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**International
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Date: **22 July 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-2556”” (ICC-01/14-01/18-1464-Conf-Red)”, (ICC-01/14-01/18-1481-Conf), 24 June 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 Ngaïssona Defence (“the Defence”) hereby responds to the Prosecution’s Confidential redacted version of “Request for Reconsideration regarding In-Court Protective Measures for Prosecution Witness P-2556 17 June 2022” ICC-01/14-01/18-1464-Conf-Red, filed on 20 June 2022 (“the Request”).¹
2. The Defence opposes the Request as the Prosecution has failed to demonstrate a change in circumstances that would warrant Trial Chamber V (“the Chamber”) to reconsider its assessment of P-2556’s security situation in its “Decision on the Prosecution Requests for In-Court Protective Measures for 73 Trial Witnesses” (“the Original Decision”).²

II. Relevant Procedural history

3. On 26 August 2020, the Chamber instructed the Prosecution, in the “Initial Directions on the Conduct of the Proceedings”, to submit its application for in-court protective measures by 7 December 2020.³
4. On 7 December 2020, the Prosecution filed *ex parte* a request for in-court protectives measures for 72 trial witnesses, a confidential redacted version of which was made available to the Defence on 18 December 2020 (“First Request”)⁴ along with its Annex wherein P-2556 was listed as a witness who would require such measures.⁵
5. On 9 March 2021, the Chamber issued the Original Decision in which it rejected the First Request with respect to, *inter alia*, P-2556, as no objectively justifiable

¹ ICC-01/14-01/18-1464-Conf-Red

² ICC-01/14-01/18-906-Conf-Red

³ ICC-01/14-01/18-631, para. 70.

⁴ ICC-01/14-01/18-757-Conf-Red

⁵ ICC-01/14-01/18-757-Conf-Anx-Red, p.4, row 19.

risk had been established by the Prosecution should the witness testify without protective measures.⁶

6. On 17 June 2022, the Prosecution filed *ex parte* the Request,⁷ a confidential redacted version of which was made available to the Defence on 20 June 2022.⁸

III. Applicable Law

7. Article 67(1) of the Statute lays out the fundamental right of accused persons to a public hearing. This principle of publicity is further enshrined in Regulation 20 of the Regulations of the Court (“RoC”), 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. Exceptions to this principle are provided in Article 68(1) and (2) of the Statute which is to be read together with Article 64 (2) and (6)(e) of the Statute as well as Rule 87 of the Rules of Procedure and Evidence (“the Rules”). Article 68(1) grants power to the Trial Chamber to implement protective measures “to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses”. Nevertheless, protective measures “shall not be prejudicial to or inconsistent with the rights of the accused to a fair and impartial trial”.⁹ According to the jurisprudence of the Court, the protective measures which the Prosecution seeks in the Requests, “should be granted only on an exceptional basis, following a case-by-case assessment of whether they are necessary in light of an objectively justifiable risk and are proportionate to the rights of the accused”.¹⁰

⁶ ICC-01/14-01/18-906-Conf-Red, p. 18, para. 41.

⁷ Prosecution email dated 17 June 2022, subject line “OTP courtesy copy of the filed : 220617 - Confidential redacted version of Request for Reconsideration regarding In-Court Protective Measures”.

⁸ ICC-01/14-01/18-1464-Conf-Red

⁹ Article 68(1) of the Rome Statute.

¹⁰ *The Prosecutor v. William Ruto and Joshua Arap Sang* (Public redacted version of Decision on 'Prosecution's

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. New facts and arguments arising since the decision was rendered may be relevant to this assessment.¹¹

IV. Confidentiality

10. This response is filed as confidential pursuant to Regulation 23 (1) *bis* of the RoC, as it contains information on a Prosecution witness that is unknown to the public. The Defence will file a public redacted version of its submissions in due time.

V. Submissions

11. The Defence opposes the Request and disagrees with the Prosecution's assertion that "new and additional facts and information" were provided to the Chamber that would warrant reconsideration of its initial assessment of P-2556's security situation.

A. The Prosecution has failed to provide the Chamber with new or additional information warranting reconsideration of the Original Decision

1. *The volatile security situation in the Central African Republic (CAR) does not constitute new or additional information warranting reconsideration*

First Request for In-Court Protective Measures for Trial Witnesses') ICC-01/09-01/11-902-Red2 (3 September 2013) para 13. See also the *Prosecutor v. Germain Katanga and Mathieu 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) paras 8-9.

¹¹ ICC-01/14-01/18-206, para 20; *The Prosecutor v. Dominic Ongwen* (Decision on Request for Reconsideration of the Order to Disclose Requests for Assistance) ICC-02/04-01/15-468 (15 June 2016), para 4; *Prosecutor v. Ruto and Sang* (Decision on the Sang Defence's Request for Reconsideration of Page and Time Limits) ICC-01/09-01/11-1813 (10 February 2015) para 19.

12. The “volatile security environment” in the CAR is information of which the Chamber was already made aware. This is evidenced by:

- the Prosecution’s concession in its First Request that the Chamber has already taken note of the volatile security situation “on two occasions”;¹²
- the wording in the Registry’s Eighth Periodic Report, which is almost identical to that in the Annex to its First Periodic Report.¹³

13. And, the Annex to the Eight Periodic Report informs the Chamber that “[REDACTED]”¹⁴ contrary to the Prosecution’s assertion in the Request.¹⁵

14. As such, the constant unstable security situation in CAR does not amount to a sufficient change in circumstances so as to warrant the Court to depart from the Original Decision and reach opposite conclusions regarding P-2556’s security situation.

2. The Prosecution has failed to provide new or additional information on P-2556’s personal circumstances warranting reconsideration

15. *First*, there has been no change in the personal circumstances of P-2556 leading to an objective risk of harm. The Prosecution already notified the Chamber of the same information surrounding P-2556’s involvement with the Anti-Balaka in its Annex to the First Request. Namely, the Prosecution had already submitted that “[REDACTED]” and that his house is located in “[REDACTED]”.¹⁶ Not only these arguments were already put to the

¹² ICC-01/14-01/18-757-Conf-Red, p. 6, para. 12

¹³ ICC-01/14-01/18-755-Conf-Anx, p. 17, paras. 53 -54 (“[REDACTED]”) ; ICC-01/14-01/18-1434-Conf, para. 7 (“[REDACTED]”).

¹⁴ ICC-01/14-01/18-1434-Conf-Anx, para. 28.

¹⁵ ICC-01/14-01/18-1464-Conf-Red, p. 5, para. 10 (“Given the changed security situation [...]”).

¹⁶ ICC-01/14-01/18-757-Conf-Anx-Red, p.4, row 19.

Chamber's determination, it also considered that all above-mentioned factors are, by themselves, "insufficient to justify granting- in-court protective measures".¹⁷

16. *Second*, the *Coalition des Patriotes pour le Changement* ("CPC") cannot be perceived as posing a new objective risk of harm to P-2556.¹⁸ The CPC comprises six pre-existing rebel groups whose acts of violence throughout CAR have already been reported by the Registry in the Annex to its First Periodic Report.¹⁹ More particularly, according to the Annex, "[REDACTED]".²⁰ Moreover, the two Anti-Balaka wings were already established throughout the CAR prior to the coalition and, as submitted in the First Request, retained "a large influence in the capital and within the provinces".²¹

17. Therefore, [REDACTED],²² P-2556's personal situation has not changed drastically since the creation of the CPC. More importantly, P-2556's security situation, in effect, has not changed since the Chamber's Original Decision.

18. Overall, the Prosecution has failed to provide the Chamber with new or additional information, whether pertaining to the CAR security situation or to P-2556's personal situation that would warrant reconsideration of the Original Decision.

B. The Prosecution has failed to demonstrate the existence of an objectively justifiable risk that would render the requested measures necessary

¹⁷ ICC-01/14-01/18-906-Red2, p. 14, para 31 ("

¹⁸ ICC-01/14-01/18-1464-Conf-Red, paras. 13-15.

¹⁹ ICC-01/14-01/18-755-Conf-Anx, p.17, para 53 to p. 24, para. 64.

²⁰ ICC-01/14-01/18-755-Conf-Anx, p. 22, para. 22.

²¹ ICC-01/14-01/18-757-Conf-Red, p. 5, para. 10

²² CAR-OTP-2112-1300, at 1302, para. 15

19. The Prosecution has not substantiated that the measures sought are necessary in light of an objectively justifiable risk.
20. In its Original Decision, the Chamber found that the Prosecution did not establish an objectively justifiable risk for P-2556.²³ On the basis of the unredacted information available to the Defence, the Prosecution did not provide the Chamber with additional information nor did it establish individual-specific circumstances that would amount to an objectively justifiable risk to witness P-2556 were he to testify without protective measures. Therefore, the Request should be rejected.

C. The implementation of the requested measures would unduly prejudice Mr Ngaïssona's right to a public hearing

21. *Frist*, protective measures should not be granted on the ground that P-2556's prospective testimony may implicate Mr Ngaïssona in the alleged "financing and provision of weapons to the Anti-Balaka".²⁴ Granting such a request would make the right to a public hearing one in name only since the overwhelming majority of Prosecution insider witnesses would benefit from in-court protective measures as most are expected to present incriminating evidence against the accused. Applying such logic would, in consequence, shift the right to a public hearing from a fundamental principle to an exception.
22. *Second*, the fact that Prosecution witness P-2556 could provide incriminating evidence against Mr Mokom is not a legal basis to deny Mr Ngaïssona's right to a public hearing. Mr Ngaïssona's procedural rights may not be curtailed due to the potential influence a suspect in another case may have on the security

²³ ICC-01/14-01/18-906-Red2, p.18, para. 41.

²⁴ ICC-01/14-01/18-1464-Conf-Red, p.6, para 11 ("[P-2556] is expected to provide evidence implicating NGAISSONA, including in the financing and provision of weapons to the Anti-Balaka in BOSSANGO and BENZABE (BENZAMBE). He describes the direct ties between the Anti-Balaka Leadership in CARNOT and NGAISSONA.").

situation of a witness testifying against Mr Ngaïssona. Moreover, any such concerns, at this stage, remain purely speculative since the Prosecution has not presented any specific information that Mr Mokom's status as a suspect in another case presents an objectively justifiable risk to Witness P-2556. If such concerns were to arise, they can be dealt with on a case by case basis when and if the Prosecution leads evidence of Mr Mokom's acts and conduct.

23. *Finally*, protective measures cannot be presented as a guarantee that P-2556 will provide unfettered evidence to the Chamber as "[a]ll witness before the Court are neutral and only expected to tell the truth and appearing in public is part of the responsibilities attached to the role".²⁵

VI. Relief sought

24. For the aforementioned reasons, the Defence respectfully requests the Chamber to **REJECT** the Prosecution Request.

Respectfully submitted,



Mr. Knoops, Lead Counsel for Patrice-Edouard Ngaïssona

The Hague, 22 July 2022

²⁵ *The 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.