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**International
Criminal
Court**

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

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 YEKATOM AND PATRICE-EDOUARD
NGAISSONA***

PUBLIC

Public Redacted Version of “Defence response to ‘Prosecution’s Request for a Variation of Time Limit pursuant to Regulation 35 to seek Submission of the Prior Recorded Testimonies of P-0460, P-0732, P-1779, P-1864, and P-1871 pursuant to Rule 68(2)(c)’, ICC-01/14/-01/18-2285-Conf”, ICC-01/14-01/18-2311-Conf, 18 January 2024

Source: Defence of Patrice-Edouard Ngaïssona

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

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REGISTRY	
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II. INTRODUCTION

1. On 22 December 2023, more than three months after the Prosecution had given official notice that it had closed its case¹ and one month into the start of the Defence case, the Prosecution filed a request for an extension of time to submit the prior recorded testimonies of no less than five of its witnesses.² The “Prosecution’s Request for a Variation of Time Limit pursuant to Regulation 35 to seek Submission of the Prior Recorded Testimonies of P-0460, P-0732, P-1779, P-1864, and P-1871 pursuant to Rule 68(2)(c)” (‘the Request’) is made at the eleventh hour, and should be rejected since the circumstances leading up to it were completely within the Prosecution’s control had it acted with due diligence as required. Therefore, the Defence requests that Trial Chamber V (‘the Chamber’) not entertain the merits of the Request and reject the Prosecution’s request for an extension of time. In the extraordinary event the Chamber does consider the Request, it should be similarly rejected for failure to meet Rule 68(2)(c)’s requirements. None of the five witnesses subject to the Request qualify as “unavailable’ within the meaning of Rule 68(2)(c). Additionally, assuming they were to qualify as such, the necessity of Article 56 measures could have been anticipated by the Prosecution had it acted with due diligence.

III. CONFIDENTIALITY

2. Pursuant to regulation 23bis(1) of the Regulations of the Court (“RoC”), this response is filed as confidential since it responds to a request of the same classification. The Defence will file a public redacted version in due course.

IV. PROCEDURAL HISTORY

¹ ICC-01/14-01/18-2089.

² ICC-01/14-01/18-2285-Conf.

3. On 2 November 2020, the Prosecution filed its “Prosecution’s Request for the Formal Submission of Prior Recorded Testimony pursuant to Rule 68(2)(b)”³ where it sought to submit the prior recorded testimony and associated materials of Witnesses P-1864 and P-1871. The Prosecution filed the request knowing full well that under Rule 68(2)(b)(ii) any decision to grant the Prosecution’s request would be conditional upon the Prosecution providing the Chamber with certified declarations under Rule 68(2)(b)(ii) and (iii).
4. On 27 November 2020, the Prosecution filed both the “Prosecution’s Second Request for the Formal Submission of Prior Recorded Testimony pursuant to Rule 68(2)(b)”⁴ and the “Prosecution’s Third Request for the Formal Submission of Prior Recorded Testimony pursuant to Rule 68(2)(b)”⁵ where it sought submission of P-0732 and P-1779’s statements and associated items. Again, the Prosecution was always aware of the requirements of Rule 68(2)(b)(ii) and (iii), meaning that any favourable decision regarding its requests would be conditional upon receipt of the certified declarations.
5. On 21 December 2020, the Prosecution filed its “Fourth Request for the Formal Submission of Prior Recorded Testimony pursuant to Rule 68(2)(b)”⁶ where it sought the submission of Witness P-0460’s prior recorded testimony and associated items. As with the other three requests, the Prosecution was always aware of its obligation to certify P-0460’s prior recorded statement if the Chamber granted its request to introduce her prior recorded testimony.
6. On 6 April 2023, the Chamber rendered its “First Decision on the Prosecution’s Requests for Formal Submission of Prior Recorded Testimonies pursuant to Rule

³ ICC-01/14-01/18-710-Conf.

⁴ ICC-01/14-01/18-744-Conf.

⁵ ICC-01/14-01/18-745-Conf.

⁶ ICC-01/14-01/18-794-Conf.

68(2)(b)” (‘First Rule 68(2)(b) Decision’).⁷ The Chamber conditionally granted the Prosecution’s request to introduce the Prior Recorded testimonies and associated items of Witnesses P-0460, P-0732, P-1779, P-1864, and P-1871 (‘the Five Witnesses’) and subjected the introduction of their prior recorded testimony to the receipt of their respective declarations under Rule 68(2)(b)(ii) and (iii).⁸

7. On 29 May 2023, the Chamber issued its “Further Directions on the Conduct of the Proceedings (Presentation of Evidence by the CLRV and the Defence),” where it ordered the Prosecution to file any requests under Rule 68(2)(c) no later than 7 July 2023.⁹
8. On 22 December 2023, the Prosecution filed the Request wherein it asked a variation of time limit to submit under Rule 68(2)(b) the prior recorded testimony and associated exhibits for the Five Witnesses.

V. APPLICABLE LAW

9. Regulation 35(2) of the Regulations of the Court specifies that a variation of time limit can be sought even after the lapse of the time limit. In such circumstances, the Chamber may extend the time limit “if the participant seeking the extension can demonstrate that he or she was unable to file the application within the time limit for reasons outside his or her control.”
10. Rule 68(2)(b) of the Rules of Procedure and Evidence allows for the introduction of prior recorded testimony when the witness is not present when: (1) the prior recorded testimony goes to proof of “a matter other than the acts and conduct of the accused” and if (2) it is accompanied by a declaration by the testifying person that “the contents of the prior recorded testimony are true and correct to the best of that person’s knowledge and belief”, which has been witnessed by a person

⁷ ICC-01/14-01/18-1833-Conf.

⁸ Ibid.

⁹ ICC-01/14-01/18-1892.

authorized by the Chamber or in accordance with the law and procedure of a State, as detailed in Rule 68(2)(b)(ii) and (iii) of the Rules of Procedure and Evidence.

11. Rule 68(2)(c) is a separate provision allowing for the introduction of prior recorded testimony once the witness is not present. It applies to a witness who has “subsequently died, must be presumed dead, or is, due to obstacles that cannot be overcome with reasonable diligence, unavailable to testify orally”. In these circumstances, the prior recorded testimony can only be introduced if: (1) the Chamber is satisfied that the person is unavailable, (2) the necessity of measures under Article 56 of the Rome Statute could not have been anticipated, and (3) the prior recorded testimony has sufficient indicia of reliability.

VI. SUBMISSIONS

12. The Defence respectfully requests that the Chamber reject the Request since it amounts to an impermissible attempt by the Prosecution to use Rule 68(2)(c) as a last-minute loophole to circumvent the requirements of Rule 68(2)(b). Similarly, the Chamber should reject the request on the merits because the two prongs of Rule 68(2)(c) are not met for any of the witnesses, in that: (1) the Prosecution has not sufficiently substantiated that the Five Witnesses are unavailable within the meaning of Rule 68(2)(c) and (2) it could have anticipated the necessity of Article 56 measures.

A. The Prosecution’s failure to ensure it could meet the requirements of Rule 68(2)(b)(ii) and (iii) stems from a lack of due diligence and therefore its Regulation 35(2) request must be rejected

13. The Prosecution attempts to substantiate its request for an extension of time by submitting that by the 7 July 2023 deadline to submit Rule 68(2)(c) requests, it believed that it had not exhausted all available means to localize the Five witnesses. It argues that it was only months thereafter that it became clear that they

were unavailable under Rule 68(2)(c).¹⁰ The underlying assumption in the Prosecution's submissions is that it had no obligation to ensure that it could meet Rule 68(2)(b)(ii) and (iii)'s requirements until the Chamber rendered its First Rule 68(2)(b) Decision, which was in April 2023. It was only upon receiving the Chamber's First Rule 68(2)(b) Decision that the Prosecution began to take concrete steps in trying to localize the Five Witnesses, which included engaging with intermediaries and taking on cooperation requests.

14. It is understandable that the Prosecution did not begin the certification process until after the Chamber rendered its First Rule 68(2)(b) Decision in April 2023. However, the Prosecution was aware, or, at least should have been aware, during the 2.5 years that its request were pending that it would have to be in a position to certify the Five Witnesses' statements in the event the Chamber granted its Rule 68(2)(b) requests. As will be demonstrated below, the Prosecution's minimal to no effort to ensure that it would be ready to certify the Five Witnesses' declarations was a deliberate choice, and therefore completely within the Prosecution's control.

P-0460

15. P-0460 provided a signed statement on [REDACTED] to Prosecution investigators.¹¹ The Prosecution provides little to no information about the communications it had with Witness P-0460 regarding the Rule 68(2)(b) request it filed with respect to her prior recorded testimony in December 2020. Indeed, the only information provided by the Prosecution is that approximately six months prior to filing the Rule 68(2)(b) request, P-0460 confirmed living in [REDACTED]. However, the Prosecution did not provide any information about whether she consented to submitting her prior recorded testimony under Rule 68(2)(b). Further, the Prosecution provides no information as to the contacts it had with P-0460

¹⁰ Request, paras 17, 31, 46, 59, 73.

¹¹ CAR-OTP-2013-0536.

regarding her prior recorded testimony between [REDACTED] 2019 and [REDACTED] 2023. Given the *prima facie* [REDACTED] nature of her testimony, the Prosecution could have and should have anticipated that such a witness would be triggered by her interactions with the Court. Therefore, the Prosecution could have inquired with P-0460 how to go about her continued cooperation with the Prosecution pending the First Rule 68(2)(b) Decision. The Prosecution did not do so, and only began taking such steps 2.5 years following its Rule 68(2)(b) request to introduce P-0460's prior recorded testimony, which was almost eight years after it took her statement. It was well within the Prosecution's control to take steps to secure P-0460's testimony and continued cooperation prior to the issuance of the First Rule 68(2)(b) Decision.

P-0732

16. P-0732 provided a signed statement to Prosecution on [REDACTED] 2017,¹² and the Prosecution has had no contact with the witness since [REDACTED]2019.¹³ This means that when the Prosecution submitted its Rule 68(2)(b) Request, it had not been in contact with the witness for over a year. It is unclear whether the witness was aware of the Prosecution's intent to submit her prior recorded testimony pursuant to Rule 68(2)(b). However, what is clear is that at the time of its Rule 68(2)(b) request for P-0732, the Prosecution knew that it would not be able to fulfill Rule 68(2)(b)(ii) and (iii)'s requirements given the lack of contact with the witness. On the basis of the limited information provided, it appears that the Prosecution began its efforts to locate Witness P-0732 two years after its last contact with the witness.¹⁴ It was well within the Prosecution's control to take such actions earlier, and it should have done so, especially given the *prima facie* [REDACTED] nature of P-0732's testimony. Similar to Witness P-0460, it was therefore

¹² CAR-OTP-2061-0003.

¹³ Request, para. 20.

¹⁴ Request, para. 22.

foreseeable that P-0732 would be triggered by her interactions with the Court and therefore would be reluctant to cooperate for an extended period of time.

P-1864

17. P-1864 provided a signed statement to Prosecution investigators on [REDACTED] 2017.¹⁵ The Prosecution was aware from at least [REDACTED] 2020, that Witness P-1864 appeared to suffer from great distress when discussing the subject matter of her testimony.¹⁶ However, it does not appear that the Prosecution took this factor into account when submitting her prior recorded testimony under Rule 68(2)(b). Indeed, the Prosecution waited almost two years after its application was submitted under Rule 68(2)(b) to inquire with the witness whether she was willing to certify her statement. While the witness agreed to certify her statement when she spoke to Prosecution on] [REDACTED] 2022 and] [REDACTED] 2023,¹⁷ the Prosecution should have anticipated that the witness may have another strong emotional response from both the meeting with the psycho-social expert and the meeting to conduct the readback log.¹⁸ The Prosecution does not provide any explanation as to why it did not certify the statement during the readback log so as to minimize the negative effects of the alleged past trauma on the witness. It was within the Prosecution's control to prepare the certification on [REDACTED] 2023, and yet, it chose not to. The Prosecution could have anticipated that following the difficulty of the readback log, the witness would refrain from further contact with the Prosecution.

P-1871

¹⁵ CAR-OTP-2064-0860.

¹⁶ Request, para. 50.

¹⁷ Ibid., para. 52.

¹⁸ Ibid., para. 54.

18. P-1871 provided a signed statement to Prosecution investigators on [REDACTED] 2017.¹⁹ While the Prosecution did get confirmation from P-1871 on [REDACTED] 2020 that she was willing to certify her statement, it appears that the Prosecution did not have any further contact with P-1871 following that contact.²⁰ Despite the Prosecution being unsuccessful in contacting P-1871 in 2022, it did not try to locate P-1871 again until six months later, in [REDACTED] 2023, where again the Prosecution was unsuccessful.²¹ It was only upon receiving the First Rule 68(2)(b) Decision that the Prosecution began engaging with intermediaries and the [REDACTED]. Given the *prima facie* [REDACTED] nature of the subject matter of P-1871's testimony, the Prosecution should have envisaged, as it similarly should have for Witnesses P-0732 and P-0460, that P-1871 may be triggered by any interaction with the Court which would lead to reluctance in further cooperation with it. A reasonable diligent Prosecution would have ensured continued cooperation pending the First Rule 68(2)(b) Decision and could have requested certification of the statement earlier, i.e. in October 2020, when P-1871 confirmed being willing to certify her statement.

P-1779

19. P-1779 provided a signed statement to Prosecution investigators on [REDACTED] 2018.²² The Prosecution submits that its last contact with the witness dates from over two years ago.²³ While the Prosecution was able to obtain confirmation that P-1779 was willing to certify his statement during that conversation,²⁴ he also stated that he may be difficult to reach since he would be working in the [REDACTED].²⁵ Despite receiving this information, the Prosecution waited eight

¹⁹ CAR-OTP-2064-0884.

²⁰ Request, paras 64-65.

²¹ Request, para. 65.

²² CAR-OTP-2087-9894.

²³ Request, para. 34.

²⁴ Ibid., para. 37.

²⁵ Ibid.

months before trying to reach P-1779 again in [REDACTED] 2022 and [REDACTED] 2022.²⁶ After its attempts were unsuccessful, the Prosecution took no further action, and waited until the Chamber rendered the First Rule 68(2)(b) Decision to try to contact P-1779.²⁷ Despite being unsuccessful in reaching him, the Prosecution again decided to wait four months before engaging with an intermediary and sending an RFA to [REDACTED].²⁸ Given the witness's warning that he may be difficult to reach, the Prosecution should have begun engaging with third parties to locate witness P-1779 earlier than the last quarter of 2023, just before the close of its case. It was well within its control to do so, and yet, it chose not to. The Prosecution did so knowing already in December of 2022 that its inability to locate Witness P-1779 would be an issue for the certification of his statement were the Chamber to grant the Prosecution's request to introduce his testimony under Rule 68(2)(b).

20. As demonstrated above, for each of the witnesses the Prosecution did not show due diligence when it decided to not take concrete action to obtain continued cooperation from the Five Witnesses pending the Chamber's decision on their Rule 68(2)(b) applications. The Prosecution was always aware that the evidence of the Five Witnesses could not be introduced until it completed all the requirements of Rule 68(2)(b), which included the certification process. By not anticipating the need to preserve the Witnesses continued cooperation during the course of a trial the Prosecution knew or should have known would take years, the Prosecution did not act with due diligence.

21. The Chamber should not allow the Prosecution to construe Rule 68(2)(c) as a loophole to circumvent the strict requirements of Rule 68(2)(b). The Prosecution has not demonstrated that it was outside its control to keep regular contact with

²⁶ Ibid., para. 38.

²⁷ Ibid., para. 39.

²⁸ Ibid., paras 40-41.

its witnesses, especially with those it qualifies as indisputably vulnerable,²⁹ to secure the certification of their statement.

22. There is nothing that prevented the Prosecution from requesting to certify the statements when it was still in contact with the Five Witnesses. Indeed, on 6 May 2020, the Chamber rendered its “Decision on the Prosecution’s Request to Designate a Person authorized to Witness a Declaration under Rule 68(2)(b) of the Rules of Procedure and Evidence,” whereby it granted the Prosecution’s request to designate the Registry Senior Legal Adviser or anyone designated by him to witness declarations under Rule 68(2)(b), and it approved a standard declaration.³⁰ While it is standard practice to certify a prior recorded statement when the relevant chamber has ruled on the Rule 68(2)(b) request, Rule 68(2)(b)(ii) does not prohibit the certification of statements before a decision on a Rule 68(2)(b) request is rendered.³¹ Indeed, the Defence has begun the certification process in advance of the Chamber’s decisions on its Rule 68(2)(b) requests.³² The Prosecution could have pursued the same course of action, instead of waiting two years for the Chamber to render its decision.

23. Given that the Prosecution’s reasonable diligence in obtaining the certification of the prior recorded statements of the Five Witnesses was well within its control, the criteria of Regulation 35(2) have not been met, and the Chamber should reject the Prosecution’s request for an extension of time, and not address the merits of the Request.

²⁹ Ibid., paras 15, 57.

³⁰ ICC-01/14-01/18-508.

³¹ See also Appeals Chamber, *The Prosecutor v. Jean-Pierre Bemba Gombo et al.*, Decision concerning the Prosecutor’s request for introduction of two witness statements under rule 68 (2) (b) of the Rules of Procedure and Evidence, 2 October 2017, ICC-01/05-01/13-2234, para. 8; Trial Chamber X, *The Prosecutor v. Al Hassan*, Decision on the Defence’s request for variation of the time limit related to the accompanying declarations of Rule 68(2)(b) witnesses and the introduction into evidence of the prior recorded testimony of D-0002 and D-0146 pursuant to Rule 68(2)(c) of the Rules, 16 December 2022, ICC-01/12-01/18-2445-Red, para. 11.

³² Email Decision on Ngaïssona Defence Urgent Request for Certifications of Rule 68(2)(b) witness statements, dated 10 November 2023 at 5:56 pm.

B. In the extraordinary event that the Chamber were to entertain the merits of the Request, the Request should be rejected because the requirements of Rule 68(2)(c) are not met

24. As submitted above, the Request is untimely and constitutes an impermissible attempt to mitigate the consequences of the Prosecution's lack of due diligence in maintaining the cooperation of its Rule 68(2)(b) witnesses. However, in the extraordinary event the Chamber were to grant the Prosecution's request for an extension of time, the Request should be rejected on the merits for the following two reasons. First, none of the Five Witnesses are "unavailable" within the sense of Rule 68(2)(c). Second, even were the Chamber to consider that the witnesses were unavailable, the Prosecution could have anticipated the necessity of Article 56 measures.

25. In the *Prosecutor v. Al Hassan*, Trial Chamber X adjudicated a similar request to the one presented by the Prosecution in the instant case. In *Al Hassan*, the Defence was unable to certify the statements of two of its witnesses under Rule 68(2)(b) and requested for the witnesses statements to be introduced under Rule 68(2)(c).³³ In its "Decision on the Defence's request for variation of the time limit related to the accompanying declarations of Rule 68(2)(b) witnesses and the introduction into evidence of the prior recorded testimony of D-0002 and D-0146 pursuant to Rule 68(2)(c) of the Rules" ('*Al Hassan* Rule 68(2)(c) Decision'), Trial Chamber X found that Rule 68(2)(c) could not be reduced to a loophole to circumvent the procedural requirements under Rule 68(2)(b).³⁴ Further, the Chamber underscored that a witness's simple unwillingness to testify, or refusal to provide the declaration required under Rule 68(2)(b)(ii) is not sufficient to conclude a witness is unavailable under Rule 68(2)(c).³⁵

³³ ICC-01/12-01/18-2445-Red.

³⁴ Ibid, para. 22.

³⁵ Ibid., para. 23.

26. In the present case, four out of the Five witnesses have demonstrated a simple unwillingness to testify or are refusing to provide a declaration as required under Rule 68(2)(b). As recently as 27 July 2023, four months after the Chamber rendered its First Rule 68(2)(b) Decision, Witness P-0460 told the Prosecution she was unable to go through the formal certification process of her statement.³⁶ The witness's [REDACTED] reiterated that the witness and her family no longer wanted to discuss the events that unfolded in CAR.³⁷ Similarly, the other three witnesses whose testimony relates to alleged [REDACTED] conveyed their unwillingness to cooperate with the Prosecution.³⁸

27. With respect to Witness P-1779, the Prosecution has not sufficiently substantiated that he would be unavailable to testify under Rule 68(2)(c). The Prosecution's argument of unavailability is merely based on its numerous attempts to locate P-1779. In support of this claim the Prosecution relies on: (1) the numerous attempts to call P-1779 and [REDACTED],³⁹ (2) an intermediary P-1231 who was unable to locate P-1779,⁴⁰ (3) an RFA that was sent to [REDACTED] requesting the authorities to assist the Prosecution in locating the witness,⁴¹ and (4) staff members of the Prosecution in [REDACTED] who have engaged with local authorities in [REDACTED], [REDACTED] and [REDACTED].⁴² However, the Prosecution has given very little to no detail as to the nature of its engagement with the authorities in [REDACTED]. Therefore, neither the Defence nor the Chamber can assess whether the obstacles in locating the witness cannot be overcome by reasonable diligence. Engaging with the [REDACTED] authorities is crucial since according

³⁶ Request, para. 12.

³⁷ Ibid., para. 13.

³⁸ Ibid., paras 26 (stating that Witness P-0732 would have [REDACTED]), 54-55 (stating that Witness P-1864 [REDACTED] at the end of meeting with the Prosecution during the readback log, and subsequently refrained from further contact), 69 (stating that Witness P-0732 would have [REDACTED] upon hearing about the Prosecution's attempt to contact her).

³⁹ Ibid., paras 38-39.

⁴⁰ Ibid., para. 40.

⁴¹ Ibid., para. 41.

⁴² Ibid., paras 42-43.

to the last information received by the Prosecution from intermediary P-1231, Witness P-1779 would have left [REDACTED], and was last residing [REDACTED].⁴³ The Prosecution has not exhausted all potential sources of information regarding the location of Witness P-1779 such as trying to contact other family members or former neighbours of Witness P-1779 who may have further information about P-1779's whereabouts. The Defence submits that the Prosecution has failed to demonstrate that Witness P-1779 "is inaccessible or otherwise incapable of testifying, thus possibly indicating unavailability."⁴⁴

28. For the aforementioned reasons, the Prosecution has failed to satisfy the first prong of Rule 68(2)(c), namely that the Five witnesses are indeed unavailable. Therefore, the Defence respectfully requests the Chamber reject the Request on this basis.

29. In the event the Chamber were to find that the Five witnesses are unavailable, then the Request must similarly fail because the Prosecution is unable to satisfy the second prong of Rule 68(2)(c), which relates to Article 56 measures. For each of the Five Witnesses, Article 56 measures could have been anticipated. The Prosecution failed to do so thereby foreclosing any possibility to introduce the Five Witnesses' prior recorded testimony under Rule 68(2)(c). In the *Al Hassan* Rule 68(2)(c) Decision, Trial Chamber X rejected the Defence's Rule 68(2)(c) request with respect to one witness, but granted it with respect to another. Trial Chamber X rejected the Prosecution's argument that Article 56 measures could have been anticipated by the Defence for one of the witnesses since the Defence was aware that it would lose contact with the witness during its presentation of evidence.⁴⁵ In rejecting the Prosecution's argument, Trial Chamber X distinguished the duty of the Prosecution to utilize Article 56 measures from the right of the Defence to invoke

⁴³ Ibid., para. 40.

⁴⁴ ICC-01/14-01/18-2021, para. 13.

⁴⁵ ICC-01/12-01/18-2445-Red, para. 32.

it.⁴⁶ Therefore, the Defence was under no obligation to use such measures when it learned that it would lose contact with the witness, and thus the Chamber granted the Defence's request to introduce the prior recorded testimony under Rule 68(2)(c).

30. Here, the Prosecution argues that it could not have anticipated the need for Article 56 measures since all Five witnesses were not of a vulnerable age and did not appear to have any serious health issues.⁴⁷ While this may be true, the health and potential death of a witnesses are not the only scenarios for which Article 56 measures can be anticipated. This Rule 68(2)(c) requirement encompasses "*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".⁴⁸ As demonstrated above, the Prosecution did not exercise such due diligence in securing the certification of the Five witnesses prior recorded testimony. The same arguments regarding the lack of the Prosecution's diligence with regard regarding certification equally apply to the lack of diligence in the Prosecution assessing the need for measures under Article 56 of the Statute. In both instances, the arguments in support thereof relate to the Prosecution's failure to preserve the Five Witnesses' evidence. This is especially true with respect to the witnesses whose testimony relates to alleged [REDACTED]. In the *Prosecutor v. Ongwen*, the Prosecution applied to the Pre-Trial Chamber for measures under Article 56 for witnesses whose testimony related to [REDACTED].⁴⁹ In the instant case, the Prosecution could have foreseen that the [REDACTED] of such alleged crimes could lead vulnerable witnesses to cease cooperation since it could be a trigger for a strong negative emotional response.

⁴⁶ Ibid.

⁴⁷ Request, paras 18, 32, 47, 60, 74.

⁴⁸ ICC-01/14-01/18-1975, para. 31.

⁴⁹ See ICC-02/04-01/15-277-Red.

31. For Witness P-1779, whose testimony does not relate to [REDACTED], Article 56 measures could also have been anticipated since the witness relayed to the Prosecution that he may be hard to reach. Given the continued reigning insecurity of CAR,⁵⁰ the Prosecution should have anticipated that this evidence needed to be preserved since it was foreseeable that the Prosecution could lose contact with the witness.⁵¹ However, the Prosecution did not do so, and thus did not exercise due diligence by anticipating the need of Article 56 measures.

32. For the aforementioned reasons, the Defence submits that the Prosecution could have anticipated the need to request measures under Article 56 for the Five Witnesses. Since it did not, the Chamber should also reject the Request on this basis.

33. There is no basis on which the Prosecution should be allowed to introduce the evidence of the Five Witnesses. The request was made two months after the official close of the Prosecution's case during the Defence's presentation of evidence. Given the untimely nature of the Request, the Prosecution should have substantiated its arguments. However, the Prosecution has been unable to show both that: (1) its request for an extension of time to introduce evidence into the record is justified and (2) that the requirements of Rule 68(2)(c) are met.

VII. RELIEF SOUGHT

For the aforementioned reasons, the Defence respectfully requests the Chamber to:

- **REJECT** the Request.

Respectfully submitted,

⁵⁰ ICC-01/14-01/18-2239.

⁵¹ Request, para. 37.



Mr Knoops, Lead Counsel for Patrice-Edouard Ngaïssona

Dated this 30 July 2024

At The Hague, the Netherlands