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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 Observations on its intended approach to Rule 68(3) in the
presentation of its case**

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. On 26 August 2020, the Presiding Judge of Trial Chamber V (“Chamber”) allotted the Prosecution a maximum of 400 hours to present its case against both Accused YEKATOM and NGAISSONA.¹ This allocation of time acknowledged the Prosecution’s intention to rely on 152 witnesses at trial, with 109 witnesses to be called live and approximately 70 of these to be heard live at the seat of the Court.² Although, at the time, the Prosecution had not yet designated its witnesses under rule 68(3), it had forecast its intention to significantly rely on rule 68 previously.³ The Prosecution has since indicated that it expects to call 77 live witnesses under rule 68(3) of the Rules of Procedure and Evidence.⁴

2. The Prosecution’s estimate of 400 hours to present its case — which the Presiding Judge found reasonable⁵ — necessarily depends on its extensive use of rule 68(3). Moreover, the Prosecution’s intended reliance on rule 68(3) — a legal provision specifically designed to make court proceedings more efficient⁶ — follows, and accords with, this Chamber’s repeated emphasis on conducting a fair and expeditious trial in this case,⁷ and the Appeals Chamber’s guidance that using rule

¹ ICC-01/14-01/18-631 (“[Initial Directions](#)”), paras. 21-22.

² [Initial Directions](#), paras. 21-22.

³ ICC-01/14-01/18-474-Red2 (“[Prosecution’s Status Conference Observations](#)”), para. 19; ICC-01/14-01/18-553 (“[Prosecution’s Preliminary Witness List Submission](#)”), para. 6.

⁴ ICC-01/14-01/18-642-Conf-AnxA (“Prosecution’s Provisional Witness List”).

⁵ [Initial Directions](#), para. 22 (“The Presiding Judge considers that the 400 hour provisional estimate provided by the Prosecution appears to be reasonable. Accordingly, the Presiding Judge sets 400 hours as the maximum time available to the Prosecution to present its case. The limit will be enforced in relation to the Prosecution’s case as a whole [...]”).

⁶ ICC-ASP/12/37/Add.1, Annex II.A, Study Group on Governance, Working Group on Lessons Learnt, Recommendation on a proposal to amend rule 68 of the Rules of Procedure and Evidence (Prior Recorded Testimony) (“[Rule 68 Amendment Proposal](#)”), p. 18 (“[...] The proposed amendment is intended to reduce the length of ICC proceedings and streamline evidence presentation.”); Resolution ICC-ASP/12/Res.7, adopted at the 12th plenary meeting, 27 November 2013 (“[ASP Resolution](#)”), pp. 51-54.

⁷ ICC-01/14-01/18-T-012-ENG ET (“[First Status Conference](#)”), 30:23-31:3 (“[...] the Chamber reserves its right to limit the number of witnesses or impose a maximum amount of hours available to the Prosecution to present its case if the Chamber thinks this is required to ensure the efficiency of the proceedings and the accused’s right to be tried without undue delay.”); ICC-01/14-01/18-459 (“[First Status Conference Scheduling Order](#)”), para. 7 (“[The Chamber] reserves the right to give directions in such a manner so as to comply with the principles of expeditiousness and fairness.”); [Initial Directions](#), paras. 1 and 35 (“When resorting to Rule 68(3) of the Rules, the Presiding Judge expects the calling participant to streamline its questioning considerably in light of the fact that this provision allows for the formal submission of the witness’s previously recorded statement(s).”).

68(3) to hear witnesses constitutes good trial management.⁸ As the Judges of this Court have underscored, the commitment to expediency — essential to a fair trial — is a collective one.⁹ By *inter alia* relying on rule 68(3), the Prosecution is committed to doing its part to ensure efficient proceedings in this case.

3. The Chamber has instructed the Parties and Participants to file their rule 68 applications by 9 November 2020,¹⁰ to be followed by a preliminary ruling before the relevant in-court testimony and a final determination once the witness attests to the accuracy of his or her prior recorded testimony before the Chamber.¹¹ The Prosecution notes that the Chamber will only decide the merits of individual rule 68(3) requests when they are filed.¹² However, to contextualise its upcoming individual rule 68(3) applications and to better assist the Parties and Participants, and indeed, the Chamber, the Prosecution submits these observations on the legal principles governing rule 68(3) ahead of time. The Prosecution is mindful of the Chamber's advice discouraging submissions anticipating future requests that may not come to fruition.¹³ However, in this instance, the Prosecution's rule 68(3) requests are a certainty, as has already been foreshadowed as well as expressly indicated in its Provisional Witness List. In the Prosecution's respectful view, finding common and correct ground on the rule 68(3) legal framework at this stage ahead of the actual

⁸ ICC-02/11-01/15-744 OA8 ("[Gbagbo Rule 68 AD](#)"), paras. 59-61; ICC-01/05-01/13-2275 ("[Bemba et al. AJ](#)"), paras. 305-306.

⁹ [Chambers Practice Manual](#) (2019), p. i ("The overall question of the expeditiousness of proceedings is one of considerable complexity and the conduct and readiness of all parties and participants to Court proceedings play a crucial role—the commitment to expediency must, in this regard, be a collective one."); ICC-01/04-01/07-2259 OA10 ("[Katanga AD](#)"), para. 43 ("The Appeals Chamber observes that expeditiousness is a recurrent theme in the Court's legal instruments. The Statute and the Rules of Procedure and Evidence place an onus on all those involved in the trial to act in a diligent and expeditious manner in the performance of their obligations. The duty applies to the Chambers of the Court, the parties and participants.[...]").

¹⁰ [Initial Directions](#), para. 33. The Prosecution has contemporaneously filed a request under regulation 35 of the Regulations of the Court ("ROC") to allow it to file its rule 68 applications on a rolling basis – by 60 days following the start of trial for rule 68(2) applications; and 45 days before the scheduled start of testimony for rule 68(3) applications (see ICC-01/14-01/18-652).

¹¹ [Initial Directions](#), para. 58.

¹² [Gbagbo Rule 68 AD](#), para. 69.

¹³ [First Status Conference](#), 6: 20-22; see also [Chambers Practice Manual](#) (2019), para. 74(ii) ("[...] Notifications or information to the Chamber should generally be limited to those circumstances where they have been required by the Chamber or where a judicial determination is otherwise necessary").

requests could avoid unnecessary litigation closer to the start of trial and put the proceedings on a smoother and more efficient footing.

II. SUBMISSIONS

A. The legal framework governing the introduction of prior recorded testimony under rule 68(3)

4. In general, rule 68 is an exception to the principle of orality in article 69(2).¹⁴ In particular, rule 68(3) governs the introduction of prior recorded testimony when the witness is present before the Chamber. In this sense, testimony introduced under rule 68(3) is not exclusively written testimony.¹⁵ Rather, it *complements* oral testimony, instead of replacing it.¹⁶ It provides:

“If the witness who gave the previously recorded testimony is present before the Trial Chamber, the Chamber may allow the introduction of that previously recorded testimony if he or she 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.”¹⁷

5. When prior recorded testimony is introduced under the various sub-provisions of rule 68, the specific legal requirements should be met. In the case of rule 68(3), and as the Appeals Chamber has held, the witness concerned must be available for

¹⁴ ICC-01/09-01/11-2024 OA10 (“[Ruto & Sang Rule 68 AD](#)”), para. 84; ICC-01/05-01/08-1386 OA5 OA6 (“[Bemba Rule 68 AD](#)”), paras. 77-78 (with respect to the earlier version of rule 68 RPE).

¹⁵ [Gbagbo Rule 68 AD](#), para. 79.

¹⁶ [Gbagbo Rule 68 AD](#), para. 79; *Prosecutor v. Milosević*, IT-02-54-AR73.4, Decision on Interlocutory Appeal on the Admissibility of Evidence-In-Chief in the Form of Written Statements, 30 September 2003 (“[Milosević AD](#)”), para. 16 (“[...] Where the witness is present before the Court and orally attests to the accuracy of the statement, the evidence entered into the record cannot be considered to be exclusively written [...] The testimony of the witness constitutes a mixture of oral and written evidence.”); *but see Prosecutor v. Milosević*, IT-02-54-AR73.4, Dissenting Opinion of Judge David Hunt on Admissibility of Evidence in Chief in the Form of Witness Statement, 21 October 2003 (“[Judge Hunt Dis. Op.](#)”), paras. 15-17 (regarding ICTY rule 92bis).

¹⁷ Rule 68(3).

examination at trial and should not object to the submission of his or her prior recorded testimony.¹⁸ The Chamber and the Parties may also examine the witness during the proceedings.¹⁹ Further, a rule 68(3) determination is subject to rule 68(1): it must not prejudice or be inconsistent with the rights of the accused.²⁰ Although the text of what is presently rule 68(3) (and previously rule 68(b)) was not substantively altered in the amendments to the Court's Rules of Procedure and Evidence in 2013, making the application of rule 68(3) subject to fair trial concerns was an important qualification that the Assembly of States Parties (ASP) emphasised.²¹

6. A rule 68(3) determination must necessarily be made on the merits of each individual application, since witness testimony and germane factors governing their introduction vary from case to case.²² A Trial Chamber must carry out a "cautious item-by-item analysis".²³ Even so, compared to the other provisions in rule 68, a Trial Chamber is allowed greater discretion in applying rule 68(3).²⁴ Indeed, as Trial Chamber VII noted in the *Bemba et al* case, the central motivation for introducing rule 68(3) testimony is to save time.²⁵ And, as that same Chamber found, the fact that in-court-testimony can be considerably shortened by admitting prior recorded testimony is, in itself a sufficient reason for granting a rule 68(3) request, as long as its other mandatory requirements are met.²⁶

¹⁸ *Bemba et al. AJ*, para. 306. See also *Ruto & Sang Rule 68 AD*, para. 86 (noting that if those requirements are not met, recourse to article 69(2) and (4) of the Statute is not permissible, since that would render rule 68 meaningless).

¹⁹ Rule 68(3).

²⁰ *Gbagbo Rule 68 AD*, para. 75 ("[...] Indeed, pursuant to rule 68(1) of the Rules, if the application of rule 68(3) of the Rules is prejudicial to or inconsistent with the rights of the accused, its use is impermissible; this is not just an additional factor to be considered by the Trial Chamber in the exercise of its discretion.")

²¹ *Gbagbo Rule 68 AD*, para. 75; *Rule 68 Amendment Proposal*, paras. 10, 11 ("The amendments to the original text of the chapeau to rule 68 are intended to make explicit the fair trial protections that apply to the rule. [...]"); 12 ("[...] Third, an explicit reference to the rights of the accused was added, to draw attention expressly to this fundamental protection in the context of exceptions to the principle of orality [...]").

²² *Gbagbo Rule 68 AD*, para. 69.

²³ *Gbagbo Rule 68 AD*, para. 69; *Bemba Rule 68 AD*, paras. 77-81.

²⁴ *Gbagbo Rule 68 AD*, para. 68.

²⁵ ICC-01/05-01/13-1478-Red-Corr ("*Bemba et al. Rule 68 Decision*"), para. 51 ("The Chamber will assess if the central motivation for admittance via Rule 68(3) of the Rules—the saving of time and the expeditious conduct of the proceedings—is served while fully respecting the rights of the defence to a fair trial. [...]")

²⁶ *Bemba et al. Rule 68 Decision*, para. 48.

7. More so, a Trial Chamber's latitude in applying rule 68(3) is not constrained by any mandatory legal requirements—other than those mentioned in rules 68(1) and 68(3).²⁷ In this context, the Appeals Chamber has held that introducing prior recorded testimony under rule 68(3) on issues that were materially in dispute, were central to core issues of the case or were uncorroborated is not precluded *per se*.²⁸ Rather, the factors (previously outlined in the *Bemba* interlocutory appeal decision) are only factors that *may* assist the Chamber to assess whether introducing the rule 68(3) testimony would be consistent with the rights of the accused or not.²⁹ They may guide a chamber, but not bind it. Likewise, the relative importance of a witness is but one factor relevant to propriety of introducing prior recorded testimony — but, while corroboration of this testimony (or any other) is not legally required, when corroborated, its introduction is not unduly prejudicial to an accused's rights.³⁰

8. Further, in relation to what “prior recorded testimony” may be introduced under rule 68, the Chambers of this Court have maintained a broad interpretation of the phrase.³¹ Accordingly, such testimony could include audio or video-taped testimony, transcripts of testimony of a witness and written statements taken under rules 111 and 112.³² Moreover, as the Appeals Chamber has confirmed, prior

²⁷ [Gbagbo Rule 68 AD](#), para. 69.

²⁸ [Gbagbo Rule 68 AD](#), para. 69.

²⁹ [Gbagbo Rule 68 AD](#), para. 69 (“[...] the Appeals Chamber notes that the factors referred to in the *Bemba* OA 5 and OA 6 Judgment are not requirements but, rather, factors that may be considered in assessing whether the introduction of prior recorded testimony under rule 68(3) of the Rules is prejudicial to or inconsistent with the rights of the accused or with the fairness of the trial generally. In this respect, the Appeals Chamber, in its previous judgment, did not *per se* preclude the introduction of prior recorded testimony under rule 68(3) which related to issues that were materially in dispute, central to core issues of the case or were uncorroborated.”); [Gbagbo Rule 68 AD](#), para. 78.

³⁰ [Gbagbo Rule 68 AD](#), paras. 72-73, 80 (“[...] While the nature of certain crime-base evidence may make it more conducive to introduction under rule 68(3) of the Rules, no general conclusions can be drawn on that basis alone.”), 81.

³¹ See ICC-01/09-01/11-1938-Red-Corr (“[Ruto & Sang Rule 68 Decision](#)”), paras. 28-33; [Bemba et al. Rule 68 Decision](#), paras. 28-34; [Rule 68 Amendment Proposal](#), para. 13 (“[...] ‘prior recorded testimony’ in this context is understood to include video or audio recorded records, transcripts and written witness statements. This is the view in the prevailing jurisprudence to date, and it was considered unduly restrictive to understand ‘prior recorded testimony’ in a narrower manner. Rule 68 may therefore apply to written statements taken by the parties or (inter)national authorities, provided that the requirements under one or more of the sub-rules are met.”)

³² [Ruto & Sang Rule 68 Decision](#), para. 32 (“[...] the fact that neither the WGLL nor the ASP made any effort to qualify ‘prior recorded testimony’ when amending Rule 68 demonstrates an intention, or at least an openness, for the amended Rule 68 to continue to apply to recorded statements under Rules 111 and 112. [...] Limiting

recorded testimony can be introduced under rule 68 to prove or to disprove any fact in issue before a chamber, whether for the truth of its contents or to challenge witness credibility.³³

B. Relying on rule 68(3) ensures both fairness and expedition of the proceedings

9. Article 64(2) requires a Trial Chamber to ensure a fair and expeditious trial.³⁴ Expeditiousness is an independent and important value that ensures the proper administration of justice. In this sense, expeditiousness is “more than just a component of the fair trial rights of the accused.”³⁵ When placed in this context, rule 68(3) is specifically geared towards enhancing the expedition of trial proceedings, while at the same time ensuring that fair trial rights are safeguarded.³⁶ The Appeals Chamber has found that “expeditiousness is a factor relevant to the implementation of rule 68(3) of the Rules, since its use in principle aims at reducing the amount of time devoted to hearing oral testimony in court.”³⁷

10. *First*, there is no doubt that rule 68(3) can effectively streamline and make the otherwise lengthy and complex trials conducted at the Court more efficient. Both the Appeals Chamber and the drafting history of the amended rule 68 confirm this. The

‘prior recorded testimony’ only to testimony sworn under oath or affirmation would also severely limit the practical application of the amended Rule 68, as the standard forms of the Prosecution witness statements set out in Rules 111 and 112 do not have such requirements.”); [Bemba et al. Rule 68 Decision](#), para. 33 (finding that statements taken under Rule 111 or 112 of the Rules can be considered testimonial in nature, but not the contents of intercepted telephone calls).

³³ [Bemba et al. AJ](#), fn. 693 (“[...] the Appeals Chamber clarifies that the distinction introduced by the Trial Chamber (between a statement submitted for the truth of its contents and to challenge the credibility of a witness) has no statutory foundation. Indeed, neither Rule 68 of the Rules nor any other provision in the legal framework of the Court supports any such distinction. The dispositive consideration is rather that the item of evidence in question is presented with a view to proving or disproving *any* fact in issue before a chamber.”); [Bemba Rule 68 AD](#), para. 43.

³⁴ [Katanga AD](#), para. 47.

³⁵ [Katanga AD](#), para. 47.

³⁶ [Bemba Rule 68 AD](#), para. 55 (“[...] expeditiousness is an important component of a fair trial [...]”); [Gbagbo Rule 68 AD](#), para. 62.

³⁷ [Gbagbo Rule 68 AD](#), para. 61. See also ICC-01/09-01/11-1938-Anx-Red (“[Ruto & Sang Judge Eboe-Osuij Sep. Op](#)”), para. 19 (“[...] the overall intendment of r 68 is to make trials simpler and shorter, not longer and more complicated.”).

Appeals Chamber has further acknowledged that Trial Chambers can take good trial management into account in making decisions under rule 68(3).³⁸ And the legislative history of rule 68 before the ASP overwhelmingly underscores that the measure was adopted to “[enhance] the efficiency and effectiveness of the Court” as a “common interest both for the [ASP] and the Court”.³⁹ The ASP’s intention behind amending rule 68 in 2013 has special resonance in the Court’s current climate. Not only is the Court currently subject to an independent expert review to improve its performance and effectiveness, it is well acknowledged that there is a challenge of resources.⁴⁰ The need to hold efficient trials has never been more relevant particularly in this case, not only because it is a complex multi-accused case, but given the particular and unprecedented challenges of preparing and conducting a trial in the midst of a global pandemic.

11. Over the past years, the Court has come under increased scrutiny for the effectiveness of its proceedings — with the ASP urging the Court to consider best practices adopted by other international courts and tribunals to enhance operational efficiency.⁴¹ The *ad hoc* international criminal tribunals are one such example. Several

³⁸ [Gbagbo Rule 68 AD](#), para. 62.

³⁹ [ASP Resolution](#), p. 51 (recalling the need to conduct a structured dialogue between States Parties and the Court with a view to strengthening the institutional framework of the Rome Statute system and enhancing the efficiency and effectiveness of the Court and recognising that enhancing the efficiency and effectiveness of the Court is of common interest both for the ASP and the Court); [Rule 68 Amendment Proposal](#), para. 8 (“The proposed amendment is intended to reduce the length of ICC proceedings and to streamline evidence presentation. This amendment reflects practice in international criminal tribunals, and has been prepared in consultation with major stakeholders.”)

⁴⁰ [ICC-ASP/18/Res.7](#) (2019), para. 4; [Draft Working Paper](#) (27 November 2019), Matrix over possible areas of strengthening the Court and Rome Statute system, pp. 12 (improve efficiency of trial process), 13 (increasing awareness of jurisprudence and practice of other international jurisdictions); [Elements of Intervention on behalf of the European Union and its Member States](#), Review of the Court, December 2019, p. 3 (“We welcome the Court’s efforts to enhance its working methods and procedures in order to [...] improve its efficiency”); [Statement of Canada on “Review of the Court”](#), December 2019, p. 2 (“[...] The Court must be a leader in the difficult process of self-reflection and in taking internal steps to improve its functioning.”); [New Zealand Intervention—Review of the Court](#), December 2019, p. 2 (“We welcome the efforts undertaken by the Court to enhance the transparency, efficiency and accountability of its work [...]”); [Remarks of the Republic of Korea](#), December 2019, p. 2 (“[...] Considering the limited resources and urgency of the matter, the prioritisation of issues and the pursuit of efficiency are also imperative in the process of strengthening the Court.”).

⁴¹ [ICC-ASP/14/Res.4](#) (2015), paras. 35 (“Recalls its invitation to the Court to continue to take note of best practices of other relevant international and national organisations and tribunals [...] in solving challenges similar to those encountered by the Court”), 36 (“Notes with appreciation the efforts undertaken by the Office of the Prosecutor to achieve the efficiency and transparency [...]”); [ICC-ASP/13/Res.5](#) (2014), paras. 34-35; [ICC-ASP/12/Res.8](#) (2013), paras. 22-23, 36; [ICC-ASP/11/Res.8](#) (2012), para. 21 (“Takes note of the experience

of these tribunals have statutory provisions similar in content to rule 68(3) and have used them to good effect to streamline proceedings, without compromising fairness.⁴² In this context, the words of the current ASP President O-Gon Kwon (when he was a judge at the ICTY) on the advantages of using provisions similar to rule 68(3) are highly relevant.⁴³ Judge Kwon wrote:

“I believed then, as I do now, that the admission of written statements in lieu of oral evidence has enhanced and will continue to enhance the ability of chambers to manage trials of a vast scale, and is fully consistent

already gained by other relevant international organisations in solving operational challenges similar to those encountered by the Court [...] and invites the Court to continue to take note of best practices of other relevant international organisations and tribunals.”), 38.

⁴² ICTY: Rule 92 *ter*, [Rules of Procedure and Evidence \(ICTY\)](#); (A) A Trial Chamber may admit, in whole or in part, the evidence of a witness in the form of a written statement or transcript of evidence given by a witness in proceedings before the Tribunal, under the following conditions: (i) the witness is present in court; (ii) the witness is available for cross-examination and any questioning by the Judges; and (iii) the witness attests that the written statement or transcript accurately reflects that witness’ declaration and what the witness would say if examined. (B) Evidence admitted under paragraph (A) may include evidence that goes to proof of the acts and conduct of the accused as charged in the indictment. See *Prosecutor v. Milosević*, IT-02-54-T, Decision in relation to Severance, Extension of Time and Rest, 12 December 2005 (“[12 December 2005 Milosević Decision](#)”), paras. 21 (“The Chamber has stated above that it has repeatedly counselled and warned the Accused to make use of the facility of written testimony [...]”), 22 (“[...] Evidence presented in writing, subject to public scrutiny, is no less public than *viva voce* evidence”); *Prosecutor v. Hadžić*, IT-04-75-T, Decision on Prosecution Motion for Admission of Evidence of GH-135 pursuant to Rule 92*ter*, 22 April 2013 (“[22 April 2013 Hadžić Decision](#)”), para. 5 (“The main objective of Rule 92 *ter* [...] is to ensure an effective and expeditious trial, while simultaneously ensuring and respecting the rights of the accused.”); *Prosecutor v. Prlić*, IT/04/74/T, Decision on the Application of Rule 92*ter* of the Rules, 25 June 2007 (“[25 June 2007 Prlić Decision](#)”), p. 2; ICTY Manual on Developed Practices (UNICRI 2009), p. 80, paras. 13-14 (noting that rule 92*ter* was used primarily by the Prosecution to present the evidence of its witnesses where in-court oral testimony would otherwise exceed the time permitted).

RSCSL: Rule 92 *ter*, [Rules of Procedure and Evidence \(RSCSL\)](#); STL: Rule 156, [Rules of Procedure and Evidence \(STL\)](#); *Prosecutor v. Ayyash et al.*, STL-11-01/T/TC, Decision granting Prosecution to proceed under Rule 156 (iii) regarding PRH707’s testimony, 11 February 2016 (“[11 February 2016 Ayyash et al. Decision](#)”), pp. 1-2; *Prosecutor v. Ayyash et al.*, STL-11-01/T/TC, Corrected Version of ‘Decision on Prosecution Motion for the Admission of the Statements of Witnesses PRH056 and PRH087’ of 29 September 2015, 5 October 2015 (“[5 October 2015 Ayyash et al. Decision](#)”), paras. 12-20.

⁴³ O-Gon Kwon, “The Challenge of an International Criminal Trial as Seen from the Bench”, *Journal of International Criminal Justice* 5 (2007), 360-375 (“Kwon”), pp. 363 (“[...] Nevertheless, as time has progressed the Tribunal has also adopted a number of essentially civil-law mechanisms for tendering and admitting evidence. This infusion of civil-law evidentiary principles into an essentially common-law framework is, in my view, a testament to the judges’ willingness to cooperate, to learn from one another and to recognise the utility and effectiveness of approaches taken in national legal systems other than their own.”), 367 (“[...] Each time the witness appeared in court to adopt the statement and submit to cross-examination by the accused. It is my firm belief that, as a result of the admission of Rule 89(F) statements, the admittedly long presentation of the prosecution’s case-in-chief was substantially shorter than it otherwise would have been. It is interesting to note that my common-law colleagues on the bench eventually came to agree with me that admitting written statements with cross-examination was an appropriate and fair way to expedite the proceedings [...]”).

with principles of justice and fair-trial rights, subject to the proviso that the maker of the statement may be subject to cross-examination.”⁴⁴

12. *Second*, notwithstanding its emphasis on efficiency, rule 68(3) also expressly guarantees a fair trial. It does not sacrifice fairness for efficiency: there is a right to cross-examination in court.⁴⁵ Further, as its legislative history shows, the express protections included in the text and the overriding powers of the Chamber to control the proceedings ensure that its use remains consistent with the dictates of fair trial.⁴⁶ In this sense, compared to its *ad hoc* tribunal counterparts, rule 68(3) may be said to be even more attuned to fair trial concerns. Moreover, the prior recorded testimony is introduced only if the witness “does not object”, as opposed to requiring the witness to only attest to the accuracy of the testimony (for instance, as rule 92 *ter* ICTY provides).⁴⁷ Further, since there will be a supplemental examination by the calling party, the rule 68(3) process still ensures that witnesses and victims are heard in court. They are given the opportunity to describe their experiences to the judges and, if the testimony allows, in public. Likewise, the Chamber also has the opportunity to fairly evaluate the witnesses: the judges can question the witnesses and will be able to observe them (and their demeanour) during the supplemental examination and cross-examination, and assess their credibility accordingly.

⁴⁴ Kwon, p. 365. See also Christopher Gosnell, “Admissibility of Evidence” in Karim A.A. Khan *et al.* (eds.), *Principles of Evidence in International Criminal Justice* (OUP, Oxford: 2010) (“Gosnell”), p. 439 (noting the use of rule 92 *ter* as an expedient mechanism for testimonial contextualisation).

⁴⁵ See Megan A. Fairlie, “The Abiding Problem of Witness Statements in International Criminal Trials”, *International Law and Politics*, Vol. 50:75 (“Fairlie”), p. 124 (noting that rule 92 *ter* offers greater protection to the accused because it provides for cross-examination as a matter of right).

⁴⁶ [Rule 68 Amendment Proposal](#), para. 43.

⁴⁷ Fergal Gaynor *et al.*, “Law of Evidence” in Goran Sluiter *et al.* (eds.), *International Criminal Procedure: Principles and Rules* (OUP, Oxford: 2013) (“Gaynor”), p. 1051 (noting that for rule 92 *ter*, unlike the ICC, the witness’s consent is not a requirement for admission).

13. Significantly, the Appeals Chamber has already addressed several fair trial challenges raised in the context of rule 68(3), and found them to be without merit.⁴⁸

For instance,

- Applying rule 68(3) in trial proceedings does not “[free] the Prosecution from part of the burden of proof” or “[lower] the standard of proof it needs to attain”.⁴⁹ Otherwise, rule 68 would be rendered obsolete since it would be considered inherently prejudicial. The Prosecution’s burden of proof under article 66 is unrelated to its use of rule 68 at trial.⁵⁰
- Arguments opposing the use of rule 68(3) on the grounds that the Parties may need additional time to cross-examine the witnesses are speculative, if a chamber has not yet stipulated time for cross-examination. Moreover, the Parties are expected to prepare their cross-examination based on relevant material disclosed, and may not be precluded from asking for additional time if needed.⁵¹
- In principle, rule 68(3) does not violate the primacy of the principle of orality.⁵² Moreover, that there may be a number of witnesses to be potentially introduced under the provision does not “infringe” the principle of orality.⁵³ As the Appeals Chamber has held, the principle of orality “cannot be reduced to a purely mathematical calculation of the percentage of witnesses providing their entire evidence orally.”⁵⁴

⁴⁸ [Gbagbo Rule 68 AD](#), paras. 57-84.

⁴⁹ [Gbagbo Rule 68 AD](#), para. 74.

⁵⁰ [Gbagbo Rule 68 AD](#), para. 74 (“[...] The Prosecutor still needs to prove the guilt of the accused person beyond reasonable doubt on the basis of the evidence presented, be it oral or written”).

⁵¹ [Gbagbo Rule 68 AD](#), para. 76. *See also Prosecutor v. Mladić*, 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 (“[3 July 2012 Mladić Decision](#)”), para. 5 (“[...] As a general rule, the opposing party should prepare for a witness’s testimony assuming that the witness’s full statement will be admitted into evidence.”)

⁵² [Gbagbo Rule 68 AD](#), paras. 78-79.

⁵³ [Gbagbo Rule 68 AD](#), para. 78.

⁵⁴ [Gbagbo Rule 68 AD](#), para. 78.

- Further, the principle of *in dubio pro reo* (in article 22 of the Statute) is unlikely to apply when the factors relevant to rule 68(3) are utilised.⁵⁵

14. *Third*, the Prosecution case in this matter is particularly suitable for the use of rule 68(3) to introduce evidence. Given its nature, heavy reliance on witness-based evidence — which predominates in this instance — is necessary to establish the truth in this complex multi-accused case. Of the 145 fact witnesses anticipated, using rule 68(3) for approximately 77 of them (with limited examination by the calling party) would save considerable time. This is particularly significant given that other pandemic-related constraints have impeded normal case preparations. Since the evidence of several witnesses is interconnected in the matrix of evidence,⁵⁶ using rule 68(3) will allow 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.

15. Although the Prosecution anticipates greater use of rule 68(3) in this case than in other trials, in principle, its projected use is consistent with the practice at this Court.⁵⁷ Several other Trial Chambers at this Court have encouraged the use of rule 68(3) as a measure of expedition.⁵⁸ As it will demonstrate in its upcoming

⁵⁵ [Gbagbo Rule 68 AD](#), para. 83 (“[...] Leaving aside whether [*in dubio pro reo*] applies to the circumstances at hand, the Appeals Chamber considers that Mr Blé Goudé has not demonstrated any ambiguity [...]”).

⁵⁶ This is readily reflected in the summaries of anticipated witness testimony recently filed; see Prosecution’s Provisional Witness List.

⁵⁷ See e.g., ICC-01/04-02/06-1667-Red (“[2 December 2016 Ntaganda Decision](#)”), paras. 20-24; ICC-01/04-02/06-2135 (“[30 November 2017 Ntaganda Decision](#)”), paras. 11-12; ICC-01/04-02/06-1640-Red (“[18 November 2016 Ntaganda Decision](#)”), paras. 7-9; ICC-01/04-02/06-1602-Red (“[2 November 2016 Ntaganda Decision](#)”), paras. 7-9; ICC-01/04-02/06-845 (“[21 September 2015 Ntaganda Decision](#)”), paras. 5-10; ICC-02/11-01/15-573-Red (“[Gbagbo Rule 68 Decision](#)”), paras. 24-41; ICC-02/04-01/15-596-Red (“[1 December 2016 Ongwen Decision](#)”), paras. 54, 209, 213. See also Gabriele Chlevickaite *et al.*, “Thousands on the stand: Exploring trends and patterns of international witnesses”, *Leiden Journal of International Law* (2019), 32, pp. 819-836 (“Chlevickaite *et al.*”), p. 832 (noting the ICC’s recognition of the need for expediency through the practice of admitting witness statements in lieu of their testimony at trial).

⁵⁸ ICC-01/04-02/06-961 (“[29 October 2015 Ntaganda Decision](#)”), para. 13 (noting rule 68(3)’s potential to significantly enhance the expeditiousness of the proceedings and encouraging the parties to explore if the use of this provision was appropriate for future witnesses); [Gbagbo Rule 68 Decision](#), paras. 25 (“[...] It is the duty of the Chamber to ensure that the trial unfolds in a focused and expeditious manner, while respecting the procedural rights of the parties and participants. Rule 68(3) of the Rules must be understood as a tool in the exercise of this duty.”); 42 (encouraging the use of Rule 68(3) to streamline the presentation of evidence). See also Fairlie, pp. 126-130.

applications to introduce prior recorded testimony, the Prosecution considers that this case warrants a similar use of rule 68(3) so that this trial is both fair and efficient.

III. CONCLUSION

16. To assist the Chamber, the Parties and the Participants and to ensure efficient proceedings, the Prosecution submits these observations on its approach and intended use of rule 68(3) in the presentation of its case. Its individual rule 68(3) applications, to follow, will contain the specific requested relief.



James Stewart, Deputy Prosecutor

Dated this 15th day of September 2020
At The Hague, The Netherlands