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

**Date: 16 October 2020**

**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**

**Decision on the Prosecution Extension Request and  
Initial Guidance on Rule 68 of the Rules**

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

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**TRIAL CHAMBER V** of the International Criminal Court, in the case of *The Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaissona*, having regard to Articles 64(2), (3)(a), (7) and 67 of the Rome Statute (the ‘Statute’), Rule 68 of the Rules of Procedure and Evidence (the ‘Rules’) and Regulations 35 and 43 of the Regulations of the Court (the ‘Regulations’), issues this ‘Decision on the Prosecution Extension Request and Initial Guidance on Rule 68 of the Rules’.

## **I. Procedural history and submissions**

1. On 26 August 2020, the Presiding Judge issued the ‘Initial Directions on the Conduct of the Proceedings’ (the ‘Directions’).<sup>1</sup> Therein, he ordered the Prosecution to file applications pursuant to Rule 68(2) and (3) of the Rules (the ‘Rule 68(2) Applications’ and the ‘Rule 68(3) Applications’, respectively) as soon as possible, and latest by 9 November 2020 (the ‘Deadline’).<sup>2</sup>
2. On 31 August 2020, as ordered by the Chamber,<sup>3</sup> the Office of the Prosecutor (the ‘Prosecution’) filed its Provisional Witness List, indicating, *inter alia*, the witnesses it intends to call to testify at trial and the intended mode of testimony for those witnesses.<sup>4</sup> Notably, the Prosecution specified that it intends to call 44 witnesses pursuant to Rule 68(2) of the Rules, 77 witnesses pursuant to Rule 68(3) of the Rules and categorised the remaining 24 witnesses as ‘live’ witnesses.<sup>5</sup>
3. On 14 September 2020, the Prosecution requested an extension of the Deadline pursuant to Regulation 35 of the Regulations (the ‘Request’).<sup>6</sup> The Prosecution asks that the Chamber set staggered deadlines, allowing for the submission of these applications on a rolling basis. Specifically, the Prosecution requests the

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<sup>1</sup> Directions, ICC-01/14-01/18-631.

<sup>2</sup> Directions, ICC-01/14-01/18-631, para. 33.

<sup>3</sup> Decision Setting the Commencement Date of the Trial, 16 July 2020, ICC-01/14-01/18-589 (the ‘Trial Date Decision’), paras 4-6, p. 10.

<sup>4</sup> See Notification of the Provisional List of Prosecution Witnesses with a Summary of their Anticipated Testimony, ICC-01/14-01/18-642-Conf (with confidential Annex A, ICC-01/14-01/18-642-Conf-AnxA, containing the Provisional Witness List).

<sup>5</sup> Provisional Witness List, ICC-01/14-01/18-642-Conf-AnxA.

<sup>6</sup> Prosecution’s Request pursuant to Regulation 35 to vary the Time Limit for the Submission of Applications pursuant to Rule 68, ICC-01/14-01/18-652.

Chamber to allow the submission of (i) Rule 68(2) Applications<sup>7</sup> up until 60 days after the scheduled start of evidence (the ‘Rule 68(2) Extension Request’) and (ii) Rule 68(3) Applications not less than 45 days before the scheduled start of the witness’s testimony (the ‘Rule 68(3) Extension Request’).<sup>8</sup>

4. The Prosecution argues that the Request is justified because ‘the Chamber did not have at its disposal the precise contours of the Prosecution’s approach when issuing the [Directions], which may have been dispositive’ in setting the Deadline.<sup>9</sup> In this regard, the Prosecution submits that (i) the circumstances of this case, in particular the number of witnesses, are unprecedented at the Court;<sup>10</sup> (ii) it cannot reasonably meet the Deadline, stressing that it intends to file 121 applications under Rule 68(2) and (3) of the Rules and that the Final Witness List and the Trial Brief are due by the same date;<sup>11</sup> and (iii) the Prosecution’s resources are limited.<sup>12</sup> The Prosecution further argues that granting the extension (i) would be in line with the jurisprudence of other chambers;<sup>13</sup> and (ii) would not materially affect the Defence’s right to prepare or to examine witnesses.<sup>14</sup>
5. On 15 September 2020, the Prosecution submitted further observations on its approach to Rule 68(3) of the Rules (the ‘Prosecution Observations’).<sup>15</sup> In essence, the Prosecution submits that its intended extensive use of Rule 68(3) of the Rules aims to ensure both fairness and expeditiousness of the proceedings.<sup>16</sup> In particular, it stresses that the use of this provision for 77 out of 145 witnesses would save considerable time.<sup>17</sup> Moreover, it argues that (i) its projected use of

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<sup>7</sup> It is not clear from the Provisional Witness List or the Request whether the anticipated 44 Rule 68(2) Applications will be filed pursuant to sub-rule (b) (which seems to be indicated in the Request, ICC-01/14-01/18-652, para. 22) or whether they may be filed under other sub-rules of Rule 68(2) of the Rules. However, noting that the requested relief is directed at Rule 68(2) of the Rules, the Chamber will make its assessment with regard to the provision as a whole.

<sup>8</sup> Request, ICC-01/14-01/18-652, paras 1, 28.

<sup>9</sup> Request, ICC-01/14-01/18-652, para. 3.

<sup>10</sup> Request, ICC-01/14-01/18-652, paras 5-8.

<sup>11</sup> Request, ICC-01/14-01/18-652, paras 9-10.

<sup>12</sup> Request, ICC-01/14-01/18-652, paras 12-15.

<sup>13</sup> Request, ICC-01/14-01/18-652, paras 16-22.

<sup>14</sup> Request, ICC-01/14-01/18-652, paras 23-27.

<sup>15</sup> Prosecution’s Observations on its intended approach to Rule 68(3) in the presentation of its case, ICC-01/14-01/18-655.

<sup>16</sup> Prosecution Observations, ICC-01/14-01/18-655, paras 9-15.

<sup>17</sup> Prosecution Observations, ICC-01/14-01/18-655, para. 14.

Rule 68(3) of the Rules is consistent with the practice at this Court;<sup>18</sup> and (ii) that the Chamber’s ‘latitude in applying rule 68(3) is not constrained by any mandatory legal requirements’.<sup>19</sup>

6. On 22 September 2020, the Yekatom Defence responded to the Request.<sup>20</sup> The Yekatom Defence does not oppose (i) the Rule 68(2) Extension Request, provided that the applications are submitted on a rolling basis and that the extension does not go beyond 11 January 2021;<sup>21</sup> or (ii) the Rule 68(3) Extension Request, provided that the applications are submitted on a rolling basis.<sup>22</sup>
7. On 23 September 2020, the Yekatom Defence responded to the Prosecution Observations.<sup>23</sup> It submits that while taking ‘no issue at this stage with the [Prosecution’s] approach *per se*, it wishes to accentuate its impact on the adequacy of the allocated time for cross-examination’.<sup>24</sup>
8. On 25 September 2020, the Ngaïssona Defence filed its consolidated response to the Request and the Prosecution Observations.<sup>25</sup> The Ngaïssona Defence submits that the Prosecution fails to show good cause pursuant to Regulation 35 of the Regulations<sup>26</sup> and that granting the Request would cause prejudice to the rights of the Defence.<sup>27</sup> It argues that ‘the ‘Prosecution’s intended approach of relying on rule 68 for the great *majority* of its witnesses, amounts to an abuse of

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<sup>18</sup> Prosecution Observations, ICC-01/14-01/18-655, para. 15.

<sup>19</sup> Prosecution Observations, ICC-01/14-01/18-655, para. 7.

<sup>20</sup> Yekatom Defence Response to Request for Extension of Time: Rule 68 Applications, ICC-01/14-01/18-663 (the ‘Yekatom Defence Response’).

<sup>21</sup> Yekatom Defence Response, ICC-01/14-01/18-663, paras 2, 22, 25, 28.

<sup>22</sup> Yekatom Defence Response, ICC-01/14-01/18-663, paras 2, 27.

<sup>23</sup> Yekatom Defence Response to the Prosecution’s Intended Approach to Rule 68(3), ICC-01/14-01/18-664 (the ‘Yekatom Defence Observations’).

<sup>24</sup> Yekatom Defence Observations, ICC-01/14-01/18-664, para. 2.

<sup>25</sup> Defence Consolidated Response to the “Prosecution’s Request pursuant to Regulation 35 to vary the Time Limit for the Submission of Applications pursuant to Rule 68” and “Prosecution’s Observations on its intended approach to Rule 68(3) in the presentation of its case”, ICC-01/14-01/18-666 (the ‘Ngaïssona Defence Response’).

<sup>26</sup> Ngaïssona Defence Response, ICC-01/14-01/18-666, paras 4, 19-30.

<sup>27</sup> Ngaïssona Defence Response, ICC-01/14-01/18-666, paras 31-38.

the rule 68 regime, in contravention to the principle of orality before the Court, which is meant to be an exception rather than the rule of in-court testimony'.<sup>28</sup>

9. The Ngaïssona Defence requests primarily 'that the Prosecution be ordered to considerably limit the number of witnesses for whom it wishes to submit rule 68 applications, and that such applications be filed on a rolling basis before the 9 November 2020 deadline'.<sup>29</sup> In the alternative, should the Chamber find that good cause exists, the Ngaïssona Defence (i) requests that the Rule 68(2) Applications be filed, 'at the very latest, at least one month before the start of trial and on a rolling basis', namely by 8 January 2021;<sup>30</sup> and (ii) submits that it 'would be amenable to the Prosecution's proposed deadline of a maximum of 45 days before the witness' schedule[d] in-court testimony' for the Rule 68(3) Applications.<sup>31</sup> Lastly, the Ngaïssona Defence requests that the Prosecution Observations 'be dismissed *in limine*, as they fail to request any specific relief' (the 'Ngaïssona Defence Dismissal Request').<sup>32</sup>
10. On 6 October 2020, the Single Judge partly granted the Request, with full reasons to follow.<sup>33</sup> The Single Judge ordered the Prosecution to file (i) its Rule 68(2) Applications on a rolling basis, latest by 11 January 2021 and (ii) its Rule 68(3) Applications not less than 45 days before the scheduled start of the witness's testimony.

## II. Analysis

11. In this decision, the Chamber<sup>34</sup> provides full reasons for the email decision of 6 October 2020 partly granting the Request, addresses the Prosecution Observations and its intended overall approach to Rule 68 of the Rules and provides initial guidance with regard to Rule 68 of the Rules.

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<sup>28</sup> Ngaïssona Defence Response, ICC-01/14-01/18-666, paras 29, 37.

<sup>29</sup> Ngaïssona Defence Response, ICC-01/14-01/18-666, paras 5, 38.

<sup>30</sup> Ngaïssona Defence Response, ICC-01/14-01/18-666, paras 6, 39-41.

<sup>31</sup> Ngaïssona Defence Response, ICC-01/14-01/18-666, para. 42.

<sup>32</sup> Ngaïssona Defence Response, ICC-01/14-01/18-666, paras 7, 43-46.

<sup>33</sup> Email from the Chamber, 6 October 2020, at 15:00.

<sup>34</sup> The Chamber recalls that the Deadline was extended by the Single Judge, *see* paragraph 10 above. However, noting the importance of the matter, and particularly the guidance provided below, this decision is issued by the full Chamber.

## A. Extension of time pursuant to Regulation 35(2) of the Regulations

12. Pursuant to Regulation 35(2) of the Regulations, a chamber may extend a time limit at the request of a participant ‘if good cause is shown and, where appropriate, after having given the participants an opportunity to be heard’.
13. At the outset, the Chamber notes that the Deadline was set against the backdrop of the information available at the time that the Directions were issued. While the Presiding Judge was aware of the Prosecution’s intention to ‘significantly’ rely on Rule 68 of the Rules,<sup>35</sup> no detailed or conclusive information was available.<sup>36</sup> The Chamber finds it unfortunate that the Prosecution waited until 31 August 2020 to inform the Chamber and the participants, particularly the Yekatom and Ngaissona Defence (jointly, the ‘Defence’), of the extent to which it anticipates to use Rule 68 of the Rules. Given that its intended approach to Rule 68 of the Rules in this case is rather unprecedented, the Chamber considers that a more timely notice would have been warranted.
14. That being said, the Chamber considers that in light of the high number of applications under Rule 68 of the Rules anticipated by the Prosecution, and the related labour-intensive work, good cause has been shown to extend the Deadline. The Chamber is of the view that this extension will enable the parties to timely comply with their respective obligations under the Statute and Rules, as well as with the Chamber’s various directions.<sup>37</sup> In this regard, the Chamber particularly notes that the Prosecution is required to carefully assess all underlying witness statements for its applications under Rule 68 of the Rules, in

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<sup>35</sup> Prosecution’s Observations on the Agenda of the First Status Conference, 8 April 2020, ICC-01/14-01/18-474-Conf (second public redacted version notified on 10 June 2020, ICC-01/14-01/18-474-Red2), para. 19.

<sup>36</sup> The only points of reference were (i) the Prosecution’s provisional estimate of 43 Rule 68(2) Applications; (ii) the indication that it was considering the ‘potential use’ of Rule 68(3) of the Rules and (iii) the indication that it would call 109 witnesses ‘live’, which appeared to comprise only full *viva voce* testimony but not testimonies under Rule 68(3) of the Rules, *see* Prosecution’s Submission in Compliance of the Single Judge’s “Order to provide a Preliminary Witness List”, ICC-01/14-01/18-528, 15 June 2020, ICC-01/14-01/18-553 (with confidential Annex A, ICC-01/14-01/18-553-Conf-AnxA, and confidential *ex parte* Annex B, only available to the Prosecution), para. 6. As regards (iii), the Chamber notes that in Annex A, ICC-01/14-01/18-553-Conf-AnxA, n. 1 the Prosecution spoke of ‘live’ testimony, and explained that ‘[t]he indication as to whether the Prosecution intends to call the witness live or instead rely on the witness’ certified statement pursuant to Rule 68 still maybe subject to further changes’.

<sup>37</sup> *See in particular* Directions, ICC-01/14-01/18-631; Trial Date Decision, ICC-01/14-01/18-589.

order to provide the Chamber with the necessary information to conduct a case-by-case assessment of each application.<sup>38</sup> The Chamber considers that this exercise, which the Prosecution expects to do for 121 witnesses in this case, cannot reasonably be completed by 9 November 2020, particularly bearing in mind that the final disclosure, the Trial Brief, the Final Witness List and the List of Evidence are due by the same date.<sup>39</sup>

15. As regards the length of the extension, the Chamber stresses that chambers generally have discretion in setting deadlines pertaining to Rule 68 of the Rules.<sup>40</sup> Neither is a deadline prescribed by the Court's legal framework, nor does an established practice exist in this regard. The Presiding Judge of this Chamber initially opted for a deadline three months in advance of trial, in order to ease the workload for all participants, particularly the Defence, shortly before and during the trial and to best preserve the rights of the accused. In determining an appropriate new deadline, the Chamber continues to be guided by these considerations.
16. Accordingly, the Chamber recognises the Defence's interest in receiving Rule 68(2) Applications as early as possible since witnesses whose testimony is introduced pursuant to this rule will not testify *viva voce*, and no cross-examination can be conducted. The Chamber does not find the Prosecution's proposal that applications be submitted 'up until 60 days after the scheduled start of evidence' reasonable or compatible with the accused's right to have adequate time to prepare for trial. In the Chamber's view, receiving Rule 68(2) Applications two months after the start of the Prosecution's evidence presentation of the Prosecution could negatively impact on the Defence's resources during trial, particularly its preparation for trial and capacity to conduct effective cross-examinations.

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<sup>38</sup> See paragraph 34 below.

<sup>39</sup> Trial Date Decision, ICC-01/14-01/18-589.

<sup>40</sup> As acknowledged by the parties, *see* Request, ICC-01/14-01/18-652, para. 18; Ngaïssona Defence Response, ICC-01/14-01/18-666, para. 27.



17. In light of the above and having considered the parties' submissions,<sup>41</sup> the Chamber finds it appropriate that Rule 68(2) Applications be filed before the beginning of trial. The Prosecution is thus ordered to submit its Rule 68(2) Applications on a rolling basis and latest by 11 January 2021.
18. As regards the Rule 68(3) Applications, the Chamber finds the Prosecution's proposal to submit applications 'not less than 45 days before the scheduled start of the witness's testimony' sensible and notes that the Defence is amenable to it.<sup>42</sup> The Chamber considers that, in light of the high number of expected Rule 68(3) Applications, the rights of the accused and the efficiency of the proceedings are best served by adopting the proposed deadline. Receiving the numerous Rule 68(3) Applications on a rolling basis, and close to the time of a witness's testimony, allows for the distribution of the workload associated with these applications over an extended time period, thereby easing the burden on the participants and the Chamber. Furthermore, the Chamber notes that similar (and even shorter) deadlines have been imposed by other chambers.<sup>43</sup>
19. Accordingly, the Prosecution is ordered to submit its Rule 68(3) Applications latest 45 days before the scheduled date of a witness's testimony. The Prosecution is nonetheless encouraged to submit these applications as early as possible.

**B. The Chamber's views on the Prosecution's intended approach to Rule 68 of the Rules and initial guidance**

20. The Chamber recalls that Rule 68 of the Rules permits the 'introduction of previously recorded audio or video testimony of a witness, or the transcript or other documented evidence of such testimony, provided that this would not be

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<sup>41</sup> The Chamber notes that the Yekatom Defence proposed 11 January 2021. The Ngaïssona Defence, while opposing the Request, proposed in the alternative 8 January 2021. *See* paragraphs 6, 9 above.

<sup>42</sup> The Chamber recalls that the Yekatom Defence indicated that it does not oppose the Rule 68(3) Extension Request, provided that the applications are submitted on a rolling basis. The Ngaïssona Defence, while generally opposing the Request, indicated in its alternative request that it 'would be amenable to the Prosecution's proposed deadline'. *See* paragraphs 6, 9 above.

<sup>43</sup> *See e.g.* Trial Chamber VII, *The Prosecutor v. Jean-Pierre Bemba Gombo et al.*, Directions on the conduct of the proceedings, 2 September 2015, ICC-01/05-01/13-1209.

prejudicial to or inconsistent with the rights of the accused and that the requirements of one or more of the following sub-rules are met'.<sup>44</sup>

21. The Prosecution currently anticipates that it will submit applications pursuant to Rule 68 of the Rules for 121 out of 145 witnesses, or in other words, approximately 83% of the witnesses on its Provisional Witness List. This number appears to be rather unprecedented at this Court. In this regard, the Chamber notes the potential impact this extensive use may have on the principles of orality and publicity, as well as the rights of the accused. The Chamber also takes note of the Ngaiissona Defence's submissions in this regard.<sup>45</sup>
22. In light of the above, and noting that the Prosecution's Final Witness List is due on 9 November 2020, the Chamber finds it prudent at this juncture to (1) provide guidance on potential limits to the use of Rule 68 of the Rules in this case, and (2) express its views on the potential impact of the Prosecution's intended approach to Rule 68 of the Rules on the allocated time for witness examination.

*1. Potential limits to the use of Rule 68 of the Rules*

23. At the outset, the Chamber notes that, in principle, it is for each party to determine the organisation and evidence presentation of its case. This includes the decision of which witnesses to call, witness scheduling, whether to request the introduction of evidence by means other than through witnesses, and the manner in which evidence provided by witnesses is brought into the

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<sup>44</sup> Rule 68(1) of the Rules.

<sup>45</sup> See above paragraph 8.

proceedings.<sup>46</sup> For that reason, the decision whether to use Rule 68 of the Rules is – in principle – up to the calling party.<sup>47</sup>

24. Nonetheless, this discretion is not absolute, but subject to judicial oversight.<sup>48</sup> In this regard, the Chamber clarifies that in general it will not interfere with a party's decision regarding its evidence presentation on a regular basis, but will do so where potential prejudice arises to the Defence and to ensure that the following principles are respected.<sup>49</sup>
25. First, the Chamber notes its obligation under Article 64(2) of the Statute to ensure that the proceedings are fair and conducted with due regard to the rights of the accused, particularly under Article 67(1)(b), (c) and (e) of the Statute, as well as its obligations under Regulation 43 of the Regulations.<sup>50</sup> Second, the Chamber notes the principle of publicity laid down in Article 64(7) and 67(1) of the Statute.<sup>51</sup> Third, the Chamber notes the principle of orality enshrined in Article 69(2) of the Statute,<sup>52</sup> which provides that the 'testimony of a witness

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<sup>46</sup> See Trial Chamber IX, *The Prosecutor v. Dominic Ongwen*, Decision on Prosecution Request to Introduce Evidence of Defence Witnesses via Rule 68(2)(b), 16 August 2018, ICC-02/04-01/15-1322-Conf (public redacted version notified the same day, ICC-02/04-01/15-1322-Red) (the '*Ongwen* 2018 Rule 68(2)(b) Decision'), para. 5; Trial Chamber III, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Decision regarding the prosecution's witness schedule, 11 November 2011, ICC-01/05-01/08-1904-Conf (public redacted version notified on 15 November 2011, ICC-01/05-01/08-1904-Red) (the '*Bemba* Witness Schedule Decision'), para. 24.

<sup>47</sup> See also *Ongwen* 2018 Rule 68(2)(b) Decision, ICC-02/04-01/15-1322, para. 12.

<sup>48</sup> See *Bemba* Witness Schedule Decision, ICC-01/05-01/08-1904-Red, para. 24; Trial Chamber VII, *The Prosecutor v. Jean-Pierre Bemba Gombo et al.*, Decision on Relevance and Propriety of Certain Kilolo Defence Witnesses, 4 February 2016, ICC-01/05-01/13-1600, para. 6.

<sup>49</sup> See *Bemba* Witness Schedule Decision, ICC-01/05-01/08-1904-Red, para. 25.

<sup>50</sup> Regulation 43 of the Regulations mandates the Presiding Judge, in consultation with the other members of the chamber, to determine the mode and order of questioning witnesses and presenting evidence so as to '[m]ake the questioning of witnesses and the presentation of evidence fair and effective for the determination of the truth' and to '[a]void delays and ensure the effective use of time'.

<sup>51</sup> See (in the context of classification of filings and decisions) Appeals Chamber, *The Prosecutor v. Mathieu Ngudjolo Chui*, Order on the filing of public redacted versions of submissions by the parties and participants, 4 October 2013, ICC-01/04-02/12-143, para. 8; Trial Chamber IX, *The Prosecutor v. Dominic Ongwen*, Decision on Publicity of Case Record, 7 February 2017, ICC-02/04-01/15-700, para. 2; Trial Chamber V(a), *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Decision on Sang Defence Application to exclude Expert Report of Mr Hervé Maupeu, 7 August 2013, ICC-01/09-01/11-844, para. 31.

<sup>52</sup> See Trial Chamber VII, *The Prosecutor v. Jean-Pierre Bemba Gombo et al.*, Decision on the Prosecution Rule 68(2) and (3) Requests, 11 November 2015, ICC-01/05-01/13-1478-Conf (corrected public redacted version notified on 12 November 2015, ICC-01/05-01/13-1478-Red-Corr), para. 48.

shall be given in person'. As held by the Appeals Chamber, *viva voce* testimony<sup>53</sup> should therefore be the default mode of testifying.<sup>54</sup>

26. Rule 68 of the Rules represents one of the statutory exceptions<sup>55</sup> to the rule of orality<sup>56</sup> and publicity. This means that this way of introducing prior recorded testimony is *per se* generally considered compatible with the rights of the accused.<sup>57</sup> Moreover, Rule 68 of the Rules is widely acknowledged as a useful tool to expedite and streamline the proceedings and its use therefore encouraged.<sup>58</sup>
27. Nonetheless, it must be noted that Rule 68 of the Rules itself requires that its application is not 'prejudicial to or inconsistent with the rights of the accused'.<sup>59</sup> The Chamber thus considers that there are inherent limits to its use, which may include potential limitations with regard to the number of witnesses called under this rule. However, the Chamber stresses that there is no clear-cut and general mathematical calculation as to which percentage of witnesses ought to be called *viva voce* (as opposed to witnesses for whom prior recorded statements are –

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<sup>53</sup> The Chamber recalls that in-person and video-link testimony are equal options to give *viva voce* testimony under the statutory framework, *see* Directions, ICC-01/14-01/18-631, para. 29.

<sup>54</sup> *See* Appeals Chamber, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Judgment on the appeals of Mr Jean-Pierre Bemba Gombo and the Prosecutor against the decision of Trial Chamber III entitled "Decision on the admission into evidence of materials contained in the prosecution's list of evidence", 3 May 2011, ICC-01/05-01/08-1386 (OA5 OA6) (the '*Bemba* OA5 OA6 Appeals Judgment'), para. 76. *See also* *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Judgment on the appeals of Mr William Samoei Ruto and Mr Joshua Arap Sang against the decision of Trial Chamber V(A) of 19 August 2015 entitled "Decision on Prosecution Request for Admission of Prior Recorded Testimony", 12 February 2016, ICC-01/09-01/11-2024 (OA10), para. 84 (the '*Ruto and Sang* OA10 Appeals Judgment').

<sup>55</sup> *See* Article 69(2) of the Statute: "The testimony of a witness at trial shall be given in person, except to the extent provided by the measures set forth in article 68 or in the Rules of Procedure and Evidence. The Court may also permit the giving of *viva voce* (oral) or recorded testimony of a witness by means of video or audio technology, as well as the introduction of documents or written transcripts, subject to this Statute and in accordance with the Rules of Procedure and Evidence. These measures shall not be prejudicial to or inconsistent with the rights of the accused."

<sup>56</sup> *See also* *Bemba* OA5 OA6 Appeals Judgment, ICC-01/05-01/08-1386, para. 78; Appeals Chamber, *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Judgment on the appeals of Mr Laurent Gbagbo and Mr Charles Blé Goudé against the decision of Trial Chamber I of 9 June 2016 entitled "Decision on the Prosecutor's application to introduce prior recorded testimony under Rules 68(2)(b) and 68(3)", 1 November 2016, ICC-02/11-01/15-744 (OA8) (the '*Gbagbo and Blé Goudé* OA8 Appeals Judgment'), para. 65.

<sup>57</sup> *See* *Gbagbo and Blé Goudé* OA8 Appeals Judgment, ICC-02/11-01/15-744, para. 74.

<sup>58</sup> *See for instance* Independent Expert Review of the International Criminal Court and the Rome Statute System, Final Report, 30 September 2020, [https://asp.icc-cpi.int/iccdocs/asp\\_docs/ASP19/IER-Final-Report-ENG.pdf](https://asp.icc-cpi.int/iccdocs/asp_docs/ASP19/IER-Final-Report-ENG.pdf) (last accessed on 16 October 2020), para. 553.

<sup>59</sup> Rule 68(1) of the Rules.

additionally or exclusively – introduced pursuant to Rule 68 of the Rules), which fits every case.<sup>60</sup>

28. On the contrary, the Chamber considers that the question whether the use of Rule 68 of the Rules is proportionate will necessarily depend on the specific circumstances of each case. Furthermore, it must be recalled that, in any case, a final assessment of applications under Rule 68 of the Rules can only be made on the basis of the concrete content of the upcoming individual applications, bearing these case-specific circumstances in mind. At this point in time, the Chamber will accordingly limit itself to expressing general and preliminary views with regard to the number of applications currently anticipated by the Prosecution in this case.
29. In doing so, the Chamber considers it crucial to first recall the key differences between Rule 68(2) and (3) of the Rules. In this regard, the Chamber recalls that Rule 68(2) of the Rules provides that a chamber, in certain narrow and exhaustively listed instances,<sup>61</sup> may allow the introduction of previously recorded testimony of a witness who is not present before the trial chamber. Rule 68(3) of the Rules, in contrast, allows the introduction of previously recorded testimony when a witness is present before the chamber, provided that the witness ‘does not object to the submission of the previously recorded testimony and the Prosecutor, the defence and the Chamber have the opportunity to examine the witness during the proceedings’. No further restrictions are imposed with regard to the instances under which Rule 68(3) of the Rules may be used.

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<sup>60</sup> See *Gbagbo and Blé Goudé* OA8 Appeals Judgment, ICC-02/11-01/15-744, para. 78.

<sup>61</sup> Rule 68(2) of the Rules essentially provides for the introduction of prior recorded testimony in the following instances: ‘(a) Both the Prosecutor and the defence had the opportunity to examine the witness during the recording. (b) The prior recorded testimony goes to proof of a matter other than the acts and conduct of the accused. [...] (c) The prior recorded testimony comes from a person who has subsequently died, must be presumed dead, or is, due to obstacles that cannot be overcome with reasonable diligence, unavailable to testify orally. [...] (d) The prior recorded testimony comes from a person who has been subjected to interference. [...]’.

30. The Chamber acknowledges that Rule 68(2) of the Rules represents a full exception to the principles of orality<sup>62</sup> and publicity, and deprives the accused of their right to examine the witness in court. Rule 68(3) of the Rules on the other hand, albeit limiting the principles of orality<sup>63</sup> and publicity, does not entirely forfeit them. This follows from the fact that a witness whose testimony is introduced pursuant to Rule 68(3) of the Rules will additionally testify in court, which allows the non-calling party to test the entirety of their testimony, both in relation to the testimony given in court and the prior recorded testimony. Testimonies pursuant to Rule 68(3) of the Rules must consequently be considered a ‘mixture of oral and written evidence’.<sup>64</sup> In this regard, the Chamber also recalls the Appeals Chamber’s finding that under Rule 68(3) of the Rules ‘the testimony cannot be considered to be exclusively written as it is not necessarily intended to replace oral testimony but, rather, *complement it*’.<sup>65</sup>
31. However, the fact that Rule 68(3) of the Rules does not impair the accused’s right to question the witness in court does not mean that this provision may be used without limits. On the contrary, its use might be disproportionate when considered against the specific circumstances of a case, particularly when used extensively in combination with Rule 68(2) of the Rules.
32. In light of the specific circumstances of this case, and noting the overall number of anticipated applications under Rule 68 of the Rules, namely for 121 out of 145 witnesses (44 of which pursuant to Rule 68(2) of the Rules and 77 pursuant to Rule 68(3) of the Rules), the Chamber considers that the Prosecution’s projected use of Rule 68 of the Rules appears, *prima facie*, disproportionate in light of the principles of orality and publicity and potentially prejudicial to the rights of the accused.

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<sup>62</sup> See *Ruto and Sang* OA10 Appeals Judgment, ICC-01/09-01/11-2024, para. 84; *Bemba* OA5 OA6 Appeals Judgment, ICC-01/05-01/08-1386, para. 77.

<sup>63</sup> See *Ruto and Sang* OA 10 Appeals Judgment, ICC-01/09-01/11-2024, para. 84.

<sup>64</sup> *Gbagbo and Blé Goudé* OA8 Appeals Judgment, ICC-02/11-01/15-744, para. 79.

<sup>65</sup> *Gbagbo and Blé Goudé* OA8 Appeals Judgment, ICC-02/11-01/15-744, para. 79 (emphasis added). See also Trial Chamber IX, *The Prosecutor v. Dominic Ongwen*, Decision on Prosecution’s Application to Introduce Prior Recorded Testimony and Related Documents Pursuant to Rule 68(3) of the Rules, 5 December 2016, ICC-02/04-01/15-621 (the ‘*Ongwen* Rule 68(3) Decision’), para. 6.

33. Having said that, the Chamber will not impose limitations on the number of prior recorded testimonies potentially to be introduced under Rule 68 of the Rules in the abstract. Rather, the Chamber trusts that the Prosecution will take the above guidance into account when finalising its Final Witness List, and particularly when deciding which, and how many witnesses, it intends to call pursuant to Rule 68 of the Rules. In this context, the Chamber also recalls the advantages of testimony given fully *viva voce*: Not only is the testimony given under oath and under the Chamber's oversight, it further enables the Chamber and the accused to hear natural and spontaneous accounts from witnesses, to directly and closely observe their reactions, demeanour and composure, and to immediately seek clarifications.<sup>66</sup>
34. Finally, the Chamber stresses again that the above considerations are preliminary guidance based on the information available on the Prosecution's intended approach to Rule 68 of the Rules at this point. Each application, once received, will be assessed on a case-by-case basis, with due regard to the specific nature and content of each prior recorded testimony,<sup>67</sup> the specific circumstances of this case and the abovementioned principles and rights of the accused.

## 2. *Allocated time for witness examination*

35. The Chamber notes that, should the Prosecution decide to indeed submit 121 applications pursuant to Rule 68 of the Rules (and should they be granted), this may impact on the time allocated to the participants.<sup>68</sup>
36. First, the Chamber recalls that, when resorting to Rule 68(3) of the Rules, the calling participant is expected to streamline its questioning considerably in light of the fact that this provision allows for the formal submission of the witness's

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<sup>66</sup> See *Bemba* OA5 OA6 Appeals Judgment, ICC-01/05-01/08-1386, para. 76.

<sup>67</sup> See *Gbagbo and Blé Goudé* OA8 Appeals Decision, ICC-02/11-01/15-744, para. 69.

<sup>68</sup> Directions, ICC-01/14-01/18-631, paras 22-25. In this regard, the Chamber also notes the Yekatom Defence Observations, ICC-01/14-01/18-664, paras 2-6, and the Ngaïssona Defence Response, ICC-01/14-01/18-666, para. 35.

previously recorded statement(s).<sup>69</sup> Consequently, the Prosecution is expected to only conduct a limited and focused supplementary examination.<sup>70</sup>

37. Second, the Chamber recalls that the time allocated for the Prosecution's evidence presentation<sup>71</sup> was based on the information known at the time<sup>72</sup> and the expectation of an average use of Rule 68 of the Rules based on the Prosecution's past practice in other cases.
38. In light of the above, the Chamber therefore reserves the right, pending the receipt of the Final Witness List and the respective concrete applications under Rule 68 of the Rules, to modify the time currently allocated.
39. Lastly, the Chamber rejects the Ngaiissona Defence Dismissal Request.<sup>73</sup> While the Chamber agrees that the Prosecution Observations did not contain a specific relief, they were linked to the Request and critical to its adjudication. That being said, going forward, the Prosecution is instructed to compile submissions pertaining to one and the same issue in consolidated filings, in order to streamline the proceedings and facilitate the work of the participants and the Chamber.

**FOR THESE REASONS, THE CHAMBER HEREBY**

**PARTLY GRANTS** the Request;

**ORDERS** the Prosecution to file its Rule 68(2) Applications on a rolling basis, latest by 11 January 2021, and its Rule 68(3) Applications not less than 45 days before the scheduled start of the witness's testimony; and

**REJECTS** the Ngaiissona Defence Dismissal Request.

Done in both English and French, the English version being authoritative.

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<sup>69</sup> Directions, ICC-01/14-01/18-631, para. 35.

<sup>70</sup> See *Ongwen* Rule 68(3) Decision, ICC-02/04-01/15-621, para. 32.

<sup>71</sup> Directions, ICC-01/14-01/18-631, para. 22.

<sup>72</sup> See paragraph 13 above.

<sup>73</sup> Ngaiissona Defence Response, ICC-01/14-01/18-666, paras 7, 43-46.





**Judge Bertram Schmitt**

**Presiding Judge**



**Judge Péter Kovács**



**Judge Chang-ho Chung**

Dated 16 October 2020

At The Hague, The Netherlands