

ANNEX 1

PUBLIC

From: [REDACTED]
Sent: 08 June 2021 18:57
To: [REDACTED] Trial Chamber V Communications
Cc: D29 Yekatom Defence Team; D30 Ngaïssona Defence Team; V44 LRV Team OPCV; V44 LRV Team; V45 LRV Team; OTP CAR IIB Case Management; OTP CAR IIB Operations; [REDACTED]
Subject: RE: P-0952 Upcoming Testimony

Dear Trial Chamber V,

The Defence wishes to convey its strong concerns with respect to the Prosecution's email sent to the Chamber at 15:57.

The publicity of the trial would be seriously undermined should Witness P-0952 testify in closed or private session. Although circumstances may, at times, justify limited exceptions to publicity of trials, the circumstances raised by the Prosecution in relation to Witness P-0952 *favour*, rather than *undermine* the need for Witness P-0952 to testify publicly. A public trial is a cornerstone of the Rome Statute and of the rule of law; it is at the heart of the fair trial rights of accused persons and participating victims in this case, as enshrined *inter alia* in articles 64(7), 67(1) and 68(2) of the Rome Statute.

As pointed out by the Prosecution, Witness P-0952 [REDACTED] at the time of the charges against Mr Ngaïssona, and is purported to have first-hand knowledge of many of the events which are at the heart of this trial. It is precisely because of [REDACTED]

[REDACTED] that there is a heightened public interest for affected communities to hear her evidence publicly, and for evidence brought against Mr Ngaïssona not be given behind closed doors. Depriving the accused, victims, and the public, of Witness P-0952's public testimony would compromise the very premises upon which the Court was built, which include the aims of establishing the truth, ending impunity, and preserving public trust and confidence in international justice and guaranteeing "lasting respect for and the enforcement of international justice", as set out in the Rome Statute's preamble. As held by the Trial Chamber in *Katanga*, the publicity of hearings "contributes to preserving the trust that all those subject to the law have to have in justice, and it is one of the best means of controlling the way in which such justice is rendered" (*Katanga et al.* (ICC-01/04-01/07), Transcript, 20 September 2009, p. 10, lines 16–2).

Additionally, the circumstances identified by the Prosecution in its email to the Chamber are highly speculative in nature and do not rise to the threshold required to limit the fundamental right to a public trial. For instance, the Prosecution indicates that Witness P-0952's "may be ill-received in CAR, posing not only risks to her livelihood and potentially to her physical security" [emphasis added]. The risks identified are entirely speculative and were not previously raised, to the Defence's knowledge; no concrete indication is provided to substantiate the risks. This was confirmed by [REDACTED]

Moreover, the Defence strongly disagrees with the Prosecution's statement that Witness P-0952's public testimony may pose risks to [REDACTED]; rather, the public nature of Witness P-0952's testimony will contribute to reconciliation and the establishment of truth. It is in that sense that her live and public testimony would [REDACTED] by having a positive impact and favouring justice in CAR. As held in *Gbagbo and Blé Goudé* "the following factors are all unsuitable to trigger the application of Rule 87: one, generic references to a social context in Ivory Coast, including its alleged polarisation or to the level of attention reserved to this trial by media, social media and ordinary citizens; and two, speculative and hypothetical scenarios" (ICC-02/11-01/15-T-86-Red-ENG, page 18 paras 1-6).

Additionally, although Witness P-0952 is [REDACTED] her circumstances are far from unique or unprecedented. It is in the very nature of the [REDACTED] cases of the Court, deriving from complementarity, that [REDACTED] will testify before the Court. Witness P-0952 is no exception. There are countless examples of [REDACTED] testifying before the international criminal tribunals, including: the [REDACTED], who testified in open session; [REDACTED], who testified against Slobodan Milošević in public session; [REDACTED], who testified against Slobodan Milošević in public session; [REDACTED] from [REDACTED] in 1990, [REDACTED] against Slobodan Milošević in public session. (See: [REDACTED])

Allowing P-0952 to testify in private session could set a dangerous precedent for those potential witnesses who, merely based on fear for their reputation and to avoid public scrutiny, could seek to evade giving testimony in public.

The Defence further observes with concern that by collecting Witness P-0952's views and concerns in relation to the publicity of her testimony, the Prosecution has clearly breached the 'Witness familiarisation Protocol' (ICC-01/14-01/18-677-Anx1) which provides at paragraph 29 that the Prosecution "will meet on the premises of the Court only for the purposes of acquainting themselves ('courtesy meeting') and attending the courtroom familiarisation. The evaluation of any security concerns is clearly, and exhaustively, within the purview of VWU's role, as provided in paragraph 30 of the Protocol which stipulates that "should urgent matters arise", "the VWU will draw the matter to the attention of the entity calling the witness or to the attention of the Chamber, as appropriate". Here, however, the Prosecution took it upon itself to collect Witness P-0952's views and convey them to the Chamber.

Lastly, the Prosecution's observations that it would not, strategically, request to compel the Witness' testimony and that it would potentially file a rule 68(2)(c) request, should the Witness refuse to testify, are premature and should be rejected *in limine* as irrelevant to the matter at hand.

The Defence fully supports VWU's assessment in this case and the Defence respectfully requests the Chamber to follow VWU's advice.

Kind regards,

[REDACTED]
Legal Assistant, Defence for Mr Ngaïssona

From: [REDACTED]
Sent: 08 June 2021 15:27
To: Trial Chamber V Communications
Cc: D29 Yekatom Defence Team; D30 Ngaïssona Defence Team; V44 LRV Team OPCV; V44 LRV Team; V45 LRV Team; OTP CAR IIB Case Management; OTP CAR IIB Operations; [REDACTED]
Subject: P-0952 Upcoming Testimony

Dear Trial Chamber V,
Dear all,

Yesterday, during the courtesy meeting with the Prosecution, P-0952 expressed serious concerns about testifying in Public Session. Indeed, the witness indicated that she could not do so, and requested to testify in Closed Session. The Prosecution is mindful of the importance of the publicity of the proceedings and their transparency. We are equally mindful of the Chamber's competing interest to receive competent and sufficient evidence toward establishing the truth, an obligation also shared by the Prosecution under article 54, as well as the protection of witnesses under article 68. P-0952's concerns were promptly communicated to VWS, which we trust will further engage with the witness regarding the same.

P-0952's circumstances are unique and unprecedented at the Court. The concerns she has expressed derive from [REDACTED]

er public testimony may be ill-received in CAR, posing not only risks to her livelihood and potentially her physical security, but also to [REDACTED]. The witness is acutely aware that she may be perceived [REDACTED], in an environment in which armed rebel groups including the two (factions of which are now aligned) remain in control of most of CAR. Her situation is unique at the Court, not only because she would be the only [REDACTED] otherwise to testify, but also because she would be doing so in the midst of an ongoing conflict, whereby the potential impact of her public testimony may further be used to [REDACTED]. Her concerns thus extend beyond her personal physical security, and bear on [REDACTED]. It should also be borne in mind that, as a [REDACTED] P-0952 is normatively bound by [REDACTED], among other. Although the witness is fully committed to contribute to the Court's inquiry in this case and to assist the Chamber in its search for the truth, [REDACTED]. Accordingly, due regard should be had in this respect as well.

The Prosecution is unaware of the position of VWS concerning P-0952. However, we consider that if VWS does not recommend the implementation of suitable measures to meet the witnesses founded concerns, the Chamber should undertake a *direct* inquiry in Closed Session with the witness in advance of her testimony, *ex parte* the Parties and Participants if need be, to more fully understand the basis for her concerns in advance of rendering a Decision on the propriety of Closed Session testimony. Should the Chamber determine that the requested measures would not be appropriate and the witness therefore withdraw her consent, the Prosecution would not seek to compel her testimony and defer to the Chamber's discretion. That said, should the witness do so, we would consider her 'unavailable' within the meaning of rule 68(2)(c) per the Court's jurisprudence and particularly ICC-01/05-01/13-1481-Red-Corr.

Thank you for your prompt consideration.

Kind regards,

On behalf of Kweku Vanderpuye

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From: [REDACTED]
Sent: 22 June 2021 10:57
To: [REDACTED] OTP CAR IIB Prosecution Team; D30 Ngaissona Defence Team; D29 Yekatom Defence Team; V44 LRV Team OPCV; V44 LRV Team; V45 LRV Team
Cc: Associate Legal Officer-Court Officer; Trial Chamber V Communications
Subject: RE: Fourth Registry Report on Email Decisions
Follow Up Flag: Follow up
Flag Status: Flagged

Dear Trial Chamber V,
 Dear Registry,

The Defence for Mr Ngaissona notes that its Response from 8 June 2021 (at 18:57) to the Prosecution's email dated 8 June 2021 (at 15:27) is not included in Annexes 39 and 40 to the Fourth Registry Report on Decisions issued by way of e-mail from 15 March 2021 to 10 June 2021 (ICC-01/14-01/18-1026).

The Defence respectfully requests that its Response be included on the record, by way of inclusion in the next Registry Report on email decisions.

Cordially Yours,

[REDACTED]
Case manager – Ngaissona Defence

From: [REDACTED]
Sent: 11 June 2021 14:59
To: [REDACTED] OTP CAR IIB Prosecution Team; D30 Ngaissona Defence Team; D29 Yekatom Defence Team; V44 LRV Team OPCV; V44 LRV Team; V45 LRV Team
Cc: Associate Legal Officer-Court Officer; Trial Chamber V Communications
Subject: RE: Fourth Registry Report on Email Decisions

Dear Trial Chamber V,
 Dear Registry,

The Defence was informed by the Court officers that any request for amendment of the decisions to be filed on the case record should be addressed to the Chamber.

We note that the Defence for Mr Ngaissona's Response from 8 June 2021 (at 18:57) to the Prosecution's email dated 8 June 2021 (at 15:27) does not appear in the email threads contained in Annexes 39 and 40.

We respectfully request that our Response, attached for the Chamber's and Registry's convenience, be included on the record, by its inclusion in the Registry Report on Email Decisions.

Cordially,

[REDACTED]
 Legal Assistant, Defence for Mr Ngaissona

From: [REDACTED]
Sent: 10 June 2021 21:17

To: OTP CAR IIB Prosecution Team; D30 Ngaissona Defence Team; D29 Yekatom Defence Team; V44 LRV Team
 OPCV; V44 LRV Team; V45 LRV Team
Cc: Associate Legal Officer-Court Officer; Trial Chamber V Communications
Subject: Fourth Registry Report on Email Decisions
Importance: High

Dear all,

Pursuant to the Initial Directions on the Conduct of the Proceedings (*ICC-01/14-01/18-631*), please find attached 37 redacted annexes of email decisions to be publicly filed in the record of the case .

Could you kindly check the annexes and inform me if any additional redactions need to be applied at your earliest convenience and no later than Monday 14 June at 12h00.

Thank you in advance for your cooperation and understanding.

Kind regards,



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From: [REDACTED]
Sent: 08 June 2021 23:26
To: [REDACTED] Trial Chamber V Communications
Cc: D29 Yekatom Defence Team; D30 Ngaissona Defence Team; V44 LRV Team OPCV; V44 LRV Team; V45 LRV Team; OTP CAR IIB Case Management; OTP CAR IIB Operations [REDACTED]
Subject: RE: P-0952 Upcoming Testimony

Dear Trial Chamber V,

The Defence for Mr Yekatom ('Defence') respectfully opposes the Prosecution's email request for closed session testimony for Witness P-0952.

As a preliminary issue, the Defence expresses its grave concerns at what appears to be a clear breach of the Witness Familiarisation Protocol ('Protocol') (ICC-01/14-01/18-677-AnxI). Under the Protocol, 'courtesy meetings' are held between a witness and a calling party 'only for the purposes of acquainting themselves' (Protocol, para. 29). As previously held by the Chamber, it is 'the VWU, as a neutral entity of the Registry, [that] is charged with ensuring the well-being of victims and witnesses and providing support services to witnesses' (ICC-01/14-01/18-677, para. 19). As soon as P-0952 began to discuss matters falling outside the proper purview of the courtesy meeting, the Prosecution ought to have immediately stopped her; to have informed her of its obligations under the Protocol; and to have referred her to the VWU. It was then for the VWU, and not the Prosecution, to have drawn this matter to the attention of the Chamber (Protocol, para. 30). The Prosecution's disregard for its responsibilities as the calling party under the Protocol is highly regrettable.

Setting aside this apparent procedural breach, the Defence submits that the Request should be denied.

At the outset, as the Trial Chamber is aware, the VWU has conducted an in-court protective measures report in relation to P-0952 and concluded that it could not 'present a compelling case to recommend the granting of in-court protective measures' (see email from VWU of 8 June 2021 at 18:04, 'VWU Report'). On this basis alone, the Request should be denied.

In any event, the bases for P-0952's concerns as set out in the Request – i.e. that her public testimony 'may be ill-received', 'may further be used to incite violence', and 'potentially' poses risks to her physical security; that the witness 'may be perceived as responsible' for the transfers of individuals to the Court; and that the 'potential impact of her public testimony may further be used to incite violence and to divide her country' – are entirely vague, speculative, and unsubstantiated. No concrete proof for these claims has been presented by the Prosecution; nor can they reasonably be considered to comprise 'objectively

justifiable risks' (ICC-01/14-01/18-906-Conf-Red, para. 17) warranting the drastic protective measures sought by the Prosecution. Indeed, as the VWU found, P-0952's concerns 'appear more based on her subjective perception rather than on any objective rationale'.

It is noted that the Prosecution has not previously sought protective measures of any kind in relation to P-0952. Moreover, not a single line in the witness's 'Summary of anticipated testimony' prepared by the Prosecution has been highlighted in grey, indicating the Prosecution's prior intention to lead the quasi-entirety of her evidence in public. This itself reflects the non-sensitive nature of her evidence, practically all of which relates to widely and publicly known events.

Furthermore, the Prosecution's reliance on the Witness's status as a former head of state is entirely misplaced. Prominent public figures have previously and will continue to testify before the Court, in accordance with its subject-matter jurisdiction. Indeed, the Chamber only last week heard the lengthy public testimony of P-0801, a sitting Minister in the CAR government and Special Counsel to the Presidency of the CAR. The Defence notes that the CAR has not since erupted into violence and division; nor is there any indication that his testimony has 'threatened national peace and security'.

The Prosecution's reliance on the fact that P-0952 referred Mr Yekatom and Mr Ngaïssona to the Court is likewise misplaced. As noted by the VWU, this fact was widely reported throughout the CAR; and the VWU was unable to establish 'any specific security incidents linked to her role or cooperation with the ICC'. Moreover, if the fact of her involvement in the referral gives rise to security risks, those risks would necessarily exist regardless of whether she testifies in public before the Court.

In any event, as noted by VWU [REDACTED] (if not all) who appear before the Court, in these proceedings and in others, would not have access to.

The Prosecution's sought protective measures are not only contrary to the publicity of the proceedings as enshrined in Articles 64(7) and 67(1) – they are also entirely disproportionate to the rights of Mr Yekatom (ICC-01/14-01/18-906-Conf-Red, paras 14, 17). Even setting aside the fact that the Prosecution seeks over four consecutive days of entirely closed session hearings for the evidence of P-0952 (which would result in a four-day broadcast of 'Closed Session' to the public in the CAR), the Prosecution request would likely have a ripple effect on the publicity of the proceedings as a whole. Future reference to parts of her extensive evidence will likely require partial closed session hearings for upcoming witnesses' testimony, and moreover, the Trial Chamber's eventual Judgment will also be impacted if and where it might rely on her evidence. Further, should the request be granted, it is likely that a number of upcoming Prosecution witness who are currently (or were previously) [REDACTED] demand closed session testimony on threat of withdrawing their cooperation, given that 'some level of disclosure [regarding P-0952's anticipated testimony] has already taken place throughout the political landscape in CAR' (see VWU Report).

The Prosecution's claim of 'national security secrecy requirements' is entirely unsubstantiated. No such concerns appear to have impeded the Witness during her extensive interviews with Prosecution investigators. In any event, should any such requirements apply, the Prosecution is free to seek properly motivated relief under Article 72.

The Defence firmly opposes the Prosecution's request for an *ex parte* hearing so as to allow P-0952 a de facto private audience before the Chamber. Such a hearing would be simultaneously contrary to both the publicity of these proceedings and the fundamental principle of *audi alteram partem*. Nothing impedes the Prosecution from filing a motivated in-court protective measures request for P-0952, as it did for every other of its witnesses who voiced security concerns. Indeed, the significant detrimental effect of the requested relief, as outlined above, further militates in favour of granting the Defence the opportunity to be heard on the matter, at the very least.

The Prosecution's submission regarding the 'unavailability' of P-0952 is premature and should be disregarded.

Lastly, the Defence notes with concern that, as is apparent from the VWU Report, the 'concerns' underlying the Prosecution Request appear to be based on P-0952's [REDACTED] This improper motivation runs contrary to the Court's broader public outreach and engagement. More importantly, it undermines the fundamental principles of freedom of expression and freedom of the press in the CAR. With respect, the Court's witness protection framework should not be cynically instrumentalised by powerful public figures for such anti-democratic aims – especially not to the detriment of Mr Yekatom's fair trial rights.

Best regards,

[REDACTED]

Legal Assistant, Yekatom Defence

From: [REDACTED]

Sent: 08 June 2021 15:27

To: Trial Chamber V Communications <TrialChamberVComms@icc-cpi.int>

Cc: D29 Yekatom Defence Team <D29YekatomDefenceTeam@iccepn.org>; D30 Ngaissona Defence Team <D30NgaissonaDefenceTeam@iccepn.org>; V44 LRV Team OPCV <V44LRVTeam-OPCV@icc-cpi.int>; V44 LRV Team <V44LRVTeam@iccepn.org>; V45 LRV Team <V45LRVTeam@icc-cpi.int>; OTP CAR IIB Case Management <OTPCARIIBCaseManagement@icc-cpi.int>; OTP CAR IIB Operations <OTPCARIIBOperations@icc-cpi.int> [REDACTED]

Subject: P-0952 Upcoming Testimony

Dear Trial Chamber V,
Dear all,

Yesterday, during the courtesy meeting with the Prosecution, P-0952 expressed serious concerns about testifying in Public Session. Indeed, the witness indicated that she could not do so, and requested to testify in Closed Session. The Prosecution is mindful of the importance of the publicity of the proceedings and their transparency. We are equally mindful of the Chamber's competing interest to receive competent and sufficient evidence toward establishing the truth, an obligation also shared by the Prosecution under article 54, as well as the protection of witnesses under article 68. P-0952's concerns were promptly communicated to VWS, which we trust will further engage with the witness regarding the same.

P-0952's circumstances are unique and unprecedented at the Court. The concerns she has expressed derive from her former position as an active politician, [REDACTED] her referral of the very situation giving rise to this case and prosecution of the Accused. Her public testimony may be ill-received in CAR, posing not only risks to her livelihood and potentially her physical security, but also to the stability of a country in a fragile political and security situation. The witness is acutely aware that she may be perceived as *responsible* for the arrest and prosecution of Anti-Balaka *and* Seleka members before this Court, in an environment in which armed rebel groups including the two (factions of which are now aligned) remain in control of most of CAR. Her situation is unique at the Court, not only because she would be the only former Head of State otherwise to testify, but also because she would be doing so in the midst of an ongoing conflict, whereby the potential impact of her public testimony may further be used to incite violence and to divide her country. Her concerns thus extend beyond her personal physical security, and bear on a greater public interest national peace and security. It should also be borne in mind that [REDACTED] among other. Although the witness is fully committed to contribute to the Court's inquiry in this case and to assist the Chamber in its search for the truth, these considerations are not matters for general public consumption. Accordingly, due regard should be had in this respect as well.

The Prosecution is unaware of the position of VWS concerning P-0952. However, we consider that if VWS does not recommend the implementation of suitable measures to meet the witnesses founded concerns, the Chamber should undertake a *direct* inquiry in Closed Session with the witness in advance of her testimony, *ex parte* the Parties and Participants if need be, to more fully understand the basis for her concerns in advance of rendering a Decision on the propriety of Closed Session testimony. Should the Chamber determine that the requested measures would not be appropriate and the witness therefore withdraw her consent, the Prosecution would not seek to compel her testimony and defer to the Chamber's discretion. That said, should the witness do so, we would consider her 'unavailable' within the meaning of rule 68(2)(c) per the Court's jurisprudence and particularly ICC-01/05-01/13-1481-Red-Corr.

Thank you for your prompt consideration.

Kind regards,

On behalf of Kweku Vanderpuye

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