

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No: *ICC-01/14-01/18*

Date: **14 February 2024**

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 YEKATOM AND PATRICE-EDOUARD
NGAISSONA***

Public

Public Redacted Version of 'Defence Response to "Prosecution's Request for the Non-Publication of P-2467 Prior-Recorded Testimony" (ICC-01/14-01/18-2003-Conf), filed 24 July 2023' (ICC-01/14-01/18-2051-Conf), filed 24 August 2023

Source: Defence of Patrice-Edouard Ngaiissona

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

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I. INTRODUCTION

1. The Defence for Mr Patrice-Édouard Ngaïssona (“Defence”) respectfully requests Trial Chamber V (“Chamber”) to reject the Prosecution’s Request not to publish the prior-recorded testimony of P-2467.¹ There is no objective risk justifying the non-publication of the testimony. Less restrictive measures that would ensure Mr Ngaïssona’s right to publicity of the proceedings are possible.
2. The Defence relies on Article 67 of the Statute as well as on Regulation 20(1) and 21(1) and (7) of the Regulations of the Court (“Regulations”) according to which all hearings shall be held in public, and all documentary evidence introduced by a participant during a public hearing shall be available for broadcast. Moreover, the Defence also notes Trial Chamber V’s decision that “The evidence presentation shall be held in public to the extent possible [...]”² and that “the same principle applies to testimony which was previously obtained and introduced under Rule 68 of the Rules”.³ Therefore, the statement of P-2467 is subject to the same standards of publicity as *viva voce* testimony.

II. CONFIDENTIALITY

3. Pursuant to Regulation 23*bis* of the Regulations, this Response is filed as “Confidential”, as it concerns material not available to the public. A public redacted version of this request will be filed as soon as practicable.

¹ ICC-01/14-01/18-2003-Conf.

² Email decision “*Publishing of prior-recorded testimonies*”, 03 June 2021 15:58 from TCV Communications *citing* Initial Directions, ICC-01/14-01/18-631, para. 45.

³ Email decision “*Publishing of prior-recorded testimonies*”, 03 June 2021 15:58 from TCV Communications.

III. SUBMISSIONS

5. There is no objective risk justifying the non-publication of P-2467's prior-recorded testimony. [REDACTED] *in the abstract* are not valid legal considerations and the Prosecution has not demonstrated that the publication of the statement would aggravate the security situation of P-2467 or of innocent third parties. Less restrictive measures to ensure Mr Ngaïssona's rights are feasible.
6. The Defence does not seek the re-consideration of the decision admitting the statement of P-2467; however, the Prosecution should have made the Chamber aware in its Rule 68(2) request⁴ that [REDACTED]. Given the impact upon the accused's right to a public trial, this information should have been considered as part of the assessment of whether the interests of justice are best served by its introduction.⁵ Granting the Prosecution's request to maintain the total confidentiality of the filing now would be prejudicial to the Defence, since relevant information was withheld from the Defence at the time the Rule 68(2) request was filed.

A. The Prosecution fails to demonstrate an objective risk justifying the measure

- i. [REDACTED] is not a valid legal consideration and in any case the publicity of P-2467's statement would not jeopardise*

6. At the outset the Prosecution's argument for the measures in relation to [REDACTED] proceeds from a flawed premise. The Trial Chamber does not have a legal obligation to [REDACTED] and therefore [REDACTED] in CAR are an irrelevant consideration under the legal framework of the Court.⁶ Rules 87 and 88 of the Rules of Procedure and Evidence are squarely addressed at protecting [REDACTED].

⁴ ICC-01/14-01/18-812-Conf, para. 34.

⁵ See Rule 68(2)(b).

⁶ *Contra* ICC-01/14-01/18-2003-Conf, para.17.

7. In any case, the publicity of P-2467's statement would not jeopardise [REDACTED]. The Prosecution overstates the risk when it claims that the publication would jeopardise [REDACTED] as well as aggravate the security situation of the witness and innocent third parties related.
8. The evidence offered to support the Request does not demonstrate the risk that the Prosecution claims. The Prosecution annexes a communication of the [REDACTED] in the country. The Prosecution does not provide any information on whether the communication was followed by any measures from the Central African authorities to prevent [REDACTED] in the country.
9. Moreover, [REDACTED] is not a secret. The cooperation of [REDACTED] with the ICC is [REDACTED] and would not change the vision Central Africans or others have of [REDACTED].[REDACTED]
- [REDACTED]⁷
10. Other references to international justice are made on general pages of the website. For example, [REDACTED] explains that it:
- [REDACTED]⁸
11. [REDACTED].⁹ [REDACTED].
12. The Prosecution claims that does, is a different mandate than collaborating in a criminal investigation and with a prosecutorial body. However, the Prosecution offers no basis for this. This distinction is not included in [REDACTED], and it

⁷ [REDACTED].

⁸ [REDACTED].

⁹ [REDACTED].

cannot be deduced by [REDACTED]. Instead, it is apparent that. Therefore, the publicity of P-2467's would not lead to a revelation that would worsen [REDACTED] and its ability to conduct its activities in the country.

ii. The sought measure is not proportional to the purported risk

Regarding the personal situation of P-2467

13. The Prosecution is incorrect when it claims that publicity would increase the risk of objective harm to P-2467. [REDACTED]¹⁰. The publicity of his statement would therefore not change his situation.

14. As previously stated, the publicity of the statement would not jeopardise [REDACTED] Therefore, and for the same reasons, it would not impact organization [REDACTED].

15. Additionally, P-2467's livelihood does not depend upon him being present in CAR. As previously stated by this Chamber, protective measures cannot be granted [REDACTED]¹¹. The Prosecution has also not demonstrated that this position [REDACTED].

Regarding the situation of innocent third parties

16. The redaction of the identity and professional affiliation of the witness is a less restrictive available measure. The Prosecution states [REDACTED] would be put in danger because of the publishing of his statement. Yet, there are no names of third parties that appear in P-2467's statement. In any case, [REDACTED]. Should the Chamber find that this is in any case a risk, redacting the name and professional affiliation of P-2467 would ensure that the said innocent third parties will not be identifiable.

¹⁰ [REDACTED].

¹¹ [REDACTED].

17. Additionally, as noted by the [REDACTED] annexed to the Request, the specified individual who would face a heightened risk for his security because of the publishing of the statement [REDACTED]¹². The publicity of the statement would therefore not alter this individual's status [REDACTED]. Regarding the risk caused by his possible affiliation to the ICC and as stated above, the Prosecution does not demonstrate the existence of such a risk.

18. The Defence considers that the Prosecution request is not well founded; however, should the Trial Chamber accept that some risk would flow from the full publication of the statement, then the Defence submits that a redacted version of it is a less intrusive measure that would prevent this risk.

B. The sought measure would be prejudicial to the Mr Ngaïssona's right to publicity

19. The principle of publicity of proceedings pursuant to Article 67(1) is an indispensable component of the right to a fair trial and internationally recognized as a human right applicable at the ICC by virtue of Article 21(3) of the Statute.¹³ It protects the accused against the administration of justice in secret with no public scrutiny. It is also one of the means whereby confidence in the courts can be maintained. Rendering the administration of justice visible, publicity contributes to the achievement of a fair trial.¹⁴ Finally, the starting point that witness's testimony will face public scrutiny provides a measure of accountability that guards against a witness making flippant and unconsidered statements.

¹² [REDACTED].

¹³ PTC, Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, *Order to the Prosecutor to File a Proposed New redacted Version of the Article 58 Application*, 4 July 2011, ICC-01/09-01/11-157, para. 7.

¹⁴ ECtHR, Case of Krestovskiy v. Russia, 28 October 2010, n° 14040/03, [KRESTOVSKIY v. RUSSIA \(coe.int\)](#), para. 24.

20. As a general rule, all documents related to the proceedings before the Chamber shall be public,¹⁵ and protective measures should be granted on an exceptional basis. This Chamber indicated its attachment to publicity of the proceedings stating that it is a way to “*preserve public trust and confidence in international justice*”. The Chamber underlined that publicity was crucial to the exposition of the truth and its effect on reconciliation indicating that:

[REDACTED].¹⁶

21. The Prosecution wrongfully argues that the statement of the witness does not need to be public [REDACTED]. However, the fact that similar declarations made years before by the witness are already public, does not meet the requirements of the publicity principle. The purpose of the principle of publicity is for people who do not have confidential access to understand the proceedings and on which legal basis and evidence a decision is made. If the public cannot draw the link between a public document and a specific proceeding, then even if substitution was permission in some cases, it is impossible for the public statement to fulfill this.

22. Moreover, the statement does contain new information on various subjects as well as on the sources of the information P-2467 provides. He says for example:

¹⁷[REDACTED] (Emphasis added)

¹⁸ [REDACTED]¹⁹ [REDACTED]

¹⁵ See footnote 13.

¹⁶ [REDACTED].

¹⁷

[REDACTED].

¹⁹ [REDACTED].

The publication of the statement is thus not duplicative of the public statement to the Subcommittee and it is incorrect for the Prosecution to point to it as a substitute.

IV. RELIEF SOUGHT

The Defence respectfully requests the Chamber to:

- **REJECT** the Prosecution's Request for the Non-Publication of P-2467's Prior-Recorded Testimony
- **IN THE ALTERNATIVE** provide the Prosecution with directions concerning permissible redactions that are consistent with the interests of justice.

Respectfully submitted,



Mr Knoop, Lead Counsel for Patrice-Edouard Ngaïssona

Dated this 14 February 2024

At The Hague, the Netherlands.