

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

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

Date: **16 December 2022**

**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 ROMBHOT YEKATOM AND PATRICE-  
EDOUARD NGAÏSSONA***

**Public**

**Public Redacted Version of “Ngaïssona Defence Response to ‘Request for Reconsideration regarding In-Court Protective Measures for Prosecution Witness P-1858’ (ICC-01/14-01/18-1651-Conf)”, ICC-01/14-01/18-1662-Conf, 14 November 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**

Mr Karim A. A. Khan QC  
 Mr Mame Mandiaye Niang  
 Ms Nazhat Shameem Khan  
 Mr Kweku Vanderpuye

**Counsel for the Defence of Mr  
Ngaïssona**

Mr Geert-Jan Alexander Knoops  
 Mr Richard Omissé-Namkeamaï  
 Ms Marie-Hélène Proulx  
 Ms Brianna Dyer

**Counsel for the Defence of Mr Yekatom**

Ms Mylène Dimitri  
 Mr Thomas Hannis  
 Ms Anta Guissé

**Legal Representatives of the Victims**

Mr Yaré Fall  
 Ms Marie Edith Douzima Lawson  
 Ms Paolina Massidda  
 Mr Abdou Dangabo Moussa  
 Ms Elisabeth Rabesandratana  
 Mr Dmytro Suprun

**Legal Representatives of the Applicants****Unrepresented Victims****Unrepresented Applicants  
(Participation/Reparation)****The Office of Public Counsel for  
Victims****The Office of Public Counsel for the  
Defence****States' Representatives****Amicus Curiae****REGISTRY****Registrar**

Mr Peter Lewis

**Counsel Support Section****Victims and Witnesses Unit****Detention Section**

## I. Introduction

1. The Defence for Mr Ngaissona (“the Defence”) requests Trial Chamber V (“Chamber”) to reject the Prosecution’s ‘Confidential Version of “Request for Reconsideration regarding In-Court Protective Measures for Prosecution Witness P-1858”’ of 2 November 2022 (“Request”).<sup>1</sup>
2. The Defence opposes the Request, as the Prosecution fails to demonstrate exceptional, new, or additional circumstances warranting reconsideration by the Chamber of its assessment of P-1858’s security situation in the “Decision on the Prosecution Requests for In-Court Protective Measures for 73 Trial Witnesses” (“Original Decision”).<sup>2</sup> The Prosecution also fails to show the existence of an objectively justifiable risk as concerns Witness P-1858.

## II. 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.<sup>3</sup>
4. On 7 December 2020, the Prosecution filed an *ex parte* request for in-court protective measures for 72 trial witnesses, a confidential redacted version of which was made available to the Defence on 18 December 2020 (“First Request”)<sup>4</sup> along with its Annex, wherein P-1858 was listed as a witness who would require such measures.<sup>5</sup>

---

<sup>1</sup> ICC-01/14-01/18-1651-Conf.

<sup>2</sup> ICC-01/14-01/18-906-Conf-Red.

<sup>3</sup> ICC-01/14-01/18-631, para. 70.

<sup>4</sup> ICC-01/14-01/18-757-Conf-Red

<sup>5</sup> ICC-01/14-01/18-757-Conf-Anx-Red, row 19.

5. On 9 March 2021, the Chamber issued the Original Decision in which it rejected the First Request with respect to, *inter alia*, P-1858, as the Prosecution had not established any objectively justifiable risk should the witness testify without protective measures.<sup>6</sup>
6. On 2 November 2022, the Prosecution filed the Request.

### III. Applicable Law

7. Article 67(1) of the Rome Statute (“Statute”) lays out the fundamental right of accused persons to a public hearing. The 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. Limited 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), as well as Rule 87 of the Rules of Procedure and Evidence (“Rules”). Article 68(1) grants the Trial Chamber power to implement protective measures “to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses.” However, protective measures “shall not be prejudicial to or inconsistent with the rights of the accused to a fair and impartial trial.”<sup>7</sup> According to the jurisprudence of the Court, protective measures “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.”<sup>8</sup>

---

<sup>6</sup> ICC-01/14-01/18-906-Conf-Red, para. 41.

<sup>7</sup> Article 68(1) of the Rome Statute.

<sup>8</sup> *Prosecutor v. Ruto and Sang*, Public redacted version of Decision on 'Prosecution's First Request for In-Court Protective Measures for Trial Witnesses', ICC-01/09-01/11-902-Red2, 3 September 2013, para 13; *see Prosecutor v. Katanga and 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.

9. While the Court's jurisprudence recognises the Chamber's power to reconsider its own decisions, reconsideration is exceptional and only granted when there is a clear error of reasoning, or to prevent an injustice. New facts and arguments arising since the rendered decision may be relevant to this assessment.<sup>9</sup>

#### **IV. Confidentiality**

10. This response is filed as confidential pursuant to regulation 23(1)*bis* of the RoC, as it responds to a confidential document that contains personal information regarding the witness. The Defence will file a public redacted version of the present response as soon as practicable.

#### **V. Submissions**

11. The Defence disagrees with and therefore opposes the Request, as the Prosecution fails to provide new or additional information or an objectively justifiable risk warranting reconsideration of the Original Decision.

##### **A. The Prosecution fails to provide the Chamber with new or additional information warranting reconsideration of the Original Decision**

###### *a. The Prosecution fails to provide new or additional information*

12. *First*, there have been no changes to P-1858's professional activities. In 2017, P-1858 already stated that [REDACTED].<sup>10</sup> This is the same position listed in the Request,<sup>11</sup> and the same position entails the same responsibilities. As such, the Chamber considered any travel required by P-1858's position when it initially assessed the witness' security situation. Further, the Prosecution has not shown the alleged

---

<sup>9</sup> ICC-01/14-01/18-206, para 20; *Prosecutor v. 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.

<sup>10</sup> CAR-OTP-2063-0050-R04, para. 14; *see* CAR-OTP-2062-0118, p. 3; ICC-01/14-01/18-1651-Conf, para. 7.

<sup>11</sup> ICC-01/14-01/18-1651-Conf, para. 7.

security issues relating to P-1858's travel requirements have any bearing on his ability to publicly testify or on the necessity for protective measures. Therefore, the Chamber should not consider P-1858's professional travels as new information warranting reconsideration of the Original Decision.

13. *Second*, the presence of former Anti-Balaka members, whether affiliated with the *Coalition of Patriots for Change* ("CPC") or the pro-Touadera faction, should not be interpreted by the Chamber as new or additional information. The First Periodic Report of the Registry on the Political and Security Situation in the CAR ("First Registry Report") confirms the presence of rebel groups in [REDACTED] and other "locations of P-1858's travel"<sup>12</sup> as early as October 2020.<sup>13</sup> Since the CPC consists of "six former enemy rebel groups *including the two Anti-Balaka branches*",<sup>14</sup> the presence of former Anti-Balaka members, regardless of their ever-changing affiliation, is not new or additional information.

14. *Third*, the situation in the CAR has not changed. The Prosecution confirms the static situation by citing the Eighth Registry Report's conclusion that "the political and security context *continue[s]* to be shaped by; (i) political tensions which have *remained* significant [...]."<sup>15</sup> The use of "continue" and "remain" refer to consistency, not deterioration. The language used throughout the Eighth Registry Report is explicit, stating that "the security situation in the CAR remained largely unchanged."<sup>16</sup>

15. *Finally*, the Prosecution's inclusion that "the situation in the CAR is unlikely to improve in the short to medium term" is irrelevant.<sup>17</sup> Lack of improvement does

---

<sup>12</sup> ICC-01/14-01/18-1651-Conf, para. 8.

<sup>13</sup> [REDACTED]; ICC-01/14-01/18-755-Conf-Anx, para. 54.

<sup>14</sup> ICC-01/14-01/18-1651-Conf, fnt 8 (emphasis added).

<sup>15</sup> ICC-01/14-01/18-1434-Conf-Anx, para. 38 (emphasis added).

<sup>16</sup> ICC-01/14-01/18-1434-Conf-Anx, para. 28.

<sup>17</sup> ICC-01/14-01/18-1651-Conf, para. 14; ICC-01/14-01/18-1434-Conf-Anx, para. 39; ICC-01/14-01/18-1556-Conf-Anx, para. 49.

not imply deterioration and therefore is not a basis to reconsider the Request. The Ninth Registry Report, uncited by the Prosecution, has identical conclusions with the Eighth Registry Report which cements the unchanged nature of the security situation in the CAR. In any event, “[t]he security situation in the capital has remained generally calm during the reporting period”.<sup>18</sup>

*b. The Prosecution fails to describe the source of “new or additional” information*

16. The Prosecution must refer to the source for any information upon which it bases its request, as the accuracy and reliability of this information is relevant to the Chamber’s evaluation of the request’s merits. The Prosecution starts by stating that “[i]n 2022, P-1858 informed the Prosecution”, yet the Prosecution did not provide any reference to the precise information received.<sup>19</sup> The Prosecution withheld the exact date of the conversation, which prevents the Chamber from evaluating if the information is still relevant. Without clear information of such conversation, the Chamber cannot verify its accuracy or confirm its existence.

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

17. *First*, the Prosecution fails to establish the existence of an objectively justifiable risk based on P-1858’s travels. The Prosecution submits that the witness “travels a few times a year to areas such as [REDACTED].”<sup>20</sup> The Prosecution fails to provide a concrete number of trips or an exhaustive list of locations. Therefore, the Chamber lacks the necessary information to determine the threat’s alleged existence. Moreover, the Prosecution has not established the necessity of its request, as it failed to explain why P-1858 cannot take other routes, or why other people cannot

<sup>18</sup> ICC-01/14-01/18-1556-Conf-Anx, para. 31.

<sup>19</sup> ICC-01/14-01/18-1651-Conf, para. 7.

<sup>20</sup> ICC-01/14-01/18-1651-Conf, para. 7 (emphasis added).

travel on behalf of P-1858. Such uncertainty and speculation are not a basis upon which to establish an objectively justifiable risk.

18. *Second*, the Prosecution argues that P-1858 “encounters check-points where his identity documents are sometimes checked,”<sup>21</sup> but checkpoints are not permanent structures. The Prosecution does not specify who monitors the checkpoints, consequently failing to establish any threat to the witness. The Chamber cannot make an accurate risk assessment based on imprecise, inaccurate and ever-changing information. Therefore, the Prosecution cannot argue that “testifying publicly will make P-1858 known [...] along the routes he travels and expose him to a risk of reprisal”<sup>22</sup> because P-1858 makes a *few* trips to *some* places with *possible* checkpoints. When the Prosecution fails to provide concrete information pertaining to the witness, it is speculative to assume the existence of an objectively justifiable risk from the witness’s professional travels.

19. *Finally*, the Chamber should not accept the that continued confidentiality status of P-1858 is necessary to avoid security incidents. The Prosecution concedes and justifies the absence of “intervening security incidents” for P-1858 by arguing that “P-1858’s status [...] *appears* to have remained confidential *for the moment*”.<sup>23</sup> It is mere conjecture to argue that the witness’s confidential status explains the lack of security incidents. This reasoning entails speculation and does not demonstrate the increase, decrease, or even existence of any risk associated with P-1858’s involvement in the case. If the Chamber were do adopt such reasoning, it would justify protective measures for all witnesses.

20. *To conclude*, the Trial Chamber originally ruled that P-1858’s “fears appear subjective and insufficient to warrant granting the requested protective

---

<sup>21</sup> ICC-01/14-01/18-1651-Conf, para. 7 (emphasis added).

<sup>22</sup> ICC-01/14-01/18-1651-Conf, para. 9.

<sup>23</sup> ICC-01/14-01/18-1651-Conf, para. 16 (emphasis added).

measures.”<sup>24</sup> Given the lack of new or additional information and the absence of an objectively justifiable risk, this conclusion remains true. P-1858 does not require in-court protective measures.

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

21. *First*, the Prosecution’s argument that “the capacity from the CAR authorities to ensure that P-1858 and his family can be adequately protected [REDACTED]” is unfounded.<sup>25</sup> The Prosecution also used this argument with P-2419<sup>26</sup> and P-2556<sup>27</sup> because both witnesses were located in [REDACTED]. If the Prosecution also argues inadequate protection for P-1858, [REDACTED], all testifying witnesses from the CAR would qualify for protective measures and thus infringe on Mr Ngaïssona’s right to a public hearing.

22. *Second*, basing the request on the nature of P-1858’s testimony is a groundless attempt to justify protective measures and infringes on the rights of the accused. The Prosecution was aware of the content of his testimony since 2017. The Prosecution cannot use known, accessible information from 2017 to justify a request for the *reconsideration* of protective measures in 2022. The nature of his testimony has not changed, and therefore does not magnify the previously mentioned factors.

23. *Third*, to assume that most of P-1858’s testimony will be public is also speculative. Although the Prosecution assumes that “much of P-1858’s testimony will be given

---

<sup>24</sup> ICC-01/14-01/18-906-Conf-Red, para. 42 ; ICC-01/14-01/18-757-Conf-Anx-Red, p. 4, entry 21.

<sup>25</sup> ICC-01/14-01/18-1651-Conf, para. 14.

<sup>26</sup> ICC-01/14-01/18-1576-Conf-Red, para. 13: « les moyens d’action forces de l’ordre centrafricaines sont insuffisants pour assurer la sécurité des témoins ; cela est d’autant plus le cas s’agissant de P-2419 qui a fait part de son intention de déménager dans un village de province. »

<sup>27</sup> ICC-01/14-01/18-1464-Conf-Red, para. 9: “Consequently, domestic authorities have a diminished capacity to protect and secure the interests of witnesses in this case, given the necessary *deployment* of a substantial portion of their limited resources to stabilise the country” (emphasis added).

in public”,<sup>28</sup> the Prosecution cannot rule out that the Chamber will allow the recourse to private session for certain aspects of the witness’ evidence.

24. *Fourth*, the Prosecution is misguided to argue that protective measures are needed so “that P-1858 is able to provide unfettered evidence”<sup>29</sup>. On the contrary, it is often that a witness who testifies without protective measures is more forthright and avoids exaggeration to avoid public scrutiny. All “witnesses 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.”<sup>30</sup> In any case, if the Prosecution’s argument was accepted at face value, all witnesses would benefit from such measures, altering the fundamental right to a public hearing into a never-applicable exception.

25. *Finally*, the Prosecution’s fear of the “chilling effect” on P-1858’s testimony [REDACTED] is irrelevant to Mr Ngaïssona’s case and is not a legal basis to request protective measures. This is confirmed by the Single Judge, who “is also mindful [...] that any incriminating evidence that [the witness] could provide against [REDACTED] ‘is not a legal basis to deny Mr Ngaïssona’s right to a public hearing’.”<sup>31</sup>

## VI. Relief sought

26. In light of the above, the Defence respectfully requests the Chamber to **REJECT** the Request.

---

<sup>28</sup> ICC-01/14-01/18-1651-Conf, para. 19.

<sup>29</sup> ICC-01/14-01/18-1651-Conf, para. 19.

<sup>30</sup> ICC-02/11-01/15-1155-Red, para. 8.

<sup>31</sup> ICC-01/14-01/18-1514-Conf-Red, para. 16.

Respectfully submitted,



---

Mr. Knoops, Lead Counsel for Patrice-Edouard Ngaïssona

The Hague, 16 December 2022