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**International
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Date: **30 July 2024**

TRIAL CHAMBER V

Before: Judge Bertram Schmitt, Presiding Judge
Judge Péter Kovács
Judge Chang-ho Chung
Judge Beti Hohler, Alternate Judge

**SITUATION IN THE CENTRAL AFRICAN REPUBLIC II
IN THE CASE OF *THE PROSECUTOR v.*
*ALFRED ROMBHOT YEKATOM & PATRICE-EDOUARD NGAÏSSONA***

Public

Public Redacted Version of the “Response to ‘Prosecution’s Request for a Variation of Time Limit pursuant to Regulation 35 to seek the Submission of the Prior Recorded Testimonies of P-0460, P-0732, P-1779, P-1864, and P-1871 pursuant to Rule 68(2)(c)’, 22 December 2023, ICC-01/14-01/18-2285-Conf”, ICC-01/14-01/18-2312-Conf, 18 January 2024

Source: Defence for Mr. Alfred Rombhot Yekatom

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. Alfred Rombhot Yekatom ('Defence') opposes the 'Prosecution's Request for a Variation of Time Limit pursuant to Regulation 35 to seek the Submission of the Prior Recorded Testimonies of P-0460, P-0732, P-1779, P-1864 and P-1871 pursuant to Rule 68(2)(c)'.¹
2. The Request is – at minimum – nearly six months too late and as such, should be dismissed *in limine*. Nor has good cause been established in accordance with Regulation 35 of the Regulations of the Court ('RoC') which would warrant a retroactive extension for the submission of prior recorded testimony beyond 7 July 2023 as ordered by the Trial Chamber.²
3. Further, the Prosecution has also failed to satisfy the requisite criteria which would permit the introduction of the prior recorded statements for P-0460, P-0732, P-1779, P-1864 and P-1871 (collectively 'Five Witnesses') pursuant to Rule 68(2)(c) of the Rules of Procedure and Evidence ('Rules'). The Prosecution has not established that the witnesses are 'unavailable' within the broad meaning ascribed within Rule 68(2)(c) and in any case, it is evident that the delay in both securing the availability of its witnesses as well as the requested extension of time is entirely attributable to the Prosecution's untimely and remiss efforts.

II. SUBMISSIONS

- a) The Prosecution's lack of due diligence cannot be repackaged as 'good cause' for the purposes of Regulation 35
4. The Prosecution has approached this Request in a mismanaged and improper manner such that the reasons advanced for an extension were not only well

¹ ICC-01/14-01/18-2285-Conf ('Request')

² ICC-01/14-01/18-1892, para. 4.

within the Prosecution's control but transpired as a result of its very own failures.

5. The Trial Chamber will recall that, at the Prosecution's request,³ it had extended the deadline for submission of applications pursuant to Rule 68(2)(b) and (c) and provided the Prosecution with ample time to meet this deadline on a rolling basis and no later than 11 January 2021.⁴ In doing so, the Chamber was guided by various factors including the need to balance the workload of participants – particularly of the Defence – and to best preserve the rights of the accused.⁵
6. Following this extension, and upon a Prosecution announcement that it intended to submit Rule 68(2)(c) applications in relation to three witnesses (P-2200, P-0881 and P-0975),⁶ the Trial Chamber subsequently ordered the Prosecution to submit any further Rule 68(2)(c) applications no later than 7 July 2023.⁷ This latter deadline ensured that the Rule 68(2)(c) applications were filed well within the Prosecution's case and that a judicial determination could be issued prior to the commencement of the Defence's case.⁸ Moreover, the Prosecution did not seek leave to appeal or reconsideration of this deadline.
7. The present Request has been submitted nearly six months after the judicial deadline of 7 July 2023. Compounding this further, and in contrast to its announcement concerning P-2200, P-0881 and P-0975,⁹ the Prosecution did not provide any prior indication of its intention to file yet another Rule 68(2)(c)

³ ICC-01/14-01/18-652.

⁴ See ICC-01/14-01/18-685. The initial deadline for the submission of applications pursuant to Rule 68 by the Prosecution was 9 November 2020. In granting an extension, the Trial Chamber had noted that the Prosecution's request for extension was untimely ('[t]he Chamber finds it unfortunate that the Prosecution waited until 31 August 2020 to inform the Chamber and the participants, particularly the Yekatom and Ngaïssona Defence (jointly, the 'Defence'), of the extent to which it anticipates to use Rule 68 of the Rules. Given that its intended approach to Rule 68 of the Rules in this case is rather unprecedented, the Chamber considers that a more timely notice would have been warranted') see ICC-01/14-01/18-685, para. 13.

⁵ ICC-01/14-01/18-685, para. 15.

⁶ See ICC-01/14-01/18-1892, fn. 5.

⁷ ICC-01/14-01/18-1892, para. 4.

⁸ See ICC-01/14-01/18-2127-Conf.

⁹ The Prosecution's announcement was issued on 15 November 2022 and 10 March 2023 respectively see ICC-01/14-01/18-1892, fn. 5.

application for a further five witnesses. Indeed, to the contrary, as of 11 September 2023, the Prosecution had maintained that it was in the process of completing the certification process for 17 witnesses and, citing logistical difficulties, sought an extension of the time limit for the proposal of PRVs of the prior recorded testimony of the outstanding Rule 68(2) witnesses to 15 November 2023 i.e. prior to the commencement of the Defence's case.¹⁰

8. The Prosecution's apparent indifference to judicial directions is mirrored by its lack of diligence towards discharging its obligations under the Court's procedural framework.
9. For all Five Witnesses, the Prosecution expressly submits that an extension is necessitated by reasons outside of the Prosecution's control as it was only after the Chamber's 6 April 2023 Decision,¹¹ granting the introduction of prior Statements of the Five Witnesses that 'the Prosecution started the certification process'.¹² This position is premised on an (false) assumption that the certification process could not have commenced at an earlier stage. This is of course untrue. The Chamber had, again at the Prosecution's request,¹³ designated 'the Registry SLA, or anyone delegated by him, to witness declarations under Rule 68(2)(b) of the Rules for the purposes of the present case' as of 6 May 2020.¹⁴ The fact that the Prosecution did not avail itself of the possibility to complete the declarations prior to the 6 April 2023 Decision cannot now be leveraged as a basis to establish good cause for the purposes of Regulation 35. As set out further below, the Prosecution had numerous opportunities to secure the accompanying declarations with each of the Five

¹⁰ ICC-01/14-01/18-2090. The Prosecution did not specify the witnesses for which declarations remained outstanding and again, did not indicate its intention to convert the rule 68(2)(b) applications to rule 68(2)(c) applications.

¹¹ ICC-01/14-01/18-1833-Conf ('6 April 2023 Decision').

¹² See e.g. Request, paras. 5, 17 (P-0460), 31 (P-0732), 46 (P-1779), 59 (P-1864) and 73 (P-1871).

¹³ ICC-01/14-01/18-489. In doing so, the Prosecution had argued that the designation of the Registry SLA would 'promote efficiency' and further, that the relief be granted as 'expeditiously as possible' on account of, inter alia, the logistical arrangements necessary to obtaining [the] required declarations' see ICC-01/14-01/18-489 paras 2 - 3.

¹⁴ ICC-01/14-01/18-508.

Witnesses “reasonably close in time’ to when the prior recorded testimony is being **submitted** (emphasis added)’¹⁵ and well before the 6 April Decision.¹⁶

10. Further, even if one were to (incorrectly) assume that the certification process could only be triggered by the 6 April 2023 Decision, the Prosecution fails to explain in the Request as to why the process was not immediately initiated or why such delays were not brought to the Chamber’s attention prior to 7 July 2023. For example:

- i. P-0460: Whilst the date on which P-0460 consents to speak with the Prosecution is conspicuously omitted,¹⁷ there is no explanation as to why, having requested the assistance of the [REDACTED] authorities on 12 May 2023, it took over two months for the Prosecution to call the witness on [REDACTED]¹⁸ i.e., over three months following the 6 April 2023 Decision and two weeks after the 7 July 2023 deadline. Nor does the Prosecution explain why it then took a further two months to call P-0460 back on [REDACTED]¹⁹ – again, a week after the close of the Prosecution’s case.
- ii. P-0732: Whilst the Prosecution avers that it has tried calling P-0732 ‘multiple occasions since December 2022’,²⁰ it provides no detail as to the frequency or dates of such attempts – information which is crucial to an assessment of its extension request. More tellingly, it also fails to explain why attempts to engage with intermediary P-1231 about the matter were only initiated in August 2023²¹ and not for example, in April 2023 or prior to the 7 July 2023 deadline.

¹⁵ ICC-01/14-01/18-508, paras 6-8, p. 7. See also 6 April 2023 Decision, para. 31.

¹⁶ P-1864 and P-1871 submitted 2 November 2020 (ICC-01/14-01/18-710-Conf); P-1779 submitted 27 November 2020 (ICC-01/14-01/18-744-Conf); P-0732 submitted 27 November 2020 (ICC-01/14-01/18-745-Conf); and P-0460 submitted 21 December 2020 (ICC-01/14-01/18-794-Conf).

¹⁷ Request, para. 11.

¹⁸ Request, para. 12.

¹⁹ Request, para. 13.

²⁰ Request, para. 22.

²¹ Request, para. 23.

- iii. P-1779: Similarly, the Prosecution states that after the 6 April 2023 Decision it 'tried calling P-1779 on multiple occasions to organise the certification of his statements' but that 'all those attempts were unsuccessful'.²² Again, the Prosecution fails to provide the necessary information as to the date(s) or frequency of attempts made – or indeed whether checks were made to ensure that it was calling the correct number for the witness. Such information would allow the Chamber to assess whether the attempts were made in a timely manner after the 6 April 2023 Decision. Similarly, the Prosecution offers no explanation as to why attempts to engage with intermediary P-1231 about the matter were only initiated in August 2023.²³
- iv. P-1864: The Prosecution fails to explain why it had sought to discuss the certification process with P-1864 on [REDACTED]²⁴ i.e., four months following the 6 April 2023 Decision and a month after the 7 July 2023 deadline.
- v. P-1871: The Prosecution fails to sufficiently explain why no efforts were made to contact P-1871 directly after the 6 April 2023 Decision nor why efforts to engage with intermediary P-1231 were only initiated 'from August 2023 onwards'.²⁵

11. The Prosecution's failure to sufficiently explain such delays to the certification process is further aggravated by its attempt to engineer circumstances in a futile attempt to circumvent the Trial Chamber's deadline of 7 July 2023. In this regard, the Defence notes the Prosecution's position that as of 7 July 2023, it was still of the view that it had not exhausted all available means to localise the Five Witnesses.²⁶ No mention is made of the fact that the Prosecution should have

²² Request, para. 39.

²³ Request, para. 40.

²⁴ Request, para. 52.

²⁵ Request, para. 66.

²⁶ Request, paras 17 (P-0460); 31 (P-0732); 46 (P-1779); 59 (P-1864) and 73 (P-1871).

provided an update to the Chamber to this effect on 7 July 2023 or indeed at any subsequent point prior to the commencement of the Defence's case.²⁷ More pertinently, in relation to P-0732, P-1779 and P-1871, the Prosecution seeks to tie this position to its argument that it was '[o]nly after having sent an RFA to the [REDACTED] authorities in August 2023...' ²⁸ that it became clear that the witnesses had become unavailable. The Prosecution does not address the fact that the RFA to [REDACTED] authorities should have been sent at an earlier stage noting that it had knowledge of the presence of P-0732, P-1779 and P-1871 in [REDACTED] well before this date.²⁹ Essentially, the Prosecution has seemingly waited to send the RFA well after the 7 July 2023 in order to then use the existence of the RFA as justification for omitting to discharge its procedural obligations in a timely manner and in accordance with judicial directions.³⁰

12. Relatedly, the Prosecution's submission that the summoning of the Five Witnesses is not an appropriate alternative has limited merit insofar as it is linked to the close of the Prosecution's case. However, as stated above, it is the Prosecution which has presented this set of circumstances as a *fait accompli* before the Chamber having waited to file this Request months after the close of its case and in the midst of the presentation of the Defence's case. The Prosecution chose this course of action and must now bear the consequences of its untimeliness particularly where, as detailed below, the submission of the applications at this stage would be prejudicial to the rights of Mr. Yekatom.

²⁷ The Defence notes that the Prosecution had indicated – in a footnote – that its notification of the close of its case was subject to the 'the certification of prior testimony provisionally recognised as formally submitted pursuant to rule 68(2)(b)'. No detail was provided as the witnesses concerned, the steps taken or more pertinently, a timeline for the submission of the declarations prior to the commencement of the Defence's case see ICC-01/14-01/18-2089, fn. 3. Similarly, the Defence notes that the Prosecution had cited logistical difficulties in securing the declarations of 17 witnesses but again, no specific detail was provided as to the witnesses concerned, the steps taken and further still, the Prosecution had seemingly projected the process to be completed by 15 November 2023 see ICC-01/14-01/18-2090.

²⁸ Request, paras. 31, 46 and 73.

²⁹ P-0732 (August 2015 see CAR-OTP-2013-0536, para. 50 see also location of interview at CAR-OTP-2013-0536); P-1779 (1 December 2021 see Request, para. 34) ; P-1871 (14 October 2020 see Request, para. 62).

³⁰ The same argument applies in relation to contact made with P-0460 (27 July 2023 see Request, para. 12) and P-1864 (4 August 2023 see Request, para. 52) following the 6 April 2023 Decision.

b) *The Prosecution has failed to establish that P-0460 and P-1864 are 'unavailable' within the meaning of Rule 68(2)(C)*

13. At its core, the Request essentially seeks to convert Rule 68(2)(b) applications into Rule 68(2)(c) applications in the absence of accompanying declarations. In this regard, the Defence recalls that Rule 68(2)(b) and Rule 68(2)(c) serve a different purpose and function. As held by Trial Chamber X in the *Al Hassan* case, 'the two sub-provisions deal with different sets of witnesses: while sub-rule (c) deals with 'unavailable' witnesses, which places an additional burden on the calling party, sub-rule (b) deals with witnesses who may be called to testify'.³¹ Accordingly, '[i]t follows that the unavailability requirement must be interpreted in a manner that would properly reflect the different standards contained in the two sub-rules and that would not reduce Rule 68(2)(c) to a loophole to circumvent the procedural requirements under Rule 68(2)(b) of the Rules.'³²

14. Therefore, whilst the Prosecution is correct to state that the 'unavailability' of a witness must be 'interpreted broadly',³³ this is not a limitless assessment. As determined by various Trial Chambers, it does not include for example, circumstances whereby a witness simply refuses to provide the accompanying declaration as is the case for both P-0460 and P-1864.³⁴

15. With regard to P-0460, the Prosecution states that on the one hand, on [REDACTED] it was informed by the witness that she 'was physically ill and unable to go through the formal certification process of her Prior Statement',³⁵ and that [REDACTED] (P-5013) had also informed the Prosecution that 'the Prosecution's attempts to contact P-0460 were a source of anxiety for P-0460 and

³¹ ICC-01/12-01/18-2445-Red, para. 22.

³² ICC-01/12-01/18-2445-Red, para. 22.

³³ Request, para. 7.

³⁴ ICC-01/12-01/18-2445-Red, para. 23 and cites therein as well as ICC-01/14-01/18-1975, para. 28 and ICC-01/14-01/18-2021, para. 22.

³⁵ Request, para. 12.

negatively affected her health'.³⁶ On the other hand, and at the same, the Prosecution avers that P-0460 had not previously 'report[ed] any life threatening health issues' in order to justify the absence of article 56 measures. Despite this inconsistency in its pleadings, no supporting medical documentation is provided for which would allow the Trial Chamber to ascertain the extent of P-0460's medical situation, nor does there appear to be any forthcoming medical report from the psycho-social expert who is cited as having assisted the Prosecution during a subsequent call with [REDACTED] on [REDACTED]. Notwithstanding the timeliness of its contacts with P-0460, the Prosecution fails to explain why – in the current circumstances - protective or special measures would not have alleviated P-0460's concerns so as to allow the accompanying declaration to be formalised. As such, the Trial Chamber is only presented with the Prosecution's (contradictory) submissions which set out P-0460's refusal to undergo the formal certification process.

16. Similarly, with regard to P-1864, the Prosecution states that it had met with P-1864 in order 'to review the content of her Prior Statement and prepare the readback log'.³⁷ According to the Prosecution, during the course of this meeting, the witness [REDACTED].³⁸ Whilst the Prosecution advances that the witness had 'confirmed her willingness to certify her statement' for the purposes of justifying the absence of article 56 measures,³⁹ it is evident from the P-1864's refusal to have any further contact with the Prosecution that this was not the case. Indeed, presumably, the Prosecution would have informed P-1864 of the formal certification process before the Registry SLA during its meeting with the witness on [REDACTED]. An inference can therefore be drawn that, having received this information, the witness had no intention to continue with the certification process. The Defence is of course understanding of P-1864's

³⁶ Request, para. 12.

³⁷ Request, para. 54.

³⁸ Request, para. 54.

³⁹ Request, para. 52.

emotional well-being but absent any concrete medical issue or documentation, there is insufficient information to draw any conclusion other than the witness did not want to provide a declaration.

c) *The Prosecution has not exercised reasonable diligence to secure the availability of the Five Witnesses*

17. Most recently, in the *Al Hassan* case, Trial Chamber X held that ‘while reasons hampering the acquisition of the accompanying declaration under Rule 68(2)(b)(ii) of the Rules may indeed, depending on the specific circumstances, be of relevance in assessing whether the requirements under Rule 68(2)(c) are met, the Chamber is of the view that the inability to obtain said declaration cannot in and of itself be sufficient to demonstrate unavailability and justify the conversion of Rule 68(2)(b) witnesses into Rule 68(2)(c) witnesses (emphasis added).’⁴⁰ This position aligns with the Trial Chamber’s prior determination that in assessing the ‘unavailability’ requirement, ‘the Chamber may have regard to, inter alia, the diligence exercised by the Prosecution in inquiring about factors affecting a witness’s availability and/or assessing the need for measures under Article 56 of the Statute (emphasis added).’⁴¹

18. As apparent from the Request, the Prosecution has failed to exercise due diligence in its inquiry of factors affecting the witness’ availability in order to secure the accompanying declarations in a timely manner and at a point which was reasonably close in time to when the prior recorded testimony was submitted. This is despite the fact that there was ample indication that the Prosecution was at risk of losing the witnesses’ cooperation at a subsequent stage:

⁴⁰ ICC-01/12-01/18-2445-Red, para. 24.

⁴¹ ICC-01/14-01/18-1975, para. 31.

- i. P-0460: Contrary to the implied assertion,⁴² the Prosecution was already on notice of the fact that P-0460 had ‘fled to [REDACTED]’ as of August 2015 – at the time of her interview-⁴³ where the witness described the difficulties encountered as a CAR refugee and the fact that she had yet to receive asylum in [REDACTED].⁴⁴ Despite being on notice of P-0460’s unstable personal circumstances, the Prosecution does not appear to have maintained, or sought to maintain contact with the witness directly. Further, as of 1 December 2021, i.e. one year after submitting its application for the submission of P-0460’s prior recorded testimony pursuant to Rule 68(2)(b),⁴⁵ the Prosecution was informed of the witness’ location in [REDACTED] which was subsequently confirmed by the [REDACTED] authorities on 13 July 2022.⁴⁶ There is no evidence that the Prosecution sought to contact the witness in this interim period between 1 December 2021 and 13 July 2022 in order to obtain the accompanying declaration, or indeed at any point between 13 July 2022 and 12 May 2023. Nor did the Prosecution act with any sense of urgency following the witness’ apprehension to complete the formal certification process as became apparent during the meeting on [REDACTED]. The Prosecution waited a further two months before getting in touch with P-0460 in the presence of a psycho-social expert.⁴⁷
- ii. P-0732: The Prosecution submits that it ‘has not been able to contact [P-0732] since [REDACTED]’.⁴⁸ No mention of this fact was made in the Prosecution’s application to submit P-0732’s prior recorded testimony pursuant to Rule 68(2)(b) filed on 27 November 2020, and no attempt was

⁴² Request, para. 9 (‘[f]ollowing those events, P-0460 fled to [REDACTED]’).

⁴³ CAR-OTP-2013-0536, para. 50 see also location of interview at CAR-OTP-2013-0536.

⁴⁴ CAR-OTP-2013-0536, para. 51.

⁴⁵ ICC-01/14-01/18-794-Conf.

⁴⁶ Request, para. 9.

⁴⁷ Request, para. 13.

⁴⁸ Request, para. 21.

apparently made to request the assistance of [REDACTED] authorities until August 2023, despite the fact the Prosecution was aware of P-0732's residence in [REDACTED] as of September 2017.⁴⁹ Nor does the Prosecution explain why, having filed its Rule 68(2)(b) application on 27 November 2020, it only seemingly resumed attempts to call the witness as of December 2022.⁵⁰

- iii. P-1779: The Prosecution submits that it 'has not managed to reach [P-1779] since [REDACTED]'.⁵¹ During this period, the Prosecution was well aware of P-1779's unstable personal circumstances noting that the witness '[a]t that time [...] was living in a refugee camp in [REDACTED]' and that as of at least [REDACTED]' he was working in the fields and that it might be difficult to contact him on short notice'.⁵² Despite this warning, and having already submitted P-1779's prior recorded testimony pursuant to Rule 68(2)(b) on 27 November 2020,⁵³ the Prosecution seemingly made no further efforts to inquire about the witness' availability until August 2022 i.e. over eight months later. The Defence further recalls that at the time of its last contact with P-1779, the Registry was available to assist with completing the certification process.⁵⁴
- iv. P-1864: The Prosecution appears to have been on notice of P-1864's emotional state as of at least [REDACTED] when the witness reportedly [REDACTED].⁵⁵ Despite the witness' purported anxiety in relation to her testimony, the Prosecution appears to have made no effort to secure her declaration following this incident – having submitted her prior

⁴⁹ See CAR-OTP-2061-0003, p.1.

⁵⁰ Request, para. 22.

⁵¹ Request, para. 34.

⁵² Request, para. 37.

⁵³ ICC-01/14-01/18-744-Conf.

⁵⁴ ICC-01/14-01/18-508.

⁵⁵ Request, para. 50.

recorded testimony pursuant to Rule 68(2)(b) on 2 November 2020,⁵⁶ and seemingly only raised the certification process with the witness two years later on [REDACTED].⁵⁷ Further still, although the witness apparently ‘confirmed her willingness to certify her statement’ on [REDACTED], the Prosecution failed to seize this opportunity and only seemingly initiated the process one year later on [REDACTED].⁵⁸ No explanation is put forward for this delay by the Prosecution despite its position that the ‘vulnerability of p-1864 is undisputable’.⁵⁹

- v. P-1871: Whilst the Prosecution states that it ‘has not been able to contact [P-1871] since [REDACTED]’,⁶⁰ it offers no explanation as to why it waited a further two years to attempt to contact the witness on September 2022 given that she had already ‘confirmed her willingness to certify her statement’.⁶¹ Nor does the Prosecution explain why it waited until August 2023 to contact the [REDACTED] authorities for their assistance to locate the witness,⁶² when it was on notice of her presence in [REDACTED] as of October 2020.⁶³ The Defence yet again recalls that throughout this period – and indeed during the Prosecution’s last contact with P-1871 – the Registry was available to assist with the certification process noting that the Prosecution had submitted P-1871’s prior recorded testimony pursuant to Rule 68(2)(b) on 2 November 2020.⁶⁴

19. The aforementioned gaps in the Prosecution’s contact with the Five Witnesses are entirely attributable to its own mismanagement. No external reasons are put

⁵⁶ ICC-01/14-01/18-710-Conf.

⁵⁷ Request, para. 52.

⁵⁸ Request, para. 53.

⁵⁹ Request, para. 57.

⁶⁰ Request, para. 62.

⁶¹ Request, para. 64.

⁶² Request, para. 67.

⁶³ Request, para. 62.

⁶⁴ ICC-01/14-01/18-710-Conf.

forward by the Prosecution in its Request and there do not appear to be any high security threats which prevented the Prosecution from discharging its obligation in a timely manner. Ultimately, the Prosecution has failed to explain why it could not organise the certification for any of the Five Witnesses at any earlier stage when they could still be contacted.⁶⁵

20. Further, whilst the Prosecution may at this point aver that it would be inappropriate to summons the Five Witnesses following the close of its case, the same argument is not available at a prior stage. In other words, had the Prosecution acted with due diligence, it may have sought the Trial Chamber's assistance to secure the availability of the Five Witnesses at an earlier stage. Having failed to do so, the Prosecution has not demonstrated that the Five Witnesses are indeed unavailable within the meaning of Rule 68(2)(c).

d) Article 56 measures should have been anticipated by the Prosecution throughout the presentation of its case

21. The Prosecution correctly sets out the requirement that prior recorded testimony may only be introduced if, *inter alia*, the necessity of measures under article 56 could not be anticipated.⁶⁶ This significance of this requirement is highlighted by the fact that it is construed as a right of the accused in order to avoid the introduction of evidence through Rule 68(2)(c) when measures under article 56 would have been a viable alternative.⁶⁷

22. In line with the rights of the accused, and contrary to the Prosecution's position, consideration as to the necessity of article 56 measures is not a one-time assessment which is limited to the interview date(s). Rather, the assessment

⁶⁵ The Defence notes that the Office of the Prosecutor advanced the very same argument in its opposition to the submission of delayed applications pursuant to Rule 68(2)(c) by the Al Hassan Defence see ICC-01/12-01/18-2461-Red, para. 10.

⁶⁶ Request, para. 7 see also plain language of Rule 68(2)(c).

⁶⁷ ICC-01/12-01/18-2445-Red, para. 24.

must be on-going throughout the course of its investigation in accordance with the plain language of article 56(1)(a).

23. As set out above, it is evident that the Prosecution had ample awareness that it was at risk of losing contact with the Five Witnesses during the course of its investigations and subsequently during the presentation of its case. Yet the Prosecution made no attempt to preserve the rights of the accused – either by acting diligently in securing the certification process – or by implementing article 56 measures. This issue is particularly aggravated in relation to both P-0460 and P-1864 whereby the Prosecution seeks to rely on the witnesses’ ‘undisputable vulnerability’ to justify the ‘unavailability’ of both witnesses,⁶⁸ whilst at the same time alluding to the fact that the emotional breakdown encountered by both P-0460 and P-1864 could not have been anticipated so as to warrant article 56 measures at the relevant time.⁶⁹

e) *The formal certification process is a necessary component to confirm the sufficient indication of reliability of the tendered evidence*

24. As set out in the 6 April 2023 Decision, the introduction of the prior recorded testimonies of the Five Witnesses pursuant to Rule 68(2)(b) was ‘made on a conditional basis, pending provision of the required declarations (emphasis added)’.⁷⁰ Accordingly the formal certification process is not merely a rubber-stamping exercise.

25. In this regard, the Defence further recalls its concerns with regard to the number of witnesses in these proceedings who, having had an opportunity to testify, have had to recant and/or make significant corrections to their prior recorded testimonies which were recorded in a language that they do not understand (i.e.

⁶⁸ Request, paras 15 and 57.

⁶⁹ Request, paras 18 and 60.

⁷⁰ 6 April 2023 Decision, para. 32 and disposition.

English).⁷¹ Of note, the tendered evidence in the Request predominantly concerns prior recorded statements compiled in the English language,⁷² and yet, the witnesses are non-English speakers. Accordingly, there is a real risk that the tendered evidence remains unreliable in the absence of any formal accompanying declaration to the contrary.

f) The introduction of the prior recorded testimonies of the Five Witnesses at this stage is prejudicial to the rights of Mr. Yekatom

26. The Prosecution asserts that granting the Request does not cause any prejudice to either of the accused on the basis that, *inter alia*: (i) the Defence did not object to the introduction of the prior recorded statements of P-0460, P-0732 and P-1779 pursuant to Rule 68(2)(b);⁷³ and (ii) the Chamber has already determined that the objections of the Defence regarding the introduction of the prior recorded statements of P-1864 and P-1871 ‘did not suffice to warrant rejecting their introduction pursuant to rule 68(2)(b)’.⁷⁴

27. The Prosecution’s submissions in this respect are misguided and wilfully ignore the fact that the stage of proceedings has significantly moved on since the Trial Chamber’s 6 April 2023 Decision. In this respect the Trial Chamber’s determination came at a point in time whereby necessary measures could have been adopted in order to either secure the availability of the witness, alleviate any personal concerns and/or address any translation discrepancies within the tendered evidence following completion of the certification process. In filing the Request at this stage, the Prosecution has essentially taken the matter into its own hands and removed such safeguards – this manoeuvre is in and of itself inherently prejudicial to the preservation of Mr. Yekatom’s rights.

⁷¹ See e.g. ICC-01/14-01/18-1181, para. 38 and ICC-01/14-01/18-1203, para. 29.

⁷² With the exception of CAR-2087-9894 (P-1779) which was recorded in the French language. There is no indication that P-1779 understands French.

⁷³ Request, para. 78.

⁷⁴ Request, para. 78.

28. Moreover, as set out above, the Request is no more than an attempt to circumvent the procedural consequences of the Prosecution's formal notice of the close of the case. It comes at a point in time when the Defence has already conducted the bulk of its investigations and commenced the presentation of its case. As such, the Request is an unwarranted deviation from the procedural sequence of these proceedings and must be dismissed as such.

III. CLASSIFICATION

29. In accordance with Regulation 23bis(1) of the RoC, this request is filed on a confidential basis as it concerns filings of the same designation. A public redacted version will be filed forthwith.

IV. RELIEF

30. For the foregoing reasons, the Defence respectfully requests the Trial Chamber to **REJECT** the Request.

RESPECTFULLY SUBMITTED ON THIS 30th DAY OF JULY 2024



Me Mylène Dimitri
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