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**International
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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 YEKATOM AND PATRICE-EDOUARD
NGAISSONA***

PUBLIC

Public Redacted Version of the “Ngaïssona Defence response to the ‘Prosecution’s submission pursuant to regulation 35 to vary the time limit and request for in-court protective measures for Prosecution Witness P-1577’ (ICC-01/14-01/18-843-Conf)”, 1 February 2021

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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I. INTRODUCTION

1. The Defence of Mr Ngaïssona ('the Defence') hereby presents its response to the "Prosecution's submission pursuant to regulation 35 to vary the time limit and request for in-court protective measures for Prosecution Witness P-1577" ('Prosecution's Request') dated 21 January 2021.¹
2. The Defence submits that: *first*, the Prosecution failed to present reasons outside its control that would justify an extension of time pursuant to Regulation 35(2) of the Regulations of the Court; *second*, the deterioration of the security situation in the Central African Republic ('CAR') was foreseeable even before the 7 December 2020 deadline; *third*, the current security situation in CAR does not amount to an objectively justifiable risk for Witness P-1577; and *fourth*, [REDACTED] is not a factor to be considered for in-court protective measures.

II. CONFIDENTIALITY

3. The present response is filed on a confidential basis pursuant to Regulation 23(1)*bis* of the Regulations of the Court (the 'Regulations') since it responds to a filing of a similar classification. The Defence will file a public redacted version as soon as possible.

III. PROCEDURAL HISTORY

4. On 26 August 2020, the Chamber adopted the "Initial Directions on the Conduct of the Proceedings", pursuant to which applications for in-court protective measures were due on 7 December 2020.²
5. On 7 December 2020, the Prosecution filled its *ex parte* application for in-court protective measures.³ On 18 December 2020, the confidential redacted version of

¹ ICC-01/14-01/18-843-Conf.

² ICC-01/14-01/18-631, paras 68-70.

³ ICC-01/14-01/18-757-Conf-Exp.

the aforementioned request was notified to the Defence. In its filing, the Prosecution requested in-court protective measures for 72 out of the 96 Prosecution witnesses who are scheduled to testify live.⁴

6. On 15 January 2021, the Defence submitted its response to the abovementioned request for in-court protective measures, arguing, *first*, that granting protective measures for 72 out of the 96 witnesses goes against Mr Ngaïssona's right to a public trial; and *second*, that the Prosecution has failed to demonstrate that the protective measures sought are necessary in light of an objectively justifiable risk.⁵
7. On 21 January 2021, the Prosecution filed its submission pursuant to Regulation 35 to vary the time limit and request for in-court protective measures for Prosecution Witness P-1577.⁶

IV. SUBMISSIONS

a. The Prosecution failed to present reasons outside its control.

8. Regulation 35 reads as follows:

"1. Applications to extend or reduce any time limit as prescribed in these Regulations or as ordered by the Chamber shall be made in writing or orally to the Chamber seized of the matter setting out the grounds on which the variation is sought.

2. The Chamber may extend or reduce a time limit if good cause is shown and, where appropriate, after having given the participants an opportunity to be heard. After the lapse of a time limit, an extension of time may only be granted 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".

9. From the text of Regulation 35(2), it is evident that depending on when the application for the extension is filed, different requirements must be fulfilled. If the

⁴ ICC-01/14-01/18-757-Conf-Red2.

⁵ ICC-01/14-01/18-827-Conf, para. 1.

⁶ ICC-01/14-01/18-843-Conf.

application for the extension is filed before the lapse of the time limit, then the requesting participant must show good cause. After the lapse of time, however, the circumstances under which the Chamber may extend the time limit pursuant to Regulation 35 are very limited; it may do so when the participant's inability to apply for an extension of time within the time limit was outside of his or her control. As held by the Appeals Chamber, the application of Regulation 35(2), last sentence, requires the existence of "exceptional circumstances". For example, illness and sequential inability to carry out one's duties or complete his/her work has been considered a cause outside one's control.⁷ On the contrary, reasons such as persistent shortage of resources or time consuming tasks cannot be considered as an 'exceptional circumstance'.⁸

10. Illustrative of the abovementioned distinction is the Trial Chamber's "Decision on Prosecution's request pursuant to Regulation 35 for an extension of time to submit evidence" in the *Ntaganda* case. In that case, the Prosecution filed its request for the variation of the deadline for admission of evidence in the afternoon of the original deadline, less than two hours before the filing deadline of 16:00, which resulted in the request being notified after the deadline. As such, the Defence could not respond to, and the Chamber could not assess and rule on, the Request prior to the lapse of the relevant time limit. Consequently, the Trial Chamber found that "[i]n these circumstances, the Prosecution should have demonstrated that it was unable to make its filing earlier, due to reasons outside its control".⁹ The Chamber further concluded that "the reasons underlying the Prosecution's failure to submit its

⁷ *The Prosecutor v. Thomas Lubanga Dyilo*, Reasons for the "Decision of the Appeals Chamber on the request of counsel to Mr Thomas Lubanga Dyilo for modification of the time limit pursuant to regulation 35 of the Regulations of the Court of 7 February 2007" issued on 16 February 2007, 21 February 2007, ICC-01/04-01/06-834, paras 9-10.

⁸ *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, "Decision on the 'Prosecution's Urgent Application to Be Permitted to Present as incriminating Evidence Transcripts and translations of Videos and Video DRC-OTP-1042-0006 pursuant to Regulation 35 and Request for Redactions (ICC-01/04-01/07-1260)", 27 July 2009, ICC-01/04-01/07-1336, para. 7.

⁹ *The Prosecutor v. Bosco Ntaganda*, Decision on Prosecution's request pursuant to Regulation 35 for an extension of time to submit evidence, 23 February 2017, ICC-01/04-02/06-1799, para. 4.

request significantly before the lapse of the deadline do not demonstrate good cause, nor would they qualify as exceptional circumstances or reasons outside the Prosecution's control".¹⁰ Such circumstances outside the Prosecution's control have not been shown. Besides, even if the Chamber were to exercise its discretion based on a case-by-case assessment, granting the Prosecution Request would not be in the interests of justice.¹¹

11. From all of the above, it is clear that circumstances beyond a participant's control must exist in order to be granted an extension of the time limit after a deadline has elapsed, which prevented the participant from submitting the application by the applicable deadline.

12. In the present case, the Prosecution has failed to show that such circumstances exist. According to the Prosecution, an extension of the time limit is justified "due to a substantial change in circumstances outside the Prosecution's control, which arose well after the 7 December 2020 time limit", namely "the serious deterioration of the security situation in CAR"¹². This change warrants, according to the Prosecution, "a variation to protect P-1577, as necessary and in accordance with the Prosecution's statutory obligations".¹³ As argued below, however, the Prosecution did not present circumstances outside of its control justifying an extension of time pursuant to Regulation 35(2).

b. The deterioration of the security situation in CAR was foreseeable even before the 7 December 2020 deadline.

¹⁰ Ibid, para. 5.

¹¹ Ibid, para. 6. In the *Ntaganda* case, the Chamber held that "even where the formal requirements of Regulation 35 are not met, the Chamber may assess whether it is in the interests of justice to grant the Request, by making a case-by-case assessment which balances the justification for the addition of new evidence against the potential prejudice which may be caused to the other party".

¹² ICC-01/14-01/18-843-Conf, para. 7.

¹³ Idem.

13. In its Request, the Prosecution argues that the recent political events in CAR, namely the 27 December 2020 presidential election, have led to a serious degradation of the security situation in the country.¹⁴ In the public redacted version of “Prosecution’s Request for in-court protective measures” the Prosecution requested such measures for 72 out of the 96 witnesses arguing that “[t]he attendant risks to the witnesses in this case are substantial, particularly in the context of the volatile and fluid security situation in the Central African Republic (‘CAR’) where rebel groups control a substantial part of the territory”.¹⁵ The Prosecution then further elaborated on the matter stating that

“9. Over the past few years, there has been no significant improvement to the security situation in CAR. As noted by the Registry: “the security situation in CAR has remained precarious throughout 2019 and the beginning of 2020.” The absence of strong state structures leave most of its territory insecure and prone to control by various rebel groups. The CAR authorities have recognised that 80% of the country’s territory is under the control of armed groups, including the Anti-Balaka”.¹⁶

14. In light of the above, it is evident that the Prosecution was aware of the fragile security situation in CAR well before the 7 December 2020 deadline. The further deterioration of the security situation, triggered by the presidential elections, could not have come as a surprise, as the elections have been scheduled since at least December 2018¹⁷ and increased tensions in CAR were anticipated by national and international observers.¹⁸

¹⁴ ICC-01/14-01/18-843-Conf, para. 8.

¹⁵ ICC-01/14-01/18-757-Red2, para. 4.

¹⁶ Ibid, para. 9.

¹⁷ UNSC, Res 2448 (15 December 2018) UN Doc S/RES/2448; see also Garda World, “CAR: Presidential election set for December 2020”, 14 July 2019, <https://www.garda.com/crisis24/news-alerts/248171/car-presidential-election-set-for-december-2020> (Last accessed: 01/02/2021).

¹⁸ CAR has doubled the size of its International Security Forces since 2014, which was considered an important milestone given the “crucial time as the country prepares for the impending 2020/2021 elections”, see MINUSCA, “Central African Internal Security Forces Boosted by Over 1,000 New Recruits”, 14 September 2020, <https://minusca.unmissions.org/en/central-african-internal-security-forces-boosted-over-1000-new-recruits> (Last accessed: 01/02/2021).

15. Furthermore, the Prosecution could have foreseen [REDACTED]. [REDACTED]. [REDACTED].¹⁹ What is more interesting is that, [REDACTED].²⁰ Evidently, the Prosecution could have expected that [REDACTED], hence should have included him in its initial application for in-court protective measures. The fact that [REDACTED] after the 7 December 2020 deadline on that matter does not amount to exceptional circumstances under Regulation 35(2) and does not justify the Request.

16. Consequently, the Prosecution could have clearly foreseen the inclusion of Witness P-1577 in its initial request for in-court protective measures. Such an oversight on the Prosecution's part cannot be remedied by submitting a request under Regulation 35(2), given the absence of circumstances outside the Prosecution's control.

c. The current security situation in CAR does not amount to an objectively justifiable risk for Witness P-1577.

17. According to the Prosecution's Request, the unpredictable and rapidly deteriorating security situation in CAR "may raise the witness's risk profile".²¹ As far as the specific circumstances of Witness P-1577 are concerned, the Prosecution argues that

"(...) as a [REDACTED]. His public cooperation with the Prosecution may thus affect (i) his security in CAR, in the context of the rising influence of the CPC coalition, of which the Anti-Balaka are part; as well as (ii) his ability to continue performing professional activities in CAR, since individuals in the field are likely to be more reluctant to interact with him".²²

18. The grounds put forth by the Prosecution are clearly of a very general, vague, and speculative nature. Even if the Chamber were to grant the Prosecution an extension

¹⁹ [REDACTED] .

²⁰ [REDACTED]. [REDACTED].

²¹ ICC-01/14-01/18-843-Conf, para. 2.

²² ICC-01/14-01/18-843-Conf, para. 13.

of time, and as a result, were to consider the application for in-court protective measures as it concerns Witness P-1577, it is submitted that the Prosecution has failed to identify any objectively identifiable risk. No additional or concrete information as to the manner in which the Witness is purportedly at risk, , by virtue of his cooperation with the Prosecution, has been provided, falling significantly short of the applicable standard for granting in-court protective measures. Mere references to the likelihood of Witness P-1577 working again in CAR and not being trusted by the locals due to his cooperation with the Prosecution, as well as the hypothetical security risks he might face do not amount to concrete grounds for granting in-court protective measures. Thus, the Prosecution's Request is unsubstantiated.

19. Similar arguments as the ones presented by the Prosecution in the request at hand, were put forth by the Prosecution in its request for in-court protective measures with respect to two freelance journalists (P-1819 and P-1558) and a private consultant for NGOs on issues and topics related to CAR (P-2926).²³ As argued by the Defence with respect to those two witnesses, potential loss of future professional opportunities is not a category protected under Article 68(1) of the Statute.²⁴ In addition to that, as stated by Trial Chamber I in *Gbagbo and Blé Goudé* “[a]ll witnesses before the Court are neutral and only expected to tell the truth, and appearing in public is part of the responsibility attached to the role”.²⁵ As a result, the Prosecution's request for in-court protective measures for Witness P-1577 lacks any basis and should be rejected.

d. [REDACTED] is not a factor to be considered for in-court protective measures.

²³ ICC-01/14-01/18-757-Red2, paras 35-39.

²⁴ ICC-01/14-01/18-827-Conf, para. 24.

²⁵ *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Transcript, 17 October 2016, ICC-02/11-01/15-T-86-Red-ENG, page 18, lns 13-14.

20. The Prosecution's Request also refers to Witness P-1577's [REDACTED], as ground justifying the granting of protective measures. The Prosecution argues that, given the violence and instability in CAR, [REDACTED]. The Prosecution further alleges that [REDACTED].²⁶ For these reasons, the Prosecution requests that, in addition to the use of a pseudonym, face distortion during testimony is necessary to prevent the dissemination of the video image of Witness P-1577 and [REDACTED].²⁷
21. The Defence submits that the Prosecution's arguments should be rejected for the following reasons. *First*, [REDACTED] are not protected under Article 68(1) of the Statute. [REDACTED] are even excluded from the scope of Article 68(5) of the Statute, which is the only provision [REDACTED]. [REDACTED]. If that was the case, then all witnesses would be granted in-court protective measures to prevent [REDACTED].
22. *Second*, [REDACTED].²⁸ [REDACTED].²⁹ The Defence submits that such a risk is of a speculative and hypothetical nature and cannot, in and of itself, justify granting of in-court protective measures for Witness P-1577. In the *Gbagbo and Blé Goudé* case, [REDACTED].³⁰ Côte d'Ivoire's security situation at the time was also unstable, as the Prosecution mentioned in its requests for in-court protective measures.
23. In conclusion, and based on the preceding analysis, the Prosecution's Request should be rejected.

V. RELIEF SOUGHT

In light of the above, the Defence respectfully requests the Chamber to

REJECT the Prosecution's Request.

²⁶ ICC-01/14-01/18-843-Conf, paras 14-15; ICC-01/14-01/18-843-Conf-Anx, pages 2-3.

²⁷ ICC-01/14-01/18-843-Conf, para. 16.

²⁸ ICC-01/14-01/18-843-Conf-Anx, page 2.

²⁹ ICC-01/14-01/18-843-Conf-Anx, page 2.

³⁰ [REDACTED]; [REDACTED]; [REDACTED]. *See* [REDACTED]; [REDACTED]; [REDACTED].

Respectfully submitted,

A handwritten signature in black ink, appearing to be a stylized 'N' or similar character.

Mr Knoop, Lead Counsel for Patrice-Edouard Ngaïssona

Dated this 12 February 2021

At The Hague, the Netherlands.