-court protective measures for nearly all witnesses in this case, who are affected in one way or another by the general security context in CAR. Such an approach is clearly incompatible with the letter and spirit of article 67(1) of the Rome Statute which guarantees Mr Ngaïssona's right to a public hearing and the jurisprudence referred to above.¹¹
15. Moreover, the Prosecution speculates that the CAR authorities' capacity to ensure that P-0954 and his family can be adequately protected is "clearly limited and further reduced relative to when the initial application for protective measures was made".¹² However, the Prosecution does not seem to rely on any further information or sources to substantiate this claim. Due to its

¹⁰ Prosecution's Request, para. 9.

¹¹ See, footnote 8 above.

¹² Prosecution's Request, para. 10.

general and unsubstantiated nature, this assertion should be rejected.

16. *Second*, the Prosecution's claim that P-0954 faces a risk of harm due to his specific circumstances appears equally unfounded. The Prosecution argues that P-0954 will "likely be marked for retaliation should his cooperation and testimony" become public.¹³ Despite the redactions applied in paragraphs 12-16 of the Request, the Defence discerns that the Prosecution appears to rely on an event dated March 2020 in support of the alleged risk of harm faced by P-0954.¹⁴ Given this event pre-dates the Prosecution's First Request by several months, these circumstances were likely known to the Prosecution at the time of its First Request, and would therefore not constitute new circumstances.
17. In addition, the Prosecution acknowledges in its Request that no security incidents have occurred relating to P-0954's cooperation and testimony before the Court.¹⁵ As indicated above, the Prosecution's mere reliance on the general context in CAR, rather than on the specific alleged objectively justifiable risk of harm faced by P-0954 arising from new circumstances, does not meet the threshold for granting in-court protective measures.
18. *Third*, concerning the alleged risk faced by P-0954's family members, the Prosecution likewise does not appear to raise any new circumstances. The Prosecution had already submitted to the Chamber in its First Request that [REDACTED].¹⁶ This information is therefore not new, and was considered by the Chamber in its Decision on Protective Measures. Moreover, in its Request, the Prosecution seems to suggest that [REDACTED].¹⁷
19. Similarly, from the information disclosed by the Prosecution to the Defence, it appears that [REDACTED], a factor which the Chamber expressly took into

¹³ Prosecution's Request, para. 11.

¹⁴ Prosecution's Request, para. 12.

¹⁵ Prosecution's Request, para. 16.

¹⁶ ICC-01/14-01/18-757-Conf-Exp-Anx, p. 4, entry 16.

¹⁷ This is apparent from the phrasing [REDACTED], Prosecution's Request, para. 15.

consideration in deciding to reject in-court protective measures for P-0954.¹⁸ In its Decision on Protective Measures, the Chamber had considered the Prosecution's submission that "P-0954 expressed security concerns if he would testify publicly, particularly [REDACTED]" but concluded that "absent any more detailed relevant information on the witness's individual circumstances or details on any incidents underlying the witness's safety concerns, the Single Judge is of the view that the expressed fears are mostly subjective, which is insufficient to amount to an objectively justifiable risk warranting the granting of the requested protective measures".¹⁹

20. *Fourth*, any exception to the overarching rule that trials at the Court are to be public must be "strictly limited to what is necessary to safeguard other interests also protected under the Statute"²⁰ and "shall not be prejudicial to or inconsistent with the rights of the accused to a fair and impartial trial".²¹ Granting the protective measures in the absence of an objectively justifiable risk would be highly prejudicial to Mr Ngaïssona's fundamental right to a public trial.

21. The Defence disagrees with the Prosecution's suggestion that protective measures are "needed to ensure that P-0954 is able to provide unfettered evidence".²² To the contrary, public anonymity may affect the ability of the Chamber to fulfil its truth-seeking mandate, as making a witness' identity known to the public increases the witness' commitment to tell the truth as well as their feeling of public accountability.²³ Should the Request be granted, Mr Ngaïssona will be denied these fundamental guarantees. In addition, protective

¹⁸ ICC-01/14-01/18-906-Conf-Red, para. 45.

¹⁹ *Ibid.*

²⁰ *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, 5 July 2018, para. 7.

²¹ Rome Statute, Rule 68(1).

²² Prosecution's Request, para. 18.

²³ United Nations Office on Drugs and Crime, Good Practices for the Protection of Witnesses in Criminal Proceedings Involving Organized Crime, 2008, page 45.

measures would prevent public scrutiny of the case, and would limit public access to the trial for those living in CAR and those who have a vested interest in following the case.

VI. Relief Sought

22. The Defence respectfully requests the Chamber to REJECT the Prosecution's Request.

Respectfully submitted,



Mr Knoop, Lead Counsel for Patrice-Edouard Ngaïssona

Dated this 7 April 2022

At The Hague, the Netherlands.