

**ANNEX 39**  
**PUBLIC**

**From:** Trial Chamber V Communications  
**Sent:** 09 June 2021 16:42  
**To:** Massidda, Paolina; 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] Vanderpuye, Kweku; [REDACTED] [REDACTED] Associate Legal Officer-Court Officer; Chamber Decisions Communication  
**Subject:** Chamber's Decision on Prosecution Requests regarding P-0952's Testimony  
**Attachments:** RE: P-0952 Upcoming Testimony; In-court protection measures for witness CAR-OTP-P-952  
**Follow Up Flag:** Follow up  
**Flag Status:** Flagged  
**Categories:** Yekatom and Ngaissona

Dear all,

The Chamber notes the Prosecution's request to hear the witness in closed session and to conduct a direct inquiry in closed session with the witness in advance of her testimony (emails from the Prosecution on 8 June 2021, at 15:27, and 9 June 2021, at 09:29), the assessment by the Victims and Witnesses Unit (the 'VWU') regarding in-court protective measures for P-0952 (email from the VWU on 8 June 2021, at 18:04), as well as the other participants' submissions on the matter (email from the Ngaissona Defence, 8 June 2021, at 18:57; email from the Yekatom Defence on 8 June 2021, at 23:26; and email from the CLRV on 9 June 2021, at 11:15).

The Chamber recalls the importance of the publicity of the proceedings and specifically to publicly hear the evidence presented. Noting that the VWU does not recommend any protective measures, and particularly noting that the witness is reportedly provided with [REDACTED] the Chamber does not see the need to authorise this witness to testify in closed session or with any other in-court protective measures.

In the interests of efficiency, the Chamber will address this matter with the witness at the beginning of her scheduled appearance this Friday, 11 June 2021, rather than scheduling an advance hearing to discuss the witness's concerns as requested by the Prosecution.

Kind regards, TC V

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**From:** Massidda, Paolina [REDACTED]  
**Sent:** 09 June 2021 11:15  
**To:** Trial Chamber V Communications [REDACTED]  
**Cc:** D29 Yekatom Defence Team [REDACTED] D30 Ngaissona Defence Team [REDACTED]; V44 LRV Team OPCV [REDACTED]; V44 LRV Team [REDACTED]; V45 LRV Team [REDACTED]; OTP CAR IIB Case Management [REDACTED]; OTP CAR IIB Operations [REDACTED]; [REDACTED] Vanderpuye, Kweku [REDACTED]  
**Subject:** RE: P-0952 Upcoming Testimony

Dear Trial Chamber V,

As a preliminary remark, the Legal Representatives note first that the Prosecution's email does not seem to be a request for holding P-0952's testimony in closed session. Instead, the Prosecution simply conveys the witness's concerns and further informs the Trial Chamber that it does not intend to compel the witness if she refuses to testify publicly. In any event, it is the Legal Representatives' view that such submissions should have been made in a formal filing rather than by email. Second, since the witness did not refer to any specific recent security or other related incidents but rather expressed her general concerns as regards the impact her public testimony might have, it is unclear why she failed to convey her concerns to the Chamber earlier.

As regards the appropriateness of hearing the witness's testimony entirely in closed session, the Legal Representatives wish to stress that the publicity of this trial is of paramount importance for the victims as this is an important component of their right to truth and justice.

However, the Legal Representatives recall that the publicity of proceedings is not an absolute requirement and is subject to restrictions. In accordance with article 64(7) of the Statute the "*Trial Chamber may determine that special circumstances require that certain proceedings be in closed session for the purposes set forth in article 68, or to protect confidential or sensitive information to be given in evidence*". Under article 6(1) of the ECHR, the publicity of proceedings is subject to restrictions in the interest, *inter alia*, of public order or national security in a democratic society, where the protection of the private life of the parties so require, or where publicity would prejudice the interests of justice. A similar provision is contained in article 14 of the ICCPR. Under article 8(5) of the IACHR, publicity of criminal proceedings may be subject to restriction in order to protect the interests of justice.

The ECtHR clarified that although in criminal proceedings there is a high expectation of publicity, it may on occasion be necessary under Article 6 [of the ECHR] to limit the open and public nature of proceedings in order, for example, to protect the safety or privacy of witnesses or to promote the free exchange of information and opinion in the pursuit of justice (e.g. B. and P. v. the United Kingdom, App. 36337/97 and 35974/97, 24 April 2001, § 37).

Therefore, the Legal Representatives submit that hearing P-0952's testimony in closed session is strictly justified by the following circumstances going far beyond the witness's personal interests allegedly at risk. In particular, the political and security situation in the CAR is extremely volatile and unpredictable.

P-0952 is a unique witness expected to provide unique evidence with the high potential to at very least [REDACTED] the highly unstable political and security situation. Hearing the witness's testimony in closed session is in the interest of justice, as this will promote the free exchange of information and opinion in the pursuit of justice. Indeed, should the witness ultimately accept to testify in public, the extent of her evidence would be self-restricted based on the concerns she expressed, and therefore would be of limited assistance to the Trial Chamber.

Accordingly, given P-0952's expected unique evidence, [REDACTED] in the CAR, the unpredictable impact her public testimony can have [REDACTED] and in the best interests of justice, the Legal Representatives contend that P-0952 should be authorised to testify entirely in closed session on an exceptional basis.

Kind regards,

Paolina Massidda and Abdou Dangabo Moussa (for the CLRV team of the victims of the other crimes)  
Dmytro Suprun (CLRV of the former child soldiers)

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**From:** Massidda, Paolina [REDACTED]  
**Sent:** 09 June 2021 09:41  
**To:** Trial Chamber V Communications [REDACTED]  
**Cc:** D29 Yekatom Defence Team [REDACTED]; D30 Ngaissona Defence Team [REDACTED]; V44 LRV Team OPCV [REDACTED] V44 LRV Team [REDACTED]; V45 LRV Team [REDACTED]; OTP CAR IIB Case Management [REDACTED]; OTP CAR IIB Operations [REDACTED] Vanderpuye, Kweku [REDACTED]

**Subject:** RE: P-0952 Upcoming Testimony

Dear All,

The CLRV take note of the issue and wish to inform the Chamber that – because the matter is essential and unique - consultations are ongoing between counsel. Since Counsel are in different countries, Ms Massidda is currently liaising with each of them to find out the common position in the matter.

The CLRV therefore respectfully inform the Chamber that they will be able to provide their position on this important issue by 11.30 at the latest.

Kind regards,

Paolina Massidda and Dmytro Suprun

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**From:** Vanderpuye, Kweku [REDACTED]

**Sent:** 09 June 2021 09:29

**To:** [REDACTED] Trial Chamber V  
Communications [REDACTED]

**Cc:** D29 Yekatom Defence Team [REDACTED]; D30 Ngaissona Defence Team

[REDACTED] V44 LRV Team OPCV [REDACTED] V44 LRV Team  
<[REDACTED] V45 LRV Team [REDACTED]; OTP CAR IIB Case Management  
[REDACTED] OTP CAR IIB Operations [REDACTED]  
[REDACTED]

**Subject:** RE: P-0952 Upcoming Testimony

**Importance:** High

Dear Trial Chamber V,

Dear All,

The Defence Responses respectively raise issues warranting clarification.

*First*, as concerns the alleged procedural violation of ICC-01/14-01/18-677-AnxI, para. 29, there is simply no issue. The witness raised her concerns spontaneously and in the presence of a VWS representative. She was directed by the Prosecution to seize VWS directly and further assured that we would also promptly advise VWS of her concerns, which is fully consistent with the Protocol, and what was done (*see* Protocol, para. 30, concerning urgent matters which may impact the witness's testimony). As is clear, the Prosecution also seized the Chamber, Parties, and Participants of the issue, to avoid surprise and to afford all concerned sufficient time to react and deal with the matter in advance of the witness's 11 June 2021 scheduled testimony.

*Second*, the Prosecution did not apply for in-Court protective measures for the witness for two reasons: (a) the witness declined an invitation to testify initially because of security concerns in addition to those recently expressed, as indicated in her statement; and (b) it was only substantially after the 7 December 2020 deadline for such applications had elapsed (in April 2021) that the witness eventually assented to testify. The Prosecution was not aware that the witness continued to hold the same reservations expressed in her 2018 interview as a *condition* of that assent. As soon as this became known to the Prosecution as expressed directly by the witness, the Chamber was duly seized.

*Third*, the publicity of proceedings is not absolute. The integrity of the proceedings and the pursuit of the truth through the elicitation of competent evidence before the Chamber cannot be secondary to the publicity of the proceedings. This case should be tried in the Courtroom. The invocation of the right of publicity, should not be used as a vehicle to try this case in the court of public opinion. Nor, should it be used as a means of chilling or intimidating prospective witnesses, or disparaging the legitimacy of the process, including the Chamber's determinations as to the fair balance of publicity in light of the attendant security situation and other salient factors, under the guise of 'freedom of expression' or pretext of the public's right to know.

*Fourth*, as is self-evident, the VWS' and the Court's ability to protect witnesses in CAR is limited. In this case alone,

[REDACTED]

██████████ ██████████  
 ██████████ Recognising of course, that each witness's security situation must be assessed separately, the broader security environment involving the case must be considered. It would be wishful thinking (at best) to believe that the Registry is able to prevent and effectively address all situations that may arise adequately, including those falling within the appropriate justification for protective measures exceeding the witnesses direct physical security, such as their ability to perform their professional activities and pursue their economic interests without harm or detriment as a consequence of their cooperation with the Court. As stated, there is no precedent before the Court as concerns assessing the broader interests ██████████ both in respect of their private circumstances, nor ██████████ which is clearly at least a *risk* in CAR's volatile security environment.

Given the circumstances and the Parties' and Participants' respective arguments, the Prosecution considers that it may be advisable to schedule a hearing on this issue in advance of the witness's testimony, as well as an *in camera* colloquy with the witness herself promptly upon her scheduled appearance.

Thank you for your consideration.

Kind regards,

Kweku Vanderpuye

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**From:** ██████████  
**Sent:** 08 June 2021 23:26  
**To:** ██████████ 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 ██████████  
 ██████████  
**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.



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 [REDACTED] will, in the manner of P-0952, 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 [REDACTED] in CAR' (see VWU Report).

The Prosecution's claim [REDACTED] 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 wish [REDACTED] and any ensuing impact on her professional life. 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 [REDACTED] for such anti-democratic aims – especially not to the detriment of Mr Yekatom's fair trial rights.

Best regards,

[REDACTED]

Legal Assistant, Yekatom Defence

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**From:** [REDACTED]  
**Sent:** 08 June 2021 15:27  
**To:** Trial Chamber V Communications [REDACTED]  
**Cc:** D29 Yekatom Defence Team [REDACTED]; D30 Ngaissona Defence Team [REDACTED]; V44 LRV Team OPCV [REDACTED]; V44 LRV Team [REDACTED]; V45 LRV Team [REDACTED] OTP CAR IIB Case Management [REDACTED] OTP CAR IIB Operations [REDACTED] > [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 [REDACTED] [REDACTED] Her public testimony may be ill-received in CAR, posing not only risks to her livelihood and potentially her physical security, but also to [REDACTED] [REDACTED] The witness is acutely aware that she may be perceived [REDACTED] [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 [REDACTED] Her concerns thus extend beyond her personal physical security, and bear on [REDACTED] should also be borne in mind that, as a [REDACTED] P-0952 is normatively bound [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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