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**International
Criminal
Court**

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Date: **1 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
NGAISSONA***

PUBLIC

With Confidential Annex A

Urgent Joint Defence Motion for an Adjournment and for a Suspension of Deadlines

Source: Defence of Patrice-Edouard Ngaiissona and Defence of 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 Ngaïssona ('Ngaïssona Defence') and the Defence for Mr Yekatom ('Yekatom Defence') hereby request Trial Chamber V ('Chamber') to adjourn the hearings scheduled from 5 to 9 December 2022 and to suspend deadlines from 5 to 9 December 2022, pursuant to articles 21(3), 64(2) and 67(1) of the Rome Statute and regulation 35(2) of the Regulations of the Court ('Regulations'), in light of the strike announced by the Defence Support Staff ('Support Staff').
2. The request is classified as "urgent" given Witness P-0487 is scheduled to begin testimony on Monday, 5 December 2022.

II. Procedural history

3. The Defence is mindful of the fact that a courtroom is not the place to debate political issues. This is not the purpose of this request. Nor do Counsel intend to litigate the position of the Defence Support Staff. However, given the impact their position will have on Counsel's ability to effectively represent their respective clients during the hearings of 5 to 9 December 2022, and for a full and proper understanding of this request, the Defence provides the following background for contextual purposes.
4. The Legal Aid Policy ('LAP'), adopted during the 11th Session by the Assembly of States Parties ('ASP') in 2012, governs the Defence team members' salaries and status at the Court. Salaries have not been adjusted since 2013 and are therefore effectively decreasing each year, due to the absence of adjustment for inflation.¹ The LAP does not afford Defence Support Staff any form of paid parental leave, annual leave, or sick leave, or a right to enjoy Court holidays as

¹ The current inflation in The Netherlands is 14.5%.

non-working days. It provides no social benefits. In addition, the LAP does not provide any right to minimum pay or minimum hourly rates, nor an average number of working hours. It also does not afford basic employment protections against wrongful termination, including if Support Staff were to be fired for filing complaints or otherwise raising issues concerning harassment or improper conduct. The absence of work security and low salaries of Defence team members compared to their Prosecution counterparts have created a situation of fundamental inequality within the Court system.

5. The issues of Defence Support Staff working conditions have repeatedly been raised by Lead Counsel in Defence teams and Support Staff alike since the adoption of the LAP in 2013.²
6. More recent initiatives include a joint letter sent by several Defence Counsel on 7 July 2022 to the Registry, in the context of the reform of the Court's legal aid system, in which six Lead Counsel on active cases at the Court strongly endorsed and advocated for Support Staff to be placed on staff contracts and to be given equivalent employment protections as their Prosecution counterparts.³ The Defence teams participated in the consultation process for legal aid reform and have identified important shortcomings in the new LAP draft, which were communicated to the ASP committee on legal aid reform. For example: the option of making Support Staff formal staff of the Court, which would afford them the same basic protections as their Prosecution counterparts, was not maintained; the draft LAP fails to address the disparity in pay associated with the taxation issue; the resources envisaged in the draft LAP for Defence teams, based on the new "complexity" scheme, are grossly insufficient; there is no additional budget for paid internships within Defence

² This material can be provided to the Chamber upon request.

³ Joint letter from Lead Counsel for Mssrs. Al Hassan, Yekatom, Ngaïssona, Ntaganda, Ongwen and Abd-Al-Rahman, 7 July 2022.

teams; and the draft LAP fails to introduce a much needed “minimum living wage” for Support Staff. Significantly, the entry into force of any potential reform would perhaps be early 2025, at the very earliest, which fails to address the urgent need for an immediate remuneration adjustment, the resolution of the taxation issue, and work security for Defence Support Staff members.⁴

7. On 10 November 2022, Support Staff sent a letter to the Registry’s Counsel Support Section (‘CSS’) requesting to be remunerated in accordance with the principles agreed in the LAP. Support Staff requested, *inter alia*, the immediate adjustment on their net monthly salary, which is over 30% lower than that of their Prosecution counterparts; the immediate abolishment of the limit on their professional charges in relation to any tax paid on their salary; and the future adjustment of their salaries in accordance with the adjustment of their Prosecution counterparts’ salaries.⁵
8. In the absence of a response from CSS, Support Staff sent a second letter to CSS on 22 November 2022, notifying it of their intention “to publicize this situation within the ICC, to the general public, and to diplomatic representations which will soon convene for the ASP”. The letter further mentioned that “awareness-raising efforts regarding the situation of Defence support staff will take place both outside and inside the courtrooms”.⁶
9. On 22 November 2022, Support Staff of the Ngaïssona and Yekatom Defence teams sent a letter to the Chamber announcing that as of 23 November 2022, Defence members will be wearing a small symbolic ribbon on their robes, both inside and outside the courtroom, to raise awareness on the working conditions of Support Staff. In the same letter, it was underlined that “Defence support

⁴ See Confidential Annex A.

⁵ The Defence can provide this letter to the Chamber upon request.

⁶ The Defence can provide this letter to the Chamber upon request.

staff have no choice but to escalate their actions by engaging in various initiatives aimed at raising awareness and improving their working conditions”.⁷

10. On 24 November 2022, the Registry responded to the Support Staff letters and refused to increase the salaries, dismissing several urgent concerns raised. The Registry argued, *inter alia*, that “the ‘mirroring principle’ between members of the defence and victims’ teams and those of staff members of the Court (...) has been put aside by the States Parties since their decision to reduce the remunerations of team members in 2012”.⁸

11. On 28 November 2022, Support Staff from six Defence teams addressed a letter to the Court’s Registrar, announcing that they are left with no other choice “but to take various measures such as strikes, protests, and/or work stoppages from 5 to 9 December 2022” in order to be heard by the Registrar and ASP:

By the present letter it is with great regret and disappointment that we announce to you that you leave us with no other choice but to take various measures such as strikes, protests, and/or work stoppages from 5 to 9 December 2022, in order to be heard by yourself and the ASP. It is our sincerest hope that our demands, which have been communicated to the Court on several occasions, will be met before or during the ASP meeting. We truly hope that you will understand the seriousness and gravity of the situation, and we will keep taking actions of our choosing for as long as necessary.

Between 5 and 9 of December, each undersigned Defence Support Staff will engage and these actions will take different forms. The work stoppages might result in the absence of the Defence Support Staff from the courtroom during any hearings scheduled that week; protests will include demonstrations before the ASP and/or the Court; and other actions include raising public awareness, including speaking with the press, about the reality of Defence working conditions.

We wish it were the case that this institution had been responsive to our prior concerns regarding human and labour rights claims and requests to ensure a fair workplace. The actions we will take seem to be the only ones which might bring the ASP and the Registry to take these issues seriously. It is regrettable that it has come to this; however, we hope that an institution whose core values are the safeguarding of human rights will take

⁷ Email from the Support Staff of the Yekatom and Ngaïssona Defence teams, 22 November 2022, at 16:57.

⁸ The Defence can provide this letter to the Chamber upon request.

seriously a situation which has affected the most basic rights of those vital to its continued functioning.⁹

12. On 30 November 2022, the Registry held a meeting “to address the concerns raised by defence and victims’ team members regarding their working conditions and to have an exchange between the Registry and said team members on this matter”. The Registry clearly stated that although Court staff had received a salary increase of 8% to conform with the United Nations Common System requirements, and that another 5% salary increase for Court staff was expected in March 2023, no concrete proposal to address the cost of inflation was made for the Defence team members, nor were any such measures presented in the Budget; and no such proposal would be made by the Registry at the upcoming ASP. In other words, the Registry made it clear that no action would be taken on the part of the Registry at the upcoming ASP to convince the States Parties to address this urgent matter; nor did the Registry provide any alternative meaningful solution in this regard.

III. Submissions

a. The essential role of Support Staff in trial proceedings requires an adjournment of the hearings scheduled from 5 to 9 December 2022 and a suspension of deadlines from 5 to 9 December 2022

13. Defence Counsel’s ability to effectively prepare for and participate in the hearings of the testimony of the witness scheduled for the week of 5 to 9 December 2022 will be gravely undermined in the absence of Support Staff, endangering the effectiveness of representation of their clients. Therefore, the Defence requests an adjournment of the hearings to ensure the integrity and

⁹ Confidential Annex A, pages 2-3.

fairness of the proceedings, including the effectiveness of the examination of the witness by Counsel.

14. Support Staff are the backbone of the Defence.¹⁰ They contribute legal expertise and technological and analytical skills, as well as institutional knowledge of a case, which has been built up over time. The ability of the Defence to retain qualified and motivated support staff is essential to the expeditious and efficient preparation of the Defence, as evidenced by the very terms of regulation 83 of the Regulations of the Court.¹¹ Support Staff are crucial participants in every hearing before the Chamber. As acknowledged by the Chamber on several occasions, Support Staff are vital in assisting Counsel during the examination and cross-examination of witnesses.¹² For instance, they conduct extensive legal and factual research prior and during the hearings; assist in the preparation and analysis of the materials used by all Parties during proceedings; assist Counsel in quickly finding references in the courtroom; raise vital interpretation issues; prepare and effectuate disclosures; liaise with the client and attend to client's questions and concerns; and otherwise attend to a multitude of issues which arise and which require immediate assistance. Where they are afforded rights of audience, Support Staff also assist by examining witnesses and making submissions before the Chamber, thereby sharing the burden that lengthy Prosecution witness lists pose on limited Defence team resources. Given this essential role, Counsel cannot effectively

¹⁰ See ICC-01/14-01/18-T-178-CONF-ENG RT 23-11-2022, pages 7-10.

¹¹ Regulation 83 paragraph 1 of the Regulations of the Court: "Legal assistance paid by the Court shall cover all costs reasonably necessary as determined by the Registrar for an effective and efficient defence, including the remuneration of counsel, his or her assistants as referred to in regulation 68 and staff (...)"

¹² See for example ICC-01/14-01/18-T-038-Conf-ENG ET 31-05-2021, page 88, ln. 11; ICC-01/14-01/18-T-062-Conf-ENG ET 02-09-2021, page 4, ln. 14; ICC-01/14-01/18-T-066-Conf-ENG ET 29-09-2021, page 69, lns 22-23; ICC-01/14-01/18-T-038-Conf-ENG ET 31-05-2021, page 88, ln. 11 ; ICC-01/14-01/18-T-135-Conf-ENG ET 21-06-2022, page 69, ln. 17 ; ICC-01/14-01/18-T-136-Conf-ENG ET 22-06-2022, page 27, ln. 5 ; ICC-01/14-01/18-T-028-Conf-ENG ET 30-04-2021, page 54, lns 17-21 and page 64, lns 10-15 ; ICC-01/14-01/18-T-169-Conf-ENG ET 26-10-2022, page 43, ln. 21-23 ; ICC-01/14-01/18-T-143-Conf-ENG ET 13-07-2022, page 35, lns 16-25 to page 36, lns 1-3.

represent their clients, without their valuable assistance inside and outside the courtroom.

15. In addition, and for this reason, a suspension of deadlines covering the timeframe of the strike is also necessary pursuant to regulation 35(2) of the Regulations. Given the exceptional circumstances of the announced strike, good cause has been shown for requesting a limited five-day variation of the time limits of filings whose deadlines expire between 5 and 9 December 2022.

b. Lead Counsel cannot compel Support Staff to assist during the hearings of 5 to 9 December 2022 in light of their internationally recognised right to strike

16. Notwithstanding Counsel's support of the Support Staff's strike, Counsel may not compel the attendance of Support Staff during the hearings scheduled from 5 to 9 December 2022 in light of their internationally recognised right to strike.

17. *First*, article 21(3) of the Rome Statute requires the Trial Chamber to interpret its legal framework in compliance with human rights, which includes the right to freedom of assembly and striking.

18. *Second*, article 8, paragraph 1(d) of the International Covenant on Economic, Social and Cultural Rights ('ICESCR') stipulates that "[t]he States Parties to the Present Covenant undertake to ensure (...) [t]he right to strike, provided that it is exercised in conformity with the laws of the particular country". According to the Committee on Economic, Social and Cultural Rights, national laws should guarantee the right of 'everyone' to strike, subject to the permissible categories of restriction under article 8, paragraph 2 of the ICESCR. While certain procedural and substantive restrictions may be imposed on the right to strike, such restrictions must not go beyond what is necessary to secure

legitimate aims. Moreover, workers and unions must enjoy legal protection for taking part in legitimate strikes.¹³

19. *Third*, the Committee on Freedom of Association of the International Labour Organisation ('Committee') declared strike action to be a right, and recognised the right to strike to be one of the principal means by which workers and their associations may legitimately promote and defend their economic and social interests.¹⁴ Furthermore, the Committee has recognised that strike action is a right to which workers and their organizations (trade unions, federations and confederations) are entitled, and not simply a social act. The exercise of the right to strike is linked to the objective of promoting and defending the economic and social interests of workers. In addition, the Committee stated that the legitimate exercise of the right to strike should not entail prejudicial penalties of any sort, which would imply acts of anti-union discrimination. The Committee further reduced the number of categories of workers who may be deprived of this right, as well as the legal restrictions on its exercise, which should not be excessive.¹⁵

20. *Fourth*, while not expressly mentioned in article 11 of the European Convention on Human Rights ('ECHR'), the European Court of Human Rights ('ECtHR') found that restrictions on the right to strike which were not sufficiently justified were in conflict with international recognised labour laws.¹⁶

¹³ The International Covenant on Economic Social and Cultural rights includes provisions providing inter alia for "equal remuneration for work of equal value without distinction of any kind", "Safe and healthy working conditions", "Rest, leisure and reasonable limitation of working hours and periodic holidays with pay", and paid maternity leave. ICECSR, Articles 7(a)(i), 7(b), 7(d) and 10(2).

¹⁴ ILO, Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO, Fourth (revised) edition, 1996, paras 473-475.

¹⁵ Bernard Gernigon, Alberto Otero and Horacio Guido, ILO Principles Concerning the Right to Strike, (International Labour Office, 2000), page 11.

¹⁶ ECtHR, *Ognevenko v. Russia*, Application no. 44873/09, 06 May 2019.

21. *Fifth*, both article 28 of the Charter of Fundamental Rights of the European Union¹⁷ and article 6 of the European Social Charter¹⁸ enshrine the right to strike as a means to ensure the effective exercise of the right to bargain collectively. The rights to collective action, including the right to strike, were recognised by the European Court of Justice as a fundamental right and an integral part of the general principles of European Union law.¹⁹
22. *Sixth*, the right to strike is recognised and protected in national legislation as well. In 18 of 27 European Union member states, the right to strike is a constitutional right,²⁰ while in the remaining eight member states it is recognised either by law or by case law.²¹ Similarly, the right to strike is recognised by law in the United Kingdom and in Iceland.
23. The rules governing industrial action in the Host State have been developed by case law. In 1986 the Supreme Court of The Netherlands ruled that article 6, paragraph 4 of the European Social Charter, i.e. the right to engage in collective bargaining and to take collective action, is directly applicable within the jurisdiction of the Netherlands, thereby recognising a right to strike for workers. Industrial action may be embarked upon only as a last resort and there

¹⁷ Article 28 of the Charter of Fundamental Rights of the European Union: “Workers and employers, or their respective organisations have, in accordance with Union law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interests, to take collective action to defend their interests, including strike action”.

¹⁸ Article 6 of the European Social Charter: “1. With a view to ensuring the effective exercise of the right to bargain collectively, the Contracting Parties undertake: [...] (4) the right of workers and employers to collective action in cases of conflict of interest, including the right to strike, subject to obligations that might arise out of collective agreements previously entered into”.

¹⁹ Case C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avd. 1, Byggettan, Svenska Elektrikerförbundet* [2007] ECR I-11845, para. 91.

²⁰ These member states are: Bulgaria, Croatia, Cyprus, Denmark, Estonia, France, Greece, Hungary, Italy, Latvia, Lithuania, Poland, Portugal, Romania, Slovakia, Slovenia Spain and Sweden, see Wiebke Warneck, *Strike rules in the EU27 and beyond – A comparative overview* (European Trade Union Institute for Research, Education and Health and Safety, 2007), page 7.

²¹ In the Czech Republic, Finland, and Malta the right to strike is recognised by law, while in Belgium, Germany, Luxembourg and the Netherlands it is recognised by case law. Iceland recognises the right to strike both in law and in case law, see Wiebke Warneck, *Strike rules in the EU27 and beyond – A comparative overview* (European Trade Union Institute for Research, Education and Health and Safety, 2007), page 7.

exist no exact deadlines for notice or rules on its content, albeit some general procedures are nonetheless to be observed. It is assumed that employers will receive a detailed list of the demands and a time limit for giving their consent before action is embarked upon.²²

24. While the Support Staff are not bound by the laws of a specific State, those criteria have been met in this case. Support Staff have exhausted all avenues in terms of participating in consultation processes, holding meetings with the Registry,²³ and raising the issue before the Chambers²⁴ and before diplomatic entities for years, with no concrete changes having been provided. Despite having submitted their comments on successive draft LAPs for years, including the 2022 draft LAP, it appears that few if any concrete commitments have been made. Indeed, Defence Counsel understand from the Registrar's comments in the 30 November 2022 meeting, that the latest draft LAP does not yet take into account the feedback provided by the Defence teams. The Registrar's letter of 29 November 2022 further suggests that the draft LAP which was circulated and commented upon by the Defence teams will not even be presented in 2022 at the ASP.²⁵ Support Staff individually and collectively have waited patiently, engaged in good faith, and were open for dialogue and negotiations with the Registry for nearly a decade. Faced with the Registry's rigid position on numerous matters and their repeated efforts to avoid addressing the Support

²² Wiebke Warneck, *Strike rules in the EU27 and beyond – A comparative overview* (European Trade Union Institute for Research, Education and Health and Safety, 2007), pages 52-53.

²³ A meeting was convened by the Registry on 30 November 2022, at 13:00, inviting the external defence and victims' teams "to address the concerns raised by defence and victims' team members regarding their working conditions and to have an exchange between the Registry and said team members on this matter".

²⁴ Eg. *The Prosecutor v. Bemba et al*, Decision on Bemba Defence Request regarding the Employment Conditions of Defence Staff, ICC-01/05-01/13-2301, 17 July 2018, paras 4, 5 and 8; ICC-01/14-01/18-T-178-CONF-ENG RT 23-11-2022, pages 7-10.

²⁵ "Indeed, the Registry intends to finalise next year the details of the Reform Proposal, including the introduction of a new legal framework for working relationships between the Court and defence and victims' team members. The Registry aims at seeking an approval of the legal aid reform by the ASP at the end of 2023. While some important progress in the required reform of the legal aid system has been made during this year, I acknowledge that the reform process is still ongoing.", Letter from the Registrar to the Defence teams, 29 November 2022, Ref: 2022/IOR/00206.

Staff's lawful demands as a matter of urgency by deflecting responsibility to the ASP, Support Staff's decision to strike is one of last resort. Clear demands were formulated and communicated to the Registry and notice was given. Support Staff thus have taken all necessary steps to ensure that their actions comply with Dutch law.

IV. Conclusion

25. The request for an adjournment pursuant to the principles as set forth by article 64(2), read together with articles 21(3) and 67(1) of the Rome Statute, is justified in light of the above circumstances. As demonstrated above, Counsels would not be able to effectively represent Messrs Ngaissona and Yekatom during the hearings of the week of 5 December 2022 while their Support Staff are on strike, given the critical role played by Support Staff inside and outside the courtroom. The very reason the current system provides assistance to Counsel by assigning Defence Support Staff is to ensure that Counsel are afforded the time and resources needed to effectively represent an accused, pursuant to their statutory rights. In this regard, Defence Counsel are no different than Judges or Prosecutors, as they cannot conduct their work in these very complex proceedings without their Support Staff by their side.

26. More importantly, Counsel recalls that this issue is the full and sole responsibility of the Registry, which has failed to effectively and meaningfully address it over a period of years. In 2018, the Registry indicated that it was hopeful that LAP reform would come into effect as of January 2020.²⁶ In 2020, an Independent Expert Review stated that LAP reform was a matter that needed 'to be urgently addressed'.²⁷ Nearly three years later, the Registry has

²⁶ Transcript of Consultation Meeting on Legal Aid Policy, 3 December 2018, p. 5; transcript available on request.

²⁷ Independent Expert Review of the International Criminal Court and the Rome Statute System Final Report, 30 September 2020, para. 821; available at https://asp.icc-cpi.int/sites/asp/files/asp_docs/ASP19/IER-Final-Report-ENG.pdf.

indicated that nothing will be done to address the issue this year, and that nothing can be done, as it is the responsibility of the ASP. In such circumstances, the Registry's responsibility cannot be deflected onto Counsel. The Registry notably stated during the 30 November meeting, and in the 24 November letter, that Defence Support Staff could simply leave if they were not satisfied with their current conditions; or that they could seek to exercise other remunerated activities or cases – despite the fact that Defence Support Staff regularly work overtime in their current positions. Such statements on the part of the Registry are certainly not constructive, and exacerbate the current situation.

27. Therefore, Counsel are facing the unfortunate consequences of the Registry's failure to address the matter. Given that the Registry deflects its responsibility onto the ASP, Defence Support staff should not be blamed for collectively seeking to confronting the Registry and the ASP at the 21st ASP; nor should Counsel be held responsible for their decision to exercise their right to do so.
28. Further, Counsel cannot and will not force their Support Staff to work and assist during court hearings from 5 to 9 December 2022 as this would violate their internationally recognised right to strike. Mr Ngaïssona and Mr Yekatom are aware of the situation.
29. Consequently, the Ngaïssona and Yekatom Defence submit the adjournment of the hearing is justified to properly balance both the fair trial rights of Mr Ngaïssona and Mr Yekatom and the Support Staff's right to strike. The adjournment request is limited in scope, and would not seriously impair the celerity of the proceedings, as it will cover the five days of strike announced by Support Staff.²⁸

²⁸ Confidential Annex A.

V. Relief Sought

30. The Ngaissona and Yekatom Defence respectfully requests the Chamber to ADJOURN the hearings scheduled from 5 to 9 December 2022 and GRANT a suspension of deadlines for all filings whose deadline expires between 5 and 9 December 2022.

Respectfully submitted,



Mr Knoop, Lead Counsel for Patrice-
Edouard Ngaissona

Ms Mylène Dimitri, Lead Counsel for
Alfred Rombhot Yekatom

Dated this 1 December 2022,

At The Hague, the Netherlands