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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 *PROSECUTOR v. ALFRED YEKATOM AND PATRICE-
EDOUARD NGAÏSSONA***

Public

**Prosecution's Request pursuant to Regulation 35 to vary the Time Limit for the
Submission of Applications pursuant to Rule 68**

Source: Office of the Prosecutor

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

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I. INTRODUCTION

1. The Office of the Prosecutor (“Prosecution”) requests an extension of time under regulation 35 of the Regulations of the Court (“RoC”) regarding Trial Chamber V’s 26 August 2020 order to submit all applications under rule 68(2) and (3) of the Rules of Procedure and Evidence (“Rules”) by 9 November 2020.¹ The Prosecution requests that the Chamber set staggered deadlines allowing for the submission of these applications on a rolling basis, such that rule 68(2) applications may be submitted up until 60 days after the scheduled start of evidence, and rule 68(3) applications may be submitted not less than 45 days before the scheduled start of the witness’s testimony. The requested extension is justified in the circumstances and supported by good cause. Further, granting the Request would not unfairly prejudice the Defence.

II. SUBMISSIONS

A. The Requested Extension is justified

2. Regulation 35(2) of the Regulations of the Court (“RoC”), permits a Chamber to extend a time limit “if good cause is shown”. The Appeals Chamber has held that:

“[s]uch reasons as may found a good cause are necessarily associated with a party’s duties and obligations in the judicial process. A cause is good if founded upon reasons associated with a person’s capacity to conform to the applicable procedural rule or regulation or the directions of the Court. Incapability to do so must be for sound reasons, such as would objectively provide justification for the inability of a party to comply with his/her obligations.”²

¹ ICC-01/14-01/18-631, para. 33 (“26 August 2020 Order”).

² ICC-01/04-01/06-834OA, para. 7.

3. Initially, it is important to note that the 26 August 2020 Order was issued only days before the Prosecution was due to provide its Provisional Witness List indicating, *inter alia* the selected modes of witness testimony, as previously ordered.³ Moreover, although the Prosecution had foreshadowed its intention to rely extensively on rule 68 in presenting its case,⁴ the Chamber did not have at its disposal the precise contours of the Prosecution's approach when issuing the 26 August 2020 Order, which may have been dispositive.

4. In any case, in view of the Prosecution's approach to streamlining the presentation of its case taking into account its particular nature and the unprecedented and prevailing surrounding circumstances, modifying the applicable deadline as requested is justified, and will ultimately advance the expeditious conduct of the proceedings.⁵

i. The circumstances of the case are without precedent at the Court

5. Among the handful of multi-accused cases to proceed to trial at the Court, the case against YEKATOM and NGAISSONA is the only one involving 51 confirmed charges under articles 7 and 8, concerning some 31 crimes.

6. As the Confirmation Decision details, the case involves a matrix of crimes committed by and through a network comprising an organised armed group committed over a vast expanse of territory, during a period lasting over a year. It is a heavily witness-based case and foresees the calling of around 145 fact witnesses.⁶ As such, notwithstanding its partial confirmation, the case remains among the largest prosecuted at the Court.

³ ICC-01/14-01/18-589, paras. 4-6 (see paragraph 4, item ii).

⁴ ICC-01/14-01/18-474-Red2, para. 19; *see also* ICC-01/14-01/18-553, para. 6,

⁵ ICC-01/05-01/13-1478-Red-Corr, 12 November 2015, para. 31 (noting, "the drafting history of the amended Rule 68 which indicates that the amendment was borne out of a need to give the chambers of the Court 'more discretion [...] in order to expedite proceedings' [...].")

⁶ These include 44 witnesses pursuant to rule 68(2) of the Rules of Procedure and Evidence ("Rules"); 77 pursuant to rule 68(3) and 24 fully *viva voce*. Four witnesses are not listed by name in Confidential Annex A, as security measures have not yet been implemented.

7. Given the unprecedented number of witnesses, the Prosecution has taken an approach which aims to ensure that the proceedings can be conducted effectively and expeditiously. It therefore intends to call 44 witnesses pursuant to rule 68(2), and 77 pursuant to rule 68(3).

8. As detailed in its Observations regarding its use of rule 68(3) in these proceedings, the Prosecution's approach accommodates the deleterious impact that the prevailing COVID-19 pandemic and budgetary and resource constraints have unsurprisingly had on its trial preparations,⁷ and will significantly expedite the conduct of proceedings without causing undue prejudice.

ii. Rule 68 Applications are numerous

9. As it stands, the 26 August 2020 Order requires the Prosecution to complete and file rule 68(2) and (3) applications for at least 121 witnesses by 9 November 2020. On the date of issuance, it thus provided 53 working days for the Prosecution to complete this exercise.

10. The 26 August 2020 Order also adds to the substantial pre-existing 9 November 2020 deadlines for the Prosecution to complete all remaining disclosure, file a 'Final Witness List', and submit a Trial Brief.⁸ The Prosecution considers that the standing deadlines do not sufficiently reflect the unique circumstances of this case.⁹ Further, given its limited resources, the Prosecution cannot reasonably meet these onerous demands.

11. However, the Request proposes a reasonable and viable alternative that has been implemented in similar circumstances without serious detriment to the interests of the Defence.

⁷ See ICC-01/14-01/18-488-Conf, paras. 5-9.

⁸ See ICC-01/14-01/18-589, paras. 14-15.

⁹ For instance, in respect of the timing of a Trial Brief, it is notable that the Defence has already received a Document Containing the Charges of 249 pages, together with several annexes; a lengthy Confirmation Decision, exceeding 100 pages; as well as several submissions regarding the nature of the case in various filings.

iii. Prosecution resources are limited

12. The Prosecution is in the process of completing its review and disclosure regarding its substantial evidence collection.¹⁰ It is also in the process of preparing its Trial Brief as directed by the Chamber and, as previously noted, continues to review and refine its list of witnesses.¹¹ Beyond these substantial and labour-intensive exercises on which its limited resources have been appropriately focussed, the Prosecution lacks the capacity to complete rule 68 applications for all relevant witnesses by 9 November 2020.

13. The Prosecution's resource constraints are well recognised. They have (and will have) a real world impact on practical issues arising during the course of the proceedings. Neither the Parties and Participants, nor the Chamber are immune to similar constraints in this case. However, this does not mean that the ultimate trial objectives are unachievable, but rather a different approach must be employed. For this reason the Prosecution requested the Chamber's staggering of deadlines on 9 July 2020 in contemplation of the prospective presentation of its case¹² and the Parties' preparedness.

14. To be effective, rule 68 applications require a careful assessment of the portions of the underlying statements to be introduced and/or excluded, as well as their associated exhibits.¹³ As a Chamber's determinations require a "case by case assessment",¹⁴ corresponding applications must be tailored to address the relevant factors¹⁵ which may appropriately be considered. This may extend to the particularities of a given case. What is important is that a Chamber is provided with

¹⁰ ICC-01/14-01/18-474-Red2, para. 23 (noting that the CAR II evidence collection is among the Court's largest historically).

¹¹ ICC-01/14-01/18-642-Conf, para. 5; *see also*, ICC-01/14-01/18-553, para. 14.

¹² *See* ICC-01/14-01/18-T-012-ENG ET, p. 23, ln. 17 - p. 24, ln. 6; *see also* ICC-01/14-01/18-589, para. 5.

¹³ ICC-02/04-01/15-596-Red, para. 10 (noting that 'prior recorded testimony' [...] also includes any annex to the witness's statement"); *see* ICC-01/04-02/06-1205, para. 7; *see also* ICC-01/09-01/11-1938-Corr-Red2, para. 33.

¹⁴ ICC-02/04-01/15-621, para. 7.

¹⁵ *See* ICC-02/04-01/15-621, para. 7.

a sufficient basis to carry out the “cautious item-by-item analysis” required of the factors which “may vary per case and per witness”.¹⁶ The time necessary to file meaningful applications in this respect is indispensable. Moreover, it allows the Prosecution to more accurately gauge and refine the amount of time required to lead pertinent evidence at trial, particularly in respect of the use of rule 68(3), but also to ensure that essential evidence is identified and put before the Chamber.¹⁷ Both substantially benefit the overall fairness and efficiency of the proceedings.¹⁸

15. By contrast, generalised applications (though perhaps more achievable in a shorter period) risk insufficient substantiation of the relevant decisional factors. This would defeat the underlying central purpose of the rule — namely, to advance “the saving of time and the expeditious conduct of the proceedings.”¹⁹ Allowing the Prosecution an extension to frame cogent applications will promote the efficacy of its approach and the expedition of the trial over the longer term.

B. Absence of prejudice

i. Granting the Request would not cause unfair prejudice

16. The Prosecution’s use of rule 68(3) is not new at the Court, although the extent to which it intends to rely on it in this case may be novel. Nevertheless, the Prosecution’s approach in this case has not only been advocated in other international courts and tribunals with procedures similar to rule 68,²⁰ but repeatedly and successfully implemented, especially in multi-accused cases.

¹⁶ See ICC-02/11-01/15-744, para. 69.

¹⁷ See ICC-01/09-01/11-1938-Corr-Red2, para. 37 (noting that, “evidence of sufficient specificity and probative value must be provided”).

¹⁸ For instance, the accuracy of these assessments directly affects logistical arrangements regarding the order of witnesses and their production for trial.

¹⁹ ICC-01/05-01/13-1478-Red-Corr, para. 51.

²⁰ See *e.g.*, Rule 92*bis* and Rule 92*ter* of the Rules of Procedure and Evidence of the Special Court of Sierra Leone, Amended on 31 May 2012; see also See Rule 92*bis* and Rule 92*ter* of the Rules of Procedure and Evidence of the International Criminal Tribunal for the Former Yugoslavia (“ICTY Rules”), IT/32/Rev.50 8 July 2015.

17. As has been demonstrated in other international courts, extensive reliance on rule 68 at trial is achievable consistently with an accused's competing fair trial rights.²¹ Importantly, this mechanism can effectively reduce court time and expedite the proceedings and conducive to good trial management,²² while allowing the Chamber to receive a fuller presentation of evidence reflecting the gravity, scope and seriousness of the charges, the attendant destruction and victimisation, and an appreciation of the historical context. Undoubtedly, this serves to advance the Chamber's capacity to discharge its duty to establish the truth regarding the crimes at issue, the harm caused, and the nature and extent of the Accused's criminal responsibility.

18. While the Chamber's discretion is broad and must be exercised in view of the peculiarities of the given case and circumstances,²³ it bears noting that the statutory framework establishes no hard or fixed notice period for rule 68 applications. Thus, in other cases, involving substantially fewer witnesses than projected in this case, Trial Chambers have linked the timing of rule 68(3) applications in particular to the scheduled appearances of witnesses.

19. In the *Ruto and Sang* case, Trial Chamber V(a) determined that, "[w]hen a party wishes to introduce prior recorded testimony in accordance with Rule 68(b) of the Rules [now rule 68(3)], it shall file an application to that effect at least 21 days before the witness is scheduled to appear."²⁴ Trial Chamber I ordered the same 21 day timeline in the *Gbagbo* case for Rule 68 applications.²⁵ Similarly, in the *Ntaganda* case, Trial

²¹ See e.g., *Prosecutor v. Karadzic*, Case No. MICT-13-55-A, Judgement, 20 March 2019, para. 137 (noting the admission of 124 witnesses pursuant to ICTY Rule 92bis), see also para. 153; see e.g., *Prosecutor v. Mladic*, Case No.IT-09-92-T, Prosecution Witness Information, 11 October 2013 (referencing 128 witnesses pursuant to ICTY Rule 92ter, https://www.icty.org/x/cases/mladic/custom11/en/mladic_otp_witness_info.pdf, of the 141 expected to testify pursuant to this mode, see also *Prosecutor v. Mladic*, Case No.IT-09-92-T, Transcript of Proceedings, 23 February 2012, p. 186, lns. 15-16.

²² See ICC-02/11-01/15-744, paras. 61-62.

²³ See ICC-02/11-01/15-744, para. 69.

²⁴ ICC-01/09-01/11-847-Corr, para. 21; see also, ICC-01/14-01/18-476-AnxA (as proposed in this case). This was not opposed by the Yekatom Defence, or the Ngaissona Defence (see see ICC-01/14-01/18-521-AnxA, para. 67.

²⁵ ICC-02/11-01/15-205, para. 55.

Chamber VI required that such applications be submitted “at the earliest opportunity, but no later than four weeks before the relevant witness is scheduled to testify (‘Rule 68(3) Application’)”.²⁶ In the *Al Hassan* case, Trial Chamber X ordered a sequence of rule 68(3) applications: those for witnesses to be called before the end of the calendar year were due in June 2020;²⁷ and all remaining rule 68(3) applications due by 30 November 2020.²⁸

20. Similarly, in the *Mladic* and *Karadzic* cases at the International Criminal Tribunal for the Former Yugoslavia (“ICTY”) — which relied extensively on prior witness statements — the timing of ICTY Rule 92*ter* applications was linked to the witness’s scheduled appearance. In the *Mladic* case for instance, such applications were required to be made as soon as possible, but not less than 30 days before the witness’s appearance.²⁹ The *Karadzic* case also adopted a similarly flexible approach, if not significantly more onerous one,³⁰ without prejudicing the Defence’s rights. In both cases the Prosecution was permitted to file applications under ICTY Rule 92*bis* on a rolling basis.³¹

21. It is also worth noting that, in the *Al Hassan* case, the Prosecution was instructed to file rule 68(2) applications “as soon as possible and no later than by the end of the year 2020”.³² At the time the order was issued, the trial was scheduled to commence on 14 July 2020. Likewise Trial Chamber VI directed that the Parties,

²⁶ ICC-01/04-02/06-619, para. 41 (emphasis added).

²⁷ ICC-01/12-01/18-789-AnxA, para. 63 (bearing in mind final Prosecution witness list deadline of 14 April 2020).

²⁸ ICC-01/12-01/18-1004, para. 21.

²⁹ *Prosecutor v. Mladic*, Case No.IT-09-92-T, Transcript of Proceedings, 19 January 2012, p. 157, Ins. 3-7; *see also, Prosecutor v. Mladic*, Case No.IT-09-92-T, Transcript of Proceedings, 10 November 2011, p. 107, Ins. 10-12.

³⁰ *See e.g., Prosecutor v. Karadzic*, Case No. IT -95-5/18-PT, Order on the Procedure for the Conduct of Trial, 8 October 2009, p. 6, (paragraph L, providing for 48 hours’ notice to the opposing party of proposed rule 92*ter* amalgamated statements).

³¹ *See Prosecutor v. Mladic*, Case No.IT-09-92-T, Transcript of Proceedings, 10 November 2011, p. 108, Ins. 16-24 (staggering the Prosecution’s submission of applications under ICTY Rule 92*bis* of the commencing one week after the Prosecution’s filing of its final witness list); *cf. Prosecutor v. Karadzic*, Case No. MICT-13-55-A, Judgement, 20 March 2019, para. 134 (staggering the Defence response deadlines in respect of 8 Prosecution motions under ICTY Rule 92*bis* regarding 238 witness).

³² ICC-01/12-01/18-789-AnxA, para. 80.

simply file such applications “as expeditiously as possible”, noting that the Chamber “may impose a final deadline for such Defence applications at a later stage.”³³

22. The Request thus proposes that the deadline for rule 68(3) applications be linked to the witnesses’ scheduled appearances, particularly given the number of witnesses involved in this case. The Prosecution believes that this is readily achievable without jeopardising the Accused’s fair trial rights as has been shown in several cases, including at other international courts. Further, allowing for the rolling submission of rule 68(2)(b) applications until 60 days after the start of evidence would not result in any unfair prejudice.³⁴ There, in the event such an application is denied, the Prosecution would not object to calling the affected witness later in the presentation of its overall case to the extent that the Chamber, having regard to the totality of the circumstances, considers it necessary to accommodate the Defence’s preparedness, as well as that of the Participants.

ii. Extending the rule 68 applications deadline would not materially affect the right to prepare or to examine

23. The Chamber’s extension of the filing deadline for rule 68(2) and (3) applications would not infringe the Defence’s trial preparedness or right ultimately, to examine witnesses.

24. *First*, presumably, the Defence’s preparation for a given witness will normatively be based on the assumption that either their statement or prior transcript may be admitted,³⁵ or that they will testify on the subject matter of their prior statement consistently, or inconsistently. In short, the Defence ought to be fully

³³ ICC-01/04-02/06-1900, para. 37.

³⁴ ICC-01/14-01/18-476-AnxA, para. 84 (proposing that rule 68(2) motions may be submitted at any time during the trial, provided that sufficient notice is given to the other Parties and Participants). The Nguissoua Defence merely proposed limiting the filing of such applications to “*during the presentation of [the Prosecution case]*, unless the Chamber set an earlier deadline” (emphasis added), *see* ICC-01/14-01/18-521-AnxA, para. 64. The Yekatom Defence did not oppose the Prosecution’s submissions altogether.

³⁵ *See e.g., Prosecutor v. Mladic*, Case No.IT-09-92-T, Decision with regard to Prosecution Motion, for Admission into Evidence of Witness Harland’s Statement and Associated Documents, 3 July 2012, para. 5.

familiar with the subject matter of a witness' prior statement or testimony by the start of trial, regardless of whether a rule 68 application has been granted or even made at all.

25. *Second*, consistent with other Chambers, this Chamber has properly acknowledged that the disposition of rule 68(3) applications cannot be definitively determined until such time as all of its requirements have been satisfied, which entails the witness's appearance.³⁶ This does not necessarily mean that the corresponding applications need be made in advance of the start of trial altogether. Notwithstanding, the Defence would have to prepare to address the witness's prospective statement(s) regardless of the timing of the Prosecution's application.

26. *Third*, the proposed extension would not impede the Defence's rights under the statutory framework to *examine* the witness fully and meaningfully,³⁷ including in respect of any specific matter contained in the statement or necessary to provide relevant context. Nothing in the requested extension diminishes rule 68(3)'s "provi[sion] for the possibility for the Prosecutor, the defence and the Chamber to have the opportunity to examine the witness during the proceedings – this *de facto* includes the calling party".³⁸ The question of the timing of the rule 68(3) applications is a distinct issue.

27. As long as the Defence is afforded a reasonable opportunity to respond to a prospective rule 68(3) application in advance of the witness's testimony, there can be no appreciable prejudicial consequence that arises as a result of the timing of the application, *per se*. This is even more so when, as here, the Prosecution's intent to proceed under such a mode has been long telegraphed, and specifically communicated to the Parties and Participants. Even if there were an impact as a

³⁶ See ICC-01/14-01/18-631, para. 58; *see e.g.*, ICC-01/04-02/06-845, para. 7.

³⁷ ICC-02/04-01/15-1665, para. 8 (noting, "the opportunity to examine the witness must be a meaningful one, mirroring as far as possible the parties' right to question the witness during his or her testimony during the trial proceedings"). The Request neither abrogates this right, nor the capacity of the Chamber to accord it.

³⁸ ICC-02/11-01/15-744, para. 69; *see* ICC-02/04-01/15-621, para. 6.

result of allowing the rolling submission of rule 68 applications — and there would not be — this can be easily addressed by a corresponding adjustment in the order of the presentation of a given witness at trial, and thus need not result in any unwarranted delay.

III. CONCLUSION

28. For the foregoing reasons, the Prosecution request that the Chamber extend the deadline imposed by the 26 August 2020 Order, allowing the Prosecution to file rule 68 applications on a rolling basis, such that rule 68(2) applications may be submitted up until 60 days after the scheduled start of evidence, and rule 68(3) applications may be submitted not less than 45 days before the scheduled start of the witness's testimony.



James Stewart, Deputy Prosecutor

Dated this 14th day of September 2020
At The Hague, The Netherlands