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**International
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Date: **25 September 2020**

TRIAL CHAMBER V

Before: Judge 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

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”

Source: Defence of Patrice-Edouard Ngaïssona

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

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I. INTRODUCTION

1. On 14 September 2020, the Prosecution filed the “Prosecution’s Request pursuant to Regulation 35 to vary the Time Limit for the Submission of Applications pursuant to Rule 68”¹ (“Request”), seeking an extension of the deadline ordered by Trial Chamber V (“Chamber”) to file its applications pursuant to rule 68 of the Rules of Procedure and Evidence (“Rules”).² Specifically, the Prosecution requests an extension of time to file its unprecedented number of rule 68 applications “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”.³
2. One day later, on 15 September 2020, the Prosecution filed the “Prosecution’s Observations on its intended approach to Rule 68(3) in the presentation of its case,” (“Prosecution’s Observations”),⁴ in which the Prosecution outlined its interpretation of rule 68(3). According to the Prosecution, its interpretation allows for an extensive reliance on rule 68(3) in order to comply with the Chamber’s order to present its case in 400 hours.
3. The Defence hereby presents its consolidated response to both the Prosecution’s Request and the Prosecution’s Observations.
4. With respect to the Request, the Prosecution fails to show ‘good cause’ which may warrant the granting of the Request pursuant to regulation 35 of the Regulations of the Court (“Regulations”). By asserting that it “cannot reasonably meet” the Chamber’s order by the established deadline, due to the

¹ ICC-01/14-01/18-652 (hereinafter “Request”).

² ICC-01/14-01/18-631.

³ Request, para. 28.

⁴ ICC-01/14-01/18-655.

its inordinate reliance on rule 68 to introduce witness testimony, the Prosecution effectively demands that the Chamber and the Defence adapt to its preferred “staggered deadlines” approach, despite it having been rejected by the Chamber.⁵

5. Given that the Chamber ordered that the Prosecution present its case within a maximum of 400 hours, the Defence requests as a primary relief 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, rather than be granted an extension of time pursuant to regulation 35.
6. In the alternative, it is requested that rule 68(2) applications be filed, at the very latest, at least one month before the start of trial and on a rolling basis.
7. With respect to the Prosecution’s Observations, the Defence submits they should be dismissed *in limine*, as they fail to request any specific relief, contrary to the Chamber’s specific instructions.⁶

II. RELEVANT PROCEDURAL HISTORY

8. Six years ago, the Prosecution opened its investigation into alleged crimes committed since 2012 in the Central African Republic.⁷ Mr Ngaïssona was arrested in December 2018 and his first appearance before the Court took place on 25 January 2019.⁸ Pre-Trial Chamber II’s Decision on the confirmation of charges was issued over nine months ago, on 11 December 2019.⁹ The Prosecution has had ample time to conduct investigations and

⁵ ICC-01/14-01/18-T-012-ENG ET, page 24, lines 2-9; ICC-01/14-01/18-631, para. 33.

⁶ ICC-01/14-01/18-655.

⁷ Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on opening a second investigation in the Central African Republic, ICC-OTP-20140924-PR1043, 24 September 2014.

⁸ ICC-01/14-02/18-T-001-ENG.

⁹ ICC-01/14-01/18-403-Conf.

organise its activities in a way that respects its disclosure obligations and established deadlines.

9. The Prosecution's intention of relying significantly on rule 68 applications was communicated to the Chamber, parties and participants as early as 8 April 2020, in its "Prosecution's Observations on the Agenda of the First Status Conference".¹⁰
10. On 22 May 2020, the Single Judge ordered that the Prosecution file a Preliminary Witness List by 15 June 2020, *inter alia* to mitigate the delays caused by the Covid-19 pandemic. The Chamber recalled the accused' right to a fair and expeditious trial and to have adequate time to prepare their defence as protected under the Rome Statute ("Statute") and the Rules.¹¹
11. On 9 July 2020, the first status conference was held during which the Prosecution reiterated that it would rely extensively on rule 68 to introduce witness testimony.¹²
12. On 16 July 2020, taking into consideration the parties' written and oral submissions, the Chamber set the beginning of trial date to 9 February 2021 and ordered the Prosecution to disclose all its witness-related evidence by 31 August 2020.¹³
13. On 26 August 2020, the Chamber issued its "Initial Directions on the Conduct of the Proceedings" setting, *inter alia*, the deadline for the submissions of rule 68(2) and (3) applications "as soon as possible" and at the latest by 9 November.¹⁴

¹⁰ ICC-01/14-01/18-474-Conf, para. 19.

¹¹ ICC-01/13-01/18-528, paras 4-5.

¹² ICC-01/14-01/18-T-012-ENG ET, page 34, lines 7-14.

¹³ ICC-01/14-01/18-589.

¹⁴ ICC-01/14-01/18-631, para. 33.

14. On 14 September 2020, the Prosecution filed the Request.

15. The following day, the Prosecution filed the “Prosecution’s Observations on its intended approach to Rule 68(3) in the presentation of its case”.¹⁵

16. On 22 September 2020, the Defence for Mr Yekatom filed its response to the Request, indicating that it does not oppose the Prosecution’s Request, as long as the Prosecution’s rule 68 applications are filed on a rolling basis and that rule 68(2) applications are filed by 11 January 2021.¹⁶

17. On 23 September 2020, the Defence for Mr Yekatom filed its “Response to the Prosecution’s Intended Approach to Rule 68(3)”.¹⁷

III. APPLICABLE LAW

18. Under regulation 35(2) of the Regulations of the Court (“Regulations”), a chamber may extend or reduce a time limit if good cause is shown. The Appeals Chamber has held that good cause means that the inability of a party to conform to a procedural rule or regulation “must be for sound reasons, such as would objectively provide justification for the inability of a party to comply with his/her obligation.”¹⁸

IV. SUBMISSIONS

A. The Prosecution has failed to show good cause which may warrant an extension of time and should be ordered to reduce its number of rule 68 applications

¹⁵ ICC-01/14-01/18-655.

¹⁶ ICC-01/14-01/18-663, paras 27-28.

¹⁷ ICC-01/14-01/18-664.

¹⁸ *Prosecutor v Lubanga*, “Reasons for the ‘Decision of the Appeals Chamber on the request of counsel to Mr. Thomas Lubanga Dyilo for modification of the time limit pursuant to regulation 35 of the Regulations of the Court of 7 February 2007’ issued on the 16 February 2007”, ICC-01/04-01/06- 834 OA8, 21 February 2007, paras 7-9; ICC-01/04-01/07-653, para. 5.

19. The Prosecution boldly states that it is not in a position to respect the Chamber's deadline, thereby placing the Chamber and the Defence before a *fait accompli*. It argues that it does not have the resources to complete and file rule 68(2) and (3) applications for at least 121 witnesses by 9 November 2020.¹⁹ Although the Defence recognises the time constraints given the volume of rule 68 applications, these restraints were created by the Prosecution's own strategy of relying on an unprecedented number of witnesses, the majority of which it elected to call based on rule 68 applications.²⁰ Such an approach does not amount to a "sound reason" which "would objectively provide justification for the inability of a party to comply with his/her obligation".²¹
20. The Prosecution advances no cogent argument, which could meet the threshold of 'good cause' as required by the regime of regulation 35 of the Regulations. Therefore, it should be ordered to reduce the number of rule 68 applications it intends to file, in order to respect the parameters set by the Chamber for the presentation of its evidence.
21. *First*, in its Request, the Prosecution implies that the Chamber may have ordered a different deadline, had it been apprised of the "precise contours" of the Prosecution's Provisional Witness List filed on 31 August,²² upon issuing its order of 26 August 2020.²³ This is unconvincing. The Chamber was, to the contrary, fully aware of the Prosecution's intention to rely "significantly" on rule 68 when deciding on the 9 November 2020 deadline. This intention was

¹⁹ Request, paras 10, 12.

²⁰ Request, para. 7.

²¹ *Prosecutor v Lubanga*, "Reasons for the 'Decision of the Appeals Chamber on the request of counsel to Mr. Thomas Lubanga Dyilo for modification of the time limit pursuant to regulation 35 of the Regulations of the Court of 7 February 2007' issued on the 16 February 2007", ICC-01/04-01/06- 834 OA8, 21 February 2007, paras 7-9; *Prosecutor v. Katanga and Ngudjolo*, Reasons for the "Decision on the 'Application for Extension of Time Limits Pursuant to Regulation 35 of the Regulations of the Court to Allow the Defence to Submit its Observations on the Prosecutor's Appeal regarding the Decision on Evidentiary Scope of the Confirmation Hearing and Preventative Relocation'", ICC-01/04-01/07-653, 27 June 2008, para. 5.

²² Request, para. 3; ICC-01/14-01/18-589.

²³ ICC-01/14-01/18-652, para. 3.

communicated to the Chamber as early as April 2020²⁴ and reiterated during the status conference hearing held on 9 July 2020.²⁵ At the time that the Chamber set the 9 November deadline, it was also apprised of the Prosecution's estimate of calling 152 witnesses,²⁶ and thus the Chamber had all the elements it needed at its disposal to set the 9 November 2020 deadline. That the Prosecution expresses disagreement with the Chamber's order, by considering "that the standing deadlines do not sufficiently reflect the unique circumstances of this case", does not amount to good cause.²⁷

22. *Second*, the Prosecution's argument that the circumstances of the case "are without precedent at the Court", as "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" is unfounded.²⁸ Firstly, the Prosecution offers no concrete examples pointing to the particular complexity of this case, in comparison to other cases, which would warrant the exceptional remedy it requests pursuant to regulation 35. Secondly, contrary to the Prosecution's suggestion, the instant case is like other cases before the Court in terms of scope and complexity. Cases at the ICC are by their very nature "complex".²⁹ Thirdly, as previously argued, the Pre-Trial Chamber's Decision on the confirmation of charges significantly reduced the scope of the charges, which now covers alleged crimes occurring over the span of less than three months, with the exception of the continuing alleged crime of the use of child soldiers, in four locations all of which allegedly formed one single "course of action" stemming from the 5 December attack.³⁰ Given that all the

²⁴ ICC-01/14-01/18-589, para. 19.

²⁵ ICC-01/14-01/18-T-012-ENG ET, page 34, lines 7-14.

²⁶ ICC-01/14-01/18-553, para. 5.

²⁷ Request, para. 10.

²⁸ Request, paras 5-6.

²⁹ The ICC deals with the gravest and "most serious crimes of concern to the international community", which "threaten the peace, security and well-being of the world", Rome Statute preamble, paras 3-4.

³⁰ ICC-01/14-01/18-573-Conf, para. 26.

charges allegedly stem from a single “course of action” linked to one attack, the factual allegations underlying the number of charges do not make this case one of unprecedented magnitude before this Court.³¹

23. Although the Prosecution’s case was broader before the confirmation of charges proceedings, ultimately, Pre-Trial Chamber II confirmed only 31 out of the 111 counts for which the Prosecution sought confirmation with respect to Mr Ngaïssona, a number significantly lower than the seventy counts confirmed against Mr Ongwen, for instance.³²

24. Rather than attesting to the complexity of the case, the Prosecution’s choice of calling 145 fact witness – 111 of which are subject to rule 68 application – is a reflection of its prosecutorial and litigation strategy.³³ In other words, rather than focusing its case, the Prosecution itself renders the case complex first by seeking to have testify an unprecedented number of witnesses and second by foreseeing an overwhelming and disproportionate amount of rule 68 applications to introduce witness testimony. During the first status conference, Judge Schmitt observed that the number of Prosecution witnesses was “rather high”, and directed the Prosecution to revise its number of witnesses.³⁴ The Chamber recalled this instruction to the Prosecution in its “Decision Setting the Commencement of the Trial”.³⁵

25. *Third*, the Prosecution’s approach does not respect the spirit of the Chamber’s order, which specifically limited the presentation of the Prosecution’s

³¹ See *Prosecutor v. Ongwen*, ICC-02/04-01/15-T-25-ENG ET, page 4, lines 21-23 (“But the number of charges does not only, and in this case not even predominantly, determine the magnitude of the case. More important are the factual allegations that lie behind the charges so to speak”).

³² ICC-01/14-01/18-403-Red. See ICC-01/14-01/18-473-Conf, paras 8-9.

³³ Request, para. 6, footnote 6.

³⁴ ICC-01/14-01/18-T-012-ENG, page 30, line 24 to page 31, line 3.

³⁵ ICC-01/14-01/18-589, para. 6: “(...) the Chamber also reminds the Prosecution to take the Chamber’s remarks during the Status Conference regarding the number of witnesses into account”.

evidence to a maximum of 400 hours.³⁶ At the status conference hearing of 9 July 2020, the Chamber noted the significant number of Prosecution witnesses.³⁷ Ultimately the Chamber limited the presentation of the Prosecution case to 400 hours, while reserving its right to order the limiting of the number of witnesses to ensure the efficiency of the proceedings and the accused' right to be tried without undue delay.³⁸ Rather than revising its approach and limiting its list of witnesses, the Prosecution elected to rely on an unprecedented number of rule 68 applications, for which it is now seeking a variance of the established deadline, in an attempt to push its case strategy to the outermost limit of the parameters established by the Chamber.

26. *Fourth*, by resolutely stating that “a different approach *must* be employed”, the Prosecution simply seeks to impose its own preferred approach to the management of the trial, whereas this is clearly the task of the Chamber, which must carefully consider that the trial is conducted “with full respect for the rights of the accused and due regard for the protection of victims and witnesses”.³⁹ It is up to the Chamber – and not the Prosecution – to manage and decide upon the parameters of the trial, which includes setting the relevant deadlines for disclosures and for rule 68 applications to be filed, and for the parties to adapt their case strategy, arguments and presentation of their evidence accordingly. Taking all considerations into account, the Chamber rejected the Prosecution's requests that the Chamber impose staggered deadlines.⁴⁰

³⁶ ICC-01/14-01/18-T-012-ENG ET, page 30, line 24 to page 31, line 3; ICC-01/14-01/18-631, para. 23.

³⁷ ICC-01/14-01/18-T-012-ENG ET, page 31.

³⁸ ICC-01/14-01/18-631, para. 22.

³⁹ Emphasis added. Request, para. 13. Articles 64(2) and 64(3)(b) of the Rome Statute; *See also* rule 132bis of the Rules of Procedure and Evidence.

⁴⁰ Request, para. 13; ICC-01/14-01/18-631, para. 33.

27. *Fifth*, as noted by the Prosecution, the statutory framework establishes no hard or fixed notice period for rule 68 applications.⁴¹ The Prosecution also rightfully noted that “the Chamber’s discretion is broad and must be exercised in view of the peculiarities of the given case and circumstances”.⁴² The Prosecution’s reliance therefore, on the various approaches taken by trial chambers in other cases, such as the *Ruto and Sang*, *Gbagbo and Blé Goudé*, *Ntaganda* and *Al Hassan* cases, is irrelevant to the ‘good cause’ test established by regulation 35.⁴³ The various approaches in those cases related to the peculiarities of those trials. In the instance case, the Chamber carefully considered the arguments put forward by the parties, including their views relating to the conduct of proceedings, and held that the Prosecution’s rule 68 applications were to be filed as soon as possible, and the latest at the same time as the Final Witness List.⁴⁴

28. The Prosecution did not appeal either the Chamber’s “Decision Setting the commencement of the trial” of 16 July 2020, or the “Initial Directions on the Conduct of the Proceedings” of 26 August 2020 setting the relevant deadlines 90 days before the start of trial. A regulation 35 request may therefore not be used to challenge the propriety of those decisions and circumvent the system of leave to appeal. Rather it should focus on the ‘good cause’ test, in the particular circumstances of a given case. Rather than adapting its case to comply with the Chamber’s orders, and by stating that it “considers that the standing deadlines do not sufficiently reflect the unique circumstances of this case”, the Prosecution effectively attempts to reopen the debate about whether staggered deadlines should be imposed.⁴⁵

⁴¹ Request, para. 18.

⁴² Request, para. 18.

⁴³ Request, paras 19-21.

⁴⁴ ICC-01/14-01/18-631, para. 33; ICC-01/14-01/18-589, para. 14.

⁴⁵ Request, para. 10.

29. *Sixth*, the Prosecution recognises that its intended reliance on rule 68 in the instant case is “novel”.⁴⁶ The unprecedented nature of the Prosecution’s approach may be explained by the fact that rule 68 provides an *exception* to the primacy of orality for the admission of testimonial statements of witnesses before the Court.⁴⁷ However, in the present case, the Prosecution intends to rely on the mechanism provided for in rule 68 as being the rule, rather than being, as it should, the exception. By proceeding in this way, it has placed itself in a position where it is unable to meet the Chamber’s established deadline of 9 November 2020 and is now seeking a considerable extension of time to fulfil its obligations.

30. It is telling that the Prosecution admits that it is materially not in a position to meet the Chamber’s deadline as it concerns rules 68 applications. A revision by the Prosecution of its excessive reliance on rule 68, such that the Prosecution respects the spirit of the Chamber’s order to limit the presentation of its case to 400 hours would resolve the issue with the deadline, and should therefore be envisaged.

B. The Prosecution’s Request is prejudicial to the rights of the Defence

31. Granting the Prosecution’s Request would cause unfair prejudice to the Defence. Article 69(2) of the Statute provides that witness testimony “shall be given in person, except to the extent provided by the measures set forth in article 68” and that such “measures shall not be prejudicial to or inconsistent with the rights of the accused”.⁴⁸

⁴⁶ Request, para. 16.

⁴⁷ Article 69(2) of the Rome Statute.

⁴⁸ *Prosecutor v. Ntaganda*, Chamber’s Decision on Prosecution application under Rule 68(2)(c) of the Rules for admission of prior recorded testimony of P-0022, P-0041 and P-0103, ICC-01/04-02/06-1029, 20 November 2015, para. 46.

32. *First*, the Prosecution's argument that its proposed approach with regard to the use of rule 68(3) has successfully been implemented in other cases, is irrelevant as it says nothing about the potential prejudice cause in this instant case.⁴⁹ References to other cases, provides little clarity as to the absence of prejudice to Mr Ngaïssona. Moreover, as the Prosecution recognises, the extent to which the Prosecution intends to rely on rule 68(3) is "novel", rendering its comparisons with other cases less relevant.⁵⁰

33. *Second*, granting the Prosecution's Request would significantly reduce the amount of time available to the Defence to be apprised of the rule 68 applications and to prepare for trial accordingly, contrary to article 67(1)(b) of the Statute. This would necessarily prejudice the Defence, depriving it of the time afforded to it by the Chamber in its Initial Directions on the Conduct of the proceedings.

34. The Prosecution's request that rule 68(2) applications be filed up to two months after the start of trial is particularly prejudicial to the Defence, as it would place the Defence in the situation where it would have to simultaneously respond within a short time frame to the applications, while it prepares the cross-examinations of witnesses being called to testify in court, and potentially while it also responds to rule 68(3) applications. As argued by the Prosecution, the preparation of rule 68 applications is a resource-intensive exercise.⁵¹ This is also the case for the Defence, who must review each individual application and prepare a response to each individual request in a short period of time, with few resources.

35. With respect to rule 68(3) applications, rather than streamlining proceedings, the Prosecution's approach would likely only cause further delays in the

⁴⁹ Request, paras 16-22.

⁵⁰ Request, para. 16.

⁵¹ Request, para. 12.

presentation of its case, prejudicing Mr Ngaïssona's right to an expeditious trial. The majority of the Prosecution's anticipated rule 68(3) witnesses are scheduled to testify for two or three hours, while three witnesses are expected to testify for six hours.⁵² This entails significant preparations for cross-examination of each witness, particularly given that several witnesses' testimonies are several hundreds of pages long.⁵³ This required preparation time is additional to the extensive resources which must be spent on analysing the Prosecution's rule 68(3) applications, creating a potential doubling of work. Moreover, the Defence would clearly need to be afforded significantly more time than the Prosecution to conduct its examination of rule 68(3) witnesses, especially given the number of insider witnesses the Prosecution intends to call via rule 68(3) whose statements are several hundreds of pages long. This would place a significant burden on the Defence, but would necessarily lead to further delays, since additional time would be required to prepare responses to the rule 68(3) witnesses, which may not be feasible given witnesses' scheduled appearances before the Court. Further, the Prosecution's applications would entail further analysis by the Chamber, in light of the parties' arguments, in order to make determinations on individual applications. Rather than streamlining the presentation of the Prosecution's case, the Prosecution's intended approach in relation to rule 68(3) applications only further complexifies the presentation of evidence and risks causing further delays, thereby defeating the purpose of rule 68(3).

36. In other words, it is questionable whether the Prosecution's extensive reliance on rule 68 applications would effectively "reduc[e] court time" and expedite the proceedings.⁵⁴ The Prosecution appears to contradict itself by arguing on the one hand that rule 68 applications are so labour intensive that they cannot be

⁵² ICC-01/14-01/18-642-Conf-AnxA.

⁵³ See ICC-01/14-01/18-664.

⁵⁴ Request, para. 4.

possibly completed in the timeframe ordered by the Chamber, and on the other hand, by arguing that its approach would be conducive to good trial management expedite proceedings.⁵⁵ It is clear that the sheer volume of witnesses expecting to testify based on rule 68(3) would cause an unfair prejudice to the Defence, in light of Mr Ngaïssona's right to a fair and expeditious trial.

37. While rule 68 can be, in certain circumstances, a valuable tool to expedite proceedings, the Prosecution's intended approach of relying on rule 68 for the great *majority* of its witnesses, amounts to an abuse of 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.⁵⁶ Such an approach does not amount to good cause.

38. In conclusion, good cause has not been shown, as the Prosecution has failed to show that its Request would not lead to unfair prejudice caused to the Defence and has failed to put forward convincing arguments which would warrant the granting of the regulation 35 Request. Therefore, the Defence requests that the Prosecution be ordered to reduce the number of rule 68 witnesses upon which it intends to rely, such that it is able to file its applications on a rolling basis up to 9 November 2020.

C. In the alternative, the rule 68(2) applications should be filed at least one month before the start of trial and on a rolling basis

⁵⁵ Request, para. 17.

⁵⁶ Article 69(2), Rome Statute; *Prosecutor v. Bemba*, Dissenting Opinion of Judge Kuniko Ozaki on the Decision on the admission into evidence of materials contained in the prosecution's list of evidence, ICC-01/05-01/08-1028, para. 8, where Judge Ozaki recalls that the principle of orality is "one of the corner-stones of the proceedings under the Rome Statute".

39. Should the Chamber find that the Prosecution has shown good cause, it is argued, in the alternative, there is no merit to the length of the proposed extensions of time requested with respect to rule 68(2) applications.

40. As held by the Appeals Chamber, “any departure from the time limits set by the Rules or Regulations of the Court must not derail the proceedings from their ordained course, requiring that they be conducted and concluded within a reasonable time”.⁵⁷

41. While the Prosecution’s Request with respect to its rule 68(2) applications could potentially justify a moderate extension of time, the requested variation of the deadline until two months after the beginning of trial is disproportionate and in contravention to the spirit of the Chamber’s order of 26 August 2020.⁵⁸ Any extension of time for filing rule 68(2) applications should allow the Defence sufficient time to respond well before the start of trial and at least one month before the beginning of trial.⁵⁹ As such, in the alternative, the Prosecution should be ordered to file its rule 68(2) applications on a rolling basis by 8 January 2021.

42. Should the Chamber find that the Prosecution has shown good cause with respect to its request for an extension of time to file rule 68(3) applications, the Defence would be amenable to the Prosecution’s proposed deadline of a maximum of 45 days before the witness’ schedule in-court testimony.

D. Response to the Prosecution’s “Observations on its intended approach to Rule 68(3) in the presentation of its case”

⁵⁷ *Prosecutor v. Katanga and Ngudjolo*, Reasons for the "Decision on the 'Application for Extension of Time Limits Pursuant to Regulation 35 of the Regulations of the Court to Allow the Defence to Submit its Observations on the Prosecutor's Appeal regarding the Decision on Evidentiary Scope of the Confirmation Hearing and Preventative Relocation'", ICC-01/04-01/07-653, 27 June 2008, para. 6.

⁵⁸ ICC-01/14-01/18-631.

⁵⁹ See ICC-01/14-01/18-663, paras 25-26.

43. The Defence submits that the Prosecution's Observations should be dismissed *in limine* since they are in direct contravention with the Chamber's preliminary remarks made during the first status conference. The Chamber expressly informed the parties that it "expects to receive submissions with a concrete relief, and that it did not "wish to receive notifications, which anticipate future requests".⁶⁰ The Prosecution's Observations make no mention of a concrete relief. Instead, they consist of abstract legal arguments extolling the use of rule 68 as an alleged terrific tool to expedite proceedings in a manner that would not be prejudicial to the accused.
44. The Prosecution Observations ignore that the Appeals Chamber has determined that when a Trial Chamber determines whether rule 68(3) testimony should be introduced, it should proceed with a "cautious item-by-item analysis" and that the assessment "should be made on a case-by-case basis where the factors to be considered may vary per case and per witness."⁶¹
45. Since the Prosecution fails to make these case specific arguments, which demonstrate the alleged suitability of rule 68(3) to the specific witnesses it wishes to have testify through this rule, its observations should not be taken into account by the Chamber, and thus be dismissed *in limine*. While the Prosecution may be certain that it will make these applications in the future, this litigation is not ripe since there is no concrete issue that has been brought to the Chamber's attention that needs its resolution.

⁶⁰ ICC-01/14-01/18-T-012-ENG ET, page 6.

⁶¹ ICC-02/11-01/15-744, para. 69.

V. RELIEF SOUGHT

46. The Defence respectfully requests the Chamber to:

- **REJECT** the Request and **ORDER** the Prosecution to limit the number of witnesses for whom it wishes to submit rule 68 applications;
- **ORDER** the Prosecution to file its rule 68(2) and (3) applications on a rolling basis up to 9 November 2020;
- In the alternative, **ORDER** the Prosecution to file its 68(2) applications by Friday 8 January 2021 and that rule 68(3) applications be filed at a minimum 45 days before the scheduled start of the witness' testimony.

Respectfully submitted,



Mr Knoops, Lead Counsel for Patrice-Edouard Ngaïssona

Dated this 25 September 2020,

At The Hague, the Netherlands.