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Date: **15 June 2022**

TRIAL CHAMBER VI

Before: Judge Miatta Maria Samba, Presiding Judge
Judge María del Socorro Flores Liera
Judge Sergio Gerardo Ugalde Godínez

**SITUATION IN THE CENTRAL AFRICAN REPUBLIC II
IN THE CASE OF *PROSECUTOR v. MAHAMAT SAID ABDEL KANI***

**Public
with Confidential Redacted Annex A**

**Public Redacted Version of the “Prosecution’s Request for In-Court Protective
Measures”, 10 June 2022, ICC-01/14-01/21-356-Conf**

Source: Office of the Prosecutor

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

The Office of the Prosecutor

Mr Karim A.A. Khan QC

Mr Mame Mandiaye Niang

Counsel for Defence

Ms Jennifer Naouri

Mr Dov Jacobs

Legal Representatives of Victims

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparations**

**The Office of Public Counsel
for Victims**

Ms Sarah Pellet

Tars Van Litsenborgh

**The Office of Public Counsel
for the Defence**

States Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Mr Nigel Verrill

Detention Section

**Victims Participation
and Reparations Section**

Other

I. INTRODUCTION

1. Pursuant to Trial Chamber VI's ("Chamber") Direction on the Conduct of Proceedings,¹ the Office of the Prosecutor ("Prosecution") requests in-court protective measures and special measures for 30 of its trial witnesses ("Request"), in accordance with articles 64 and 68 of the Rome Statute ("Statute"), and rules 87 and 88 of the Rules of Procedure and Evidence ("Rules").

2. The Prosecution seeks three general types of in-court protective and special measures for its trial witnesses: (i) measures intended to protect a witness's identity from the public; (ii) closed or private session intended to protect particular portions of a witness's testimony from public disclosure; and (iii) measures intended to support a witness's psychological well-being. The requested measures, with justifications, are set out in detail in Annex A for each witness individually. They concern the following categories of witnesses who share, in full or in part, relevant circumstances: (i) [REDACTED]; (ii) witnesses who have been admitted into the ICC Protection Programme ("ICCP"); (iii) crime-based witnesses; (iv) victims of sexual violence; (v) a witness detained in prison; and (vi) Prosecution staff members.

3. The protective measures sought are necessary and appropriate in view of the objectively justifiable risk faced by the witnesses, if their identity became known to the public. They are requested on a case-by-case basis and are, in each case, the least restrictive means available to appropriately balance the Accused's right to a fair and public trial with the Court's obligation to protect the physical and psychological well-being, dignity, and privacy of victims and witnesses who appear before it. The measures requested are not prejudicial to or inconsistent with the rights of Mahamat Said Abdel Kani ("Mr SAID") and a fair and impartial trial.

¹ ICC-01/14-01/21-251, paras. 47-48.

4. The Prosecution notes that four other trial witnesses – P-0884, P-2251, P-2232 and P-1339 – are already subject to protective measures ordered by this Court, which continue to have full force and effect in this proceeding pursuant to regulation 42(1) of the Regulations of the Court (“Regulations”). As explained below, those measures have not been varied and the circumstances that have led to their imposition remain unchanged.

II. CONFIDENTIALITY

5. Pursuant to regulation 23*bis*(1) of the Regulations, this Request is filed confidential because it contains identifying and other sensitive information about the Prosecution’s witnesses. The Prosecution will file a public redacted version as soon as practicable.

6. Annex A is filed “Confidential, *ex parte* - only available to the Prosecution and the VWU”, because it, *inter alia*, contains information about the witnesses’ current residence and sensitive information about Prosecution’s investigative activities in the situation as a whole. The Prosecution will file a confidential redacted version of Annex A shortly.

III. SUBMISSIONS

A. Overview of requested measures

7. Witness testimony in this case is scheduled to begin on 26 September 2021. The Prosecution currently intends to call 44 witnesses to testify *live* before the Chamber, either in person at the seat of the Court or via video-link.

8. Annex A to this Request sets out the witnesses for whom protective measures are sought, indicating for each witness: (i) the witness’s pseudonym; (ii) the witness’s

name; (iii) the intended mode of testimony; (iv) the location of testimony (remote via video-link or at the ICC headquarters); (v) the in-court protective measures requested (pseudonym, face distortion, and/or voice distortion); (vi) the in-court special measures requested (psychological support); (vii) the witness's dual status (if any); and (viii) key facts and security incidents that demonstrate the need for protective measures.

9. The Prosecution requests that the Chamber order the use of pseudonym, voice and facial distortion, and use of private and closed sessions for Witnesses P-1167, P-2161, P-2563, P-2478, P-1737, P-0435, P-2573, P-0349, P-2240, [REDACTED], [REDACTED], P-3056, P-3064, P-2692, P-0664, P-1762, P-2607, P-1263, P-2931, P-1429, P-1264, P-0834, P-2400, P-2241, and [REDACTED]. For Witnesses P-3108, P-3112, P-3113, P-3114, and P-3115, the Prosecution seeks protective measures of facial distortion, the use of a pseudonym and use of private and closed sessions, but no voice distortion.

10. The Prosecution requests that the Chamber order special measures, namely psychological support, pursuant to rule 88 of the Rules, for Witnesses P-0547, P-0834, P-1262, P-1263, P-1264, P-2400 in order to facilitate the testimony of traumatised witnesses, subject to the Registry's input on the matter.

11. This Request addresses the in-court protective measures that are reasonably foreseeable at this moment. The Prosecution notes that modifications to some of the requested measures may be requested in the future. The Prosecution monitors the situation of each witness and will promptly approach the Chamber if there is any change in circumstances in the future. It will also promptly inform the Chamber should protective measures no longer be necessary for any of its witnesses.

B. Objectively justifiable risk to witnesses in the region

1. *The current security situation in CAR remains volatile*

12. 22 of the witnesses included in Annex A reside in the Central African Republic (“CAR”), with the vast majority living in Bangui. Others have immediate family in the CAR who may be at risk because of the witnesses’ cooperation with the Court, or have other particular circumstances that justify protective measures.

13. When granting in-court protective measures, the security situation in a country and region is to be considered as a relevant factor.² The security situation in the CAR remains volatile. Large parts of the CAR are controlled by different and rivalling armed groups.³ The OPCV also communicated that *“regarding the volatile security situation in the CAR, victims continue to indicate that they are living in permanent fear”*.⁴

² ICC-01/04-02/06-824-Red, para. 14; ICC-01/04-02/06-1004-Red, para. 5; ICC-01/04-02/06-1383-Red2, para. 12; ICC-01/09-01/11-902-Red2, para. 14. See also *Prosecutor v Rwamakuba*, Decision on the Defence Motion for Protective Measures, ICTR-98-44C-PT, T.Ch. III, 21 September 2005, para. 9; *Prosecutor v Furundzija*, Decision on Prosecutor’s Motion Requesting Protective Measures for Witnesses “A” and “D” at Trial, IT-95-17/1-T, T. Ch.II, 11 June 1998, paras. 7-8; *Delalić et al.*, Decision on the Motion by the Prosecution for Protective Measures for the Witness Designated by the Pseudonym “N”, IT-96-21-T, T.Ch., 28 April 1997, paras. 7-9 (reasoning that: “[e]ven if witness’s fears have not been substantiated by objective evidence, they cannot be disregarded as irrational. They must be seen in the light of the normal tensions that exist in the aftermath of the conflict. It is not unusual for people to take the law into their own hands against their enemies, real or imagined, in such situations, and in the circumstances, fear of probable attacks is not an abnormal reaction. A Trial Chamber cannot, therefore, summarily dismiss the personal fears of a witness it is mandated to protect under Article 22 of the Statute”)

³ ICC-01/14-01/21-247-Conf, para. 39. See e.g. France 24, press article at [Central African Republic declares state of emergency as rebels surround capital \(france24.com\)](https://www.france24.com/en/central-african-republic/20210121-central-african-republic-declares-state-of-emergency-as-rebels-surround-capital), 21 January 2021, noting that the CAR government ‘controls only about one-third’ of the country; Al Jazeera, [Rebels launch attacks on Central African Republic’s capital | Conflict News | Al Jazeera](https://www.aljazeera.com/news/2021/1/13/rebels-launch-attacks-on-central-african-republics-capital), 13 January 2021, noting that an alliance of six powerful rebel groups ‘control two-thirds of the country’; FIDH report, <https://www.fidh.org/fr/regions/afrique/republique-centrafricaine/questions-reponses-premier-proces-devant-cour-penale-special>, 17 May 2022, noting that the CAR is controlled by different armed groups.

⁴ ICC-01/14-01/21-336, para. 18.

2. Mr SAID's associates may retaliate against witnesses, if their identity is publicly known

14. Mr SAID has been a member of armed groups in the CAR for 12 years prior to his arrest⁵ and continues to hold influence over the *Front Populaire pour la Renaissance de la Centrafrique* (the "FPRC") and its affiliates in the CAR. In this broad context of instability, in-court protective measures are justified for witnesses living within the areas of influence of the FPRC and its supporters, to ensure their safety once they return to their respective communities.

15. A number of witnesses have already faced security threats in the past. Most recently Witness [REDACTED], for example, received two threatening phone calls.⁶

16. According to recent media coverage, the FPRC and its off-shoot rebel groups - including the *Coalition des patriotes pour le changement* (CPC) - and partner groups continue to engage in armed hostilities which show that Mr SAID's support network is still armed and continues to destabilise the CAR.⁷ There is no indication that Mr SAID has broken ranks with the FPRC or has fallen out with its current leadership, former colleagues or subordinates since his arrest. There is therefore a real possibility that the FPRC or its members in their private capacity, may approach Prosecution witnesses, if their identity is known, in an attempt to influence, threaten or harm them to prevent them from testifying.

17. The Prosecution had previously reported that the CPC was targeting persons they perceived as 'traitors'.⁸ The Chamber noted in its decision on interim release that even if these threats were not attributable to Mr SAID, "*this clearly shows how fragile the*

⁵ ICC-01/14-01/21-236-Conf, paras. 26-27.

⁶ See Annex A, second entry in the table.

⁷ Reports cited in ICC-01/14-01/21-335, para. 6 (dated 30 May 2022).

⁸ ICC-01/14-01/21-236-Conf, para. 24.

security situation is for ICC witnesses residing inside the CAR".⁹ Further, the Chamber observed that [REDACTED]".¹⁰

18. In light of Mr SAID's apparent continuous influence over and support in the CAR, the risk of his supporters exerting pressure on witnesses to change their testimony, either directly or indirectly remains high. The actions of Mr SAID's supporters could increase the risk to the physical security and safety of witnesses testifying openly on behalf of the Prosecution and who, after their testimony, will return to their homes in the CAR.

3. Specific risks for witnesses from the region

a. Insider witnesses

19. The Prosecution requests in-court protective measures for nine witnesses on the basis that [REDACTED].¹¹ Witnesses P-1167, P-2161, P-2563, P-2478, P-1737, P-0435, P-2573, P-0349 and P-2240 are at risk and susceptible to retaliation from [REDACTED] due to one or more of the following factors: (i) [REDACTED]; (ii) [REDACTED]; and (iii) a witness has a high public profile or is, or has been, subject to increased media exposure. In *Yekatom and Ngaissona* case, Trial Chamber V recognised that [REDACTED].¹²

20. Several of the witnesses mentioned have experienced security incidents that appear to be related to their cooperation with the Court and/or to their past involvement with the Seleka.¹³ Moreover, a number of these insider witnesses have expressed fear of retaliation if their cooperation with the Court became public and

⁹ ICC-01/14-01/21-247-Conf, para. 32.

¹⁰ [REDACTED]. See also ICC-01/14-01/21-318, para. 53.

¹¹ See the Annex.

¹² [REDACTED]

¹³ [REDACTED].

their identity known to the local communities in the CAR.¹⁴ The protective measures sought will enable them to testify freely and provide full accounts of the events at issue without reticence, and thus contribute to the truth-seeking function of the Chamber.

21. However, the Prosecution also notes that evidence of prior direct threats to a witness, or his/her family, are not a prerequisite for determining that a witness faces an objectively justifiable risk that warrants protective measures. The determination of whether a risk exists necessarily involves a degree of prediction and speculation and is to be performed on a case by case basis, taking into account the individual circumstances of each witness.

22. Finally, the witness's own understanding of their security situation can (and should) be taken into account according to article 68(2) of the Statute, but is not determinative.¹⁵ Even where a witness may have indicated that they would be open to testifying publicly, the Prosecution – and the Chamber – should not rely exclusively on the witness's perception at the expense of an objective assessment of the risk. Where protective measures are objectively justified, they should be implemented in order to protect the witness, even when the witness may perceive that they are not at any risk.

b. Witnesses in the Court's protection programme ("ICCPP")

23. The Prosecution seeks protective measures for [REDACTED] and [REDACTED] who have been admitted into the ICCPP.¹⁶ They are in the Court's protection programme because of the risks to their personal safety which have been carefully and objectively assessed by the VWU. The in-court protective measures will ensure that

¹⁴ [REDACTED].

¹⁵ ICC-01/14-01/18-906-Red, para. 32. *See also* ICC-02/04-01/15-612-Red, para. 29; ICC-01/09-01/11-902-Red2, para. 14.

¹⁶ *See* Annex A.

the witnesses can give evidence without fear for their personal safety and without compromising the protection they have been afforded under the terms of the ICCPP. Granting protective measures for this category of witnesses is consistent with the jurisprudence of the Court.¹⁷

c. Crime-base witnesses

24. Protective measures are also requested for the following nine witnesses to protect them from possible retaliation and to protect their privacy and dignity: P-3056, P-3064, P-2692, P-0664, P-1762, P-2607, P-1263, P-2931 and P-1429.¹⁸ *First*, a number of these witnesses provide evidence related to the acts and conduct of Mr SAID and directly implicate him and/ or his co-perpetrators in the commission of crimes. If left unprotected, these witnesses would be identifiable to co-perpetrators or other associates. Such potential threat actors would have an interest to interfere with them, as they may fear prosecution themselves.¹⁹ *Second*, some of these witnesses reported security incidents in relation to their past victimisation by the Seleka or related to their cooperation with the Court.²⁰ *Third*, some of these witnesses are also participating victims in this proceeding.²¹ They face a heightened risk of stigmatisation upon their testimony should their cooperation with the Prosecution become public. Most of the witnesses in this category do not have access to any additional protection measures linked to their profession or social status, and most live within an area of influence of supporters of Mr SAID or other potential threat actors.

25. In-court protective measures for witnesses in this category will ensure that they can provide full accounts without fear for their personal safety and the safety of their

¹⁷ ICC-01/04-02/06-774-Red, paras. 3-5; ICC-01/09-01/20-276-Red, paras. 32-33; ICC-01/09-01/11-902-Red, paras. 26-27; ICC-01/14-01/18-906-Red, para. 52.

¹⁸ See Annex A.

¹⁹ See Annex A, witnesses [REDACTED].

²⁰ See Annex A, witnesses [REDACTED].

²¹ Witnesses [REDACTED].

family members. Withholding their identity from the public will also prevent them from facing judgment, stigma, questions, or remarks from people they know or members of the public more generally, who learn about their experiences as a result of their testimony. In this regard, protective measures will protect their dignity and privacy and help avoid re-traumatisation.

d. Victims of sexual violence

26. The Prosecution requests in-court protective measures for four witnesses who were direct or indirect victims of sexual violence, namely P-1264, P-0834, P-2400 and P-2241.²²

27. Articles 68(1) and (2) of the Statute provide for a presumption, albeit not absolute, that protection of legitimate interests of the victims of sexual violence, due to the inherent nature of such crimes and the regrettable but persisting associated stigma, constitutes in and of itself a proportionate and justified exception to the principle of publicity of the proceedings.²³

28. The requested measures will enable these highly vulnerable witnesses to provide full accounts with minimal re-traumatisation, to protect their privacy and the privacy of their family members, and to avoid the public stigma, associated with rape or other forms of sexual violence in the CAR. Having to testify openly would likely result in the witnesses being forced to repeat or discuss their traumatic experiences after they return to their homes, or at least live with the anxiety of having to do so. What is more, if these witnesses' identity is publicly revealed, this would likely result in further stigmatisation from the communities where they live.

²² See Annex A.

²³ ICC-02/04-01/15-612-Red (Ongwen case), para. 16. ICC-02/04-01/15-612-Red, para. 16. See also ICTY, Trial Chamber, *Prosecutor v. Duško Tadić*, Decision on the Prosecutor's motion requesting protective measures for victims and witnesses, IT-94-1-T, 10 August 1995, para. 46.

e. Witness detained in prison

29. [REDACTED].²⁴

30. The requested measures as set out in Annex A are necessary and justified to protect the safety of [REDACTED]. [REDACTED] is expected to testify about [REDACTED]. The ability of the Court to protect him while he is incarcerated in a detention facility in Bangui is limited. If the witness's cooperation with the Court became known, his security in the prison would likely be compromised. Granting the requested measures will ensure the safety, physical and psychological well-being of witness [REDACTED] as mandated by article 68(1) of the Statute. It will also mitigate the need for more intrusive security-related measures post-testimony.

C. Objectively justifiable risk to Prosecution staff members

31. The Prosecution requests in-court protective measures for five witnesses on account of their professional role and affiliation in the Office of the Prosecutor (P-3108, P-3112, P-3113, P-3114 and P-3115).²⁵ Witness P-3108 is an investigative analyst, P-3112 is a forensic officer, and P-3113, P-3114 and P-3115 are investigators. P-3113, P-3114 and P-3115 regularly travel to the field, and P-3108 and P-3112 occasionally. During their confidential operations and missions, these Prosecution staff members have direct contacts with witnesses, sources, representatives of governments and international and non-government organisations, and other third persons on behalf of the Office of the Prosecutor. Protective measures are required in order to preserve their ability to perform these and other core investigative functions pursuant to article 54 of the Statute.

²⁴ The Prosecution is disposed to provide additional information to the Chamber should it so require.

²⁵ See the Annex.

32. Granting the requested measures for these witnesses is consistent with the Court's jurisprudence. Prosecution staff members working in the field on investigations have regularly been granted protective measures in order to avoid security risks and also to protect ongoing investigations.²⁶

D. The measures requested do not prejudice the Accused

33. The requested measures are not prejudicial to or inconsistent with the rights of Mr SAID and a fair and impartial trial. They are necessary and justified as set out in the Prosecution's submissions above and in Annex A. The measures are also proportionate as they would have only a limited impact on the public nature of the proceedings.

34. The measures requested are needed to ensure that the witnesses are able to provide unfettered evidence, and in so doing, assist the Court in establishing the truth. The identities of all witnesses are known to the Accused and his Defence team.²⁷ The Accused will have the same opportunity and ability to question these witnesses as if their identity were publicly known and is not prevented from conducting his own enquiries to test the prospective evidence.

35. Although the public will not know the identity of the affected witnesses, most of their testimony will still be given in public. Notably, the Prosecution has not (at this point) requested that the totality of testimony of any witness be given in closed session. Under the requested measures, closed or private sessions will be used only for limited portions of testimony to protect the identity of witnesses or information that is particularly private or sensitive and therefore likely to affect the psychological well-being, dignity, or privacy of the witness if broadcast publicly.

²⁶ ICC-02/05-02/09-T-13-ENG CT WT, p. 11, lns. 13-29. *See also*, ICC-01/12-01/18-1019-Red2, paras. 15.

²⁷ While the identity of P-2478 has been withheld, her identity will be disclosed on 13 June 2022.

E. Witnesses subject to protective measures in the *Yekatom and Ngaissona* case pursuant to regulation 42(1)

36. The Prosecution submits that four of its witnesses, namely P-0884, P-2251, P-2232 and P-1339 are, in accordance with regulation 42(1) of the Regulations, already subject to continuing protective measures ordered in the *Yekatom and Ngaissona* case. Regulation 42(1) is unequivocal that protective measures, once ordered in any proceedings, shall continue to have full force and effect in relation to any other proceedings before the Court.

37. Prior to their respective testimony in the *Yekatom and Ngaissona* case, Trial Chamber V ordered in-court protective measures for these witnesses in the form of voice and facial distortion, the use of pseudonym and permitted private sessions, as necessary.²⁸ P-0884, P-2251 and P-2232 have already testified; and P-1339 is expected to testify soon. The evidence of these witnesses is expected to be substantially similar in the case against Mr SAID and the risk level remains unchanged, making the same measures warranted.

IV. RELIEF SOUGHT

38. For reasons set out above and in Annex A, the Prosecution requests the Chamber to:

- a) grant in-court protective measures in the form of the use of pseudonym, facial distortion, and use of private and closed sessions for Witnesses P-1167, P-2161, P-2563, P-2478, P-1737, P-0435, P-2573, P-0349, P-2240, [REDACTED],

²⁸ **P-0884**: ICC-01/14-01/18-906-Conf-Red, paras. 33-34, 37-38; **P-2251**: ICC-01/14-01/18-906-Conf-Red, paras. 33-34, 38; **P-1339**: ICC-01/14-01/18-906-Conf-Red, para. 52; **P-2232**: ICC-01/14-01/18-906-Conf-Red, para. 52.

[REDACTED], P-3056, P-3064, P-2692, P-0664, P-1762, P-2607, P-1263, P-2931, P-1429, P-1264, P-0834, P-2400, P-2241, and [REDACTED];

- b) grant in-court protective measures in the form of the use of pseudonym, facial distortion, and use of private and closed sessions for Witnesses P-3108, P-3112, P-3113, P-3114, and P-3115;
- c) grant special measures in the form of psychological support for Witnesses P-0547, P-0834, P-1762, P-1263, P-1264, P-2400;
- d) take notice that in-court protective measures, in the form of voice and facial distortion, the use of pseudonym and use of private sessions, continue to apply in this proceeding for Witnesses P-0884, P-2251, P-2232 and P-1339 in accordance with regulation 42(1) of the Regulations.



Karim A. A. Khan QC, Prosecutor

Dated this 15th day of June 2022
At The Hague, The Netherlands