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TRIAL CHAMBER V

Before: Judge Bertram Schmitt, Single Judge

SITUATION IN THE CENTRAL AFRICAN REPUBLIC II

IN THE CASE OF

***THE PROSECUTOR v. ALFRED YEKATOM AND PATRICE-EDOUARD
NGAISSONA***

Public redacted version of

**Corrected version of ‘Decision on the Prosecution Request for Reconsideration
regarding In-Court Protective Measures for P-0889’**

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

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Judge Bertram Schmitt, acting as Single Judge on behalf of Trial Chamber V of the International Criminal Court, in the case of *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaiisona*, having regard to Articles 64(2), (6)(e) and (7), 67(1) and 68(1), (2) and (4) of the Rome Statute (the ‘Statute’), and Rule 87 of the Rules of Procedure and Evidence, issues this ‘Decision on the Prosecution Request for Reconsideration regarding In-Court Protective Measures for P-0889’.

I. Procedural history

1. On 9 March 2021, the Single Judge rejected the Office of the Prosecutor’s (the ‘Prosecution’) request for in-court protective measures for P-0889 (the ‘Initial Decision’).¹
2. On 31 December 2021, the Prosecution sought reconsideration of the Initial Decision, requesting the Chamber to grant in-court protective measures in the form of voice and facial distortion, and the use of a pseudonym, for P-0889 (the ‘Request’).²
3. On 10 January 2022,³ the Yekatom Defence responded to the Request, opposing it.⁴ On the same day, the Ngaiisona Defence indicated that while it ‘supports and joins the specific arguments of the Yekatom Defence [...] which substantiate that the stringent requirements for reconsideration of a decision are not met in the instant case’, it ‘defers to the VWU’s assessment with respect to whether there is

¹ Decision on the Prosecution Requests for In-Court Protective Measures for 73 Trial Witnesses, ICC-01/14-01/18-906-Conf-Exp, confidential *ex parte*, only available to the Prosecution and the Registry (confidential redacted version notified the same day, ICC-01/14-01/18-906-Conf-Red; public redacted version notified on 19 April 2021, ICC-01/14-01/18-906-Red2), paras 41, 46-48, p. 46.

² Request for Reconsideration regarding In-Court Protective Measures for Prosecution Witness P-0889, ICC-01/14-01/18-1232-Conf-Exp, confidential *ex parte*, only available to the Prosecution and the Registry (with a confidential *ex parte* annex, only available to the Prosecution and the Registry) (confidential redacted version notified the same day, ICC-01/14-01/18-1232-Conf-Red), paras 1, 19.

³ The Chamber suspended the time limits related to any motion submitted via formal filing or email between Friday, 17 December 2021, at 17:30 and the end of the judicial recess on Monday, 10 January 2022, at 09:00 (*see* email from the Chamber, 14 December 2021, at 09:59). Noting that P-0889 is scheduled to start testifying on 17 January 2022, the Single Judge subsequently directed the participants to file responses to the Request, if any, by 11 January 2022, and instructed the Victims and Witnesses Unit to provide its assessment by the same date (*see* email from the Chamber, 5 January 2022, at 10:37).

⁴ Yekatom Defence Response to ‘Confidential Redacted Version of “Request for Reconsideration regarding In-Court Protective Measures for Prosecution Witness P-0889”, dated 31 December 2021’, ICC-01/14/01/18-1232-Conf-Red, ICC-01/14-01/18-1236-Conf (the ‘Response’), paras 2, 32.

an objectively justifiable risk to Witness [P-0889]’s security that may result from his upcoming testimony’.⁵ On the same day, the Common Legal Representatives of the Victims indicated that they do not intend to respond to the Request.⁶

4. On 11 January 2022, the Chamber received the Victims and Witnesses Unit’s report (the ‘VWU’ and the ‘Report’, respectively), which recommends ‘granting limited in-court protective measures such as face distortion, use of a pseudonym and redaction of any identifying information from any records that may be disseminated to the public’.⁷

II. Analysis

5. The Single Judge recalls the applicable law for protective measures, as set out in the Initial Decision.⁸ In particular, he recalls that any rejection of a request for protective measures in an initial ruling ‘is without prejudice to the Chamber reconsidering, upon request or *proprio motu*, the need for an order under Rule 87 of the Rules, should new or additional information be made available to it at a later stage’.⁹
6. The Single Judge further recalls that he previously rejected the in-court protective measures requested by the Prosecution for P-0889 because, on the basis of the information available at the time, it was not established that the witness would face an objectively justifiable risk in case he were to testify without protective measures. Specifically, the Single Judge considered that while P-0889 had reportedly experienced a security incident, there was ‘no indication’ that this incident was related to his cooperation with the Court.¹⁰

⁵ Email from the Ngaïssona Defence, 10 January 2022, at 15:42.

⁶ Email from the Common Legal Representative of the Former Child Soldiers, 10 January 2022, at 16:10; email from the Common Legal Representatives of the Victims of Other Crimes, 10 January 2022, at 16:18.

⁷ Registry’s Report on the Prosecution “Request for Reconsideration regarding In Court Protective Measures for Prosecution Witness P-0889”, dated 31 December 2021 (ICC-01/14-01/18-1232-Conf-Red), ICC-01/14-01/18-1240-Conf, para. 8.

⁸ Initial Decision, ICC-01/14-01/18-906-Red2, paras 14-21.

⁹ Initial Decision, ICC-01/14-01/18-906-Red2, para. 21. *See also e.g.* email from the Chamber, 22 March 2021, at 15:08.

¹⁰ Initial Decision, ICC-01/14-01/18-906-Red2, paras 41, 46-48.

7. However, the Single Judge is satisfied that the information provided in the Request and the Report, as well as the Chamber's experience with witnesses in this case so far, warrant reconsideration of his previous ruling.
8. In this regard, the Single Judge notes that the security situation in the CAR has further deteriorated since the Initial Decision was rendered.¹¹ He further notes that P-0889 [REDACTED],¹² [REDACTED].¹³ Although no additional information has been provided regarding the [REDACTED] and predicting its outcome is speculative,¹⁴ the Single Judge also notes that the risk that P-0889 [REDACTED] still exists. Moreover, the VWU reported that 'in the event [P-0889] [REDACTED] risk of being harmed as an insider witness, perceived as a traitor to the Anti-Balaka cause and their leaders', and that '[c]onsidering that the ICC has no control or influence on the outcome of the [REDACTED], [it] would recommend granting limited in-court protective measures.'¹⁵
9. Furthermore, the Single Judge notes the witness's concerns for the safety of his extended family [REDACTED], according to the Prosecution, [REDACTED].¹⁶ While the VWU indicated that this risk 'could not be properly assessed due to the lack of information available', it nonetheless concluded that 'an increased risk to the witness' extended family [REDACTED] cannot be excluded'.¹⁷
10. The Single Judge is of the view that the abovementioned factors, compounded by other circumstances, notably the nature of the witness's expected testimony,¹⁸ are sufficient to establish the existence of an objectively justifiable risk to the witness's legitimate interests protected under Article 68 of the Statute. Mindful of the Yekatom Defence's submissions regarding the impact of such measures on the accused's right to a public and fair trial,¹⁹ the Single Judge considers it

¹¹ See Sixth Periodic Report of the Registry on the Political and Security Situation in the Central African Republic, 26 November 2021, ICC-01/14-01/18-1192-Conf (with one confidential annex), para. 8.

¹² Final Witness List, 10 November 2020, ICC-01/14-01/18-724-Conf-AnxA, p. 25, entry 30.

¹³ See Request, ICC-01/14-01/18-1232-Conf-Red, para. 12.

¹⁴ See also Response, ICC-01/14-01/18-1236-Conf, paras 11-14.

¹⁵ Report, ICC-01/14-01/18-1240-Conf, paras 7-8.

¹⁶ Request, ICC-01/14-01/18-1232-Conf-Exp, para. 13.

¹⁷ Report, ICC-01/14-01/18-1240-Conf, para. 7.

¹⁸ Prosecution's Request for the Formal Submission of the Prior Recorded Testimony of P-0889 pursuant to Rule 68(3), 8 November 2021, ICC-01/14-01/18-1170-Conf (with confidential Annexes A and B) (public redacted version notified on 23 December 2021, ICC-01/14-01/18-1170-Red), para. 2.

¹⁹ Response, ICC-01/14-01/18-1236-Conf, paras 27-30.

appropriate to grant only limited in-court protective measures for P-0889, as recommended by the VWU. Accordingly, the Single Judge grants only the use of a pseudonym and face distortion.

FOR THESE REASONS, THE SINGLE JUDGE HEREBY

PARTLY GRANTS the Request, as set out in paragraph 10 above; and

ORDERS the Prosecution, the Yekatom Defence and the VWU to file public redacted versions of the Request, the response to the Request and the Report, respectively, within one week of notification of this decision.

Done in both English and French, the English version being authoritative.



Judge Bertram Schmitt

Single Judge

Dated 17 June 2022

At The Hague, The Netherlands