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Date: 04 April 2008

TRIAL CHAMBER I

Before: Judge Adrian Fulford, Presiding Judge
Judge Elizabeth Odio Benito
Judge René Blattmann

SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO
*IN THE CASE OF
THE PROSECUTOR
v. THOMAS LUBANGA DYILO*

Public Document
**Prosecution's Application for a Preliminary Ruling on the Admission of Prior
Recorded Statements**

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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**Victims Participation and Reparations
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I. Introduction

1. At the status conference on 12 March 2008, the Prosecution raised the issue of the interpretation of Rule 68 of the Rules of Procedure and Evidence ("Rules") prompting the Trial Chamber to order the Prosecution to file a written application on the said issue.¹ At this stage the Prosecution seeks a preliminary ruling from the Trial Chamber on the interpretation of Rule 68 so that it may decide with which witnesses Rule 68 applications can be made. Should there be an oral hearing on this matter, the Prosecution would be in a position to suggest specific witnesses that may fall within the scope of Rule 68.
2. The Prosecution herewith makes submissions on the admission of prior recorded statements that may not then necessitate substantive questioning by the Prosecution pursuant to Rule 68(b) of the Rules of the Procedure and Evidence ("Rules").

II. Admission of Prior Recorded Statements

3. The Prosecution makes an application to the Trial Chamber for a preliminary ruling that permits in principle the admission of a prior recorded statement of a witness, in particular those taken in compliance with Rules 111 and 112, as substantive evidence at trial without the calling party conducting a full examination of the witness. Following the preliminary ruling from the Trial Chamber, the Prosecution may file separate applications for the admission of statements pertaining to specific witnesses.

¹ ICC-01/04-01/06-T-78-CONF-ENG ET T.85-86.

4. It is submitted that Rule 68 (b) of the Rules, in accordance with the discretion afforded to a Trial Chamber under Article 69(2) of the Rome Statute ("the Statute"), affords the Trial Chamber the discretion to permit the introduction into evidence of a prior recorded statement, as long as the witness is present in the court, agrees to its admission and is available for examination by the parties and the Bench.

5. The possible scenario envisaged is that the witness takes the stand and confirms the accuracy and authenticity of his statement under oath. The statement is subsequently tendered into evidence in its entirety by the calling party and the witness is then available for questioning by the opposing party and examination by the Bench. Rule 68(b) stipulates that "...the Prosecutor, the defence and the Chamber have the *opportunity* to examine the witness during proceedings" (emphasis added). This implies that any party may waive its right to substantively examine the witness, thereby permitting the calling party to tender the statement of the witness into evidence and not substantively question the witness. In such circumstances, the Prosecution submits that the statement would represent the substantive evidence of the witness.

6. The Prosecution submits that the application of Rule 68 is not restricted to *viva voce* (oral) testimony in another proceeding but may include, *inter alia*, written depositions and written statements of the kind taken by OTP staff pursuant to Rules 111 and 112, which would be admissible only in a situation governed by Rule 68(b), i.e. when the witness is present in court for questioning – unless the Defence had been present and had the

opportunity to question the witness during the initial recording of the statement, as contemplated by Rule 68(a)².

7. Further, while this Rule falls within the Chapter entitled “Provisions related to various stages of the proceedings”, under Section 1 dealing with Evidence, the Prosecution submits that it also relates to Section III on “Victims and Witnesses”. Accordingly, in some circumstances, Rule 68 may be invoked as a Special Measure of the kind contemplated in Rule 88 to facilitate testimony of certain witnesses, in conjunction with various protective measures orders.³

i) Legal Basis for the Admission of Prior Recorded Testimony

8. Article 69(2) of the Statute provides that, subject to the Statute and in accordance with the Rules, the Court may permit the testimony of a witness other than in person. Rule 68 regulates this.
9. At the outset, the wording in Rule 68 “...or other documented evidence of such testimony...”, at the very least contemplates the introduction of depositions or affidavits⁴, and this is in line with the meaning of the term “testimony” to include a statement given by a witness under oath or affirmation.
10. Additionally, the Prosecution submits that “...other documented evidence of such testimony...” suggests that Rule 68(b) equally applies to other types of statements, in particular those taken in accordance with Rule 111

² It is noted that this practice is supported by the jurisprudence of the International Criminal Tribunal for the Former Yugoslavia, in particular and is specifically permitted under its Rules of Procedure and Evidence (Rule 92ter).

³ See page 455 of ROY.S.LEE “*The International Criminal Court, Elements of Crimes and Rules of Procedure and Evidence*, 2001.

and 112. The term “testimony” is not defined in the Rules or the Statute; however, through statutory interpretation of the Rule below, the Prosecution submits that the term “testimony” is not restricted to evidence given by a competent witness under oath or affirmation; as distinguished from evidence derived from writings and other sources⁵.

11. In this regard Rule 47 of the Rules and Article 15(2) of the Statute are instructive. Article 15(2) refers to the power of the Prosecutor to initiate investigations *proprio motu*. It provides that the Prosecutor may “...receive written or oral testimony at the seat of the Court”. Rule 47 explicitly refers to “testimony under Article 15, paragraph 2”. Rule 47 prescribes that the written or oral testimony received by the Prosecutor pursuant to Article 15 (2) must be recorded in accordance with the procedure prescribed in Rules 111 and 112. Statements taken in accordance with the aforementioned Rules do not constitute testimony, either oral or written, that is statements affirmed under oath. Therefore, in the Prosecution’s submission, the use of the term “testimony” in Article 15(2) is not restricted to written or *viva voce* testimony made under oath in a court or before a judicial body. Rather, the use of the term “testimony” includes all information provided to the Prosecutor within the format prescribed by Rules 111 and 112, as unambiguously stated in Rule 47.

12. Further, applying the maxim of statutory interpretation, *expressio unius est exclusio alterius*, Article 93 (b), relating to the forms of international cooperation other than arrest and surrender, provides: “the taking of evidence, including testimony under oath...” The testimony is qualified as “testimony under oath” which, in the Prosecution’s submission, indicates

⁵ Black’s Law Dictionary. Also says testimony properly means only such evidence as is delivered by a witness on the trial of a cause, either orally or in the form of affidavits or depositions.

that where the term “testimony” is used on its own in the Statute and Rules it is not restricted to testimony given under oath.

13. Given the above, the Prosecution submits that, similarly, the use of the term “testimony” in Rule 68 is not restricted to *viva voce* and written (deposition) testimony made under oath, but also includes, *inter alia*, statements taken in accordance with Rule 111 and 112. Rules 111 and 112 are very detailed and thorough. They ensure as much as possible that information given by witnesses and persons questioned pursuant to Article 55(2) is recorded accurately and completely. It would be contrary to the purpose of Rule 68 if the said Rule could not be used to introduce potential evidence recorded in compliance with either Rule 111 and 112, especially in light of the strict safeguards contained in Rule 68(a) and (b).
14. Significantly, the Prosecution underscores that because Rule 68(b) envisages the presence of the witness in court, the Prosecution submits that an oral affirmation under oath⁶ will be made by the witness confirming the truth of the contents of the statement. In this situation, whether the statement was a deposition or an affirmed statement given before a judicial body arguably becomes immaterial as once the witness takes the oath and confirms his statement, such evidence becomes substantive testimony and is *prima facie* reliable for the purpose of introducing it into evidence.⁷

⁶ As prescribed in Article 69 (1) and Rules 66(1) and noting the exception contained in Rule 66(2).

⁷ While Rule 68(b) does not explicitly oblige the witness to confirm the accuracy of his statement in court, it is logical that it must be established that the prior recorded testimony was given by the witness and that it is accurate before it can be admitted into evidence. It is noted that Rule 92^{ter} of the ICTY Rules of Procedure and Evidence specifically allows for the introduction of statements into evidence without examination-in-chief as long as the witness is present to confirm the accuracy of the statement under oath. This Rule was amended in light of the Appeals Decision in Slobodan Milosevic case where such practice was rendered permissible – *Prosecutor v. Slobodan Milosevic*, “Decision on Interlocutory Appeal on the Admissibility of Evidence-in-Chief in the Form of Written Statements”, Case no. IT-02-54-AR73.4, 30 September 2003. Critically, this Rule negates the necessity of the witness to affirm the truth and content of his statement before a judicial body or the Registrar, as prescribed by the Rule 92^{bis} of Tribunal’s Rules, precisely because the statement or prior testimony is not being presented in lieu of oral testimony; rather

15. The Prosecution further submits that the admission of prior recorded statements is permissible and envisaged in the ICC Statute and Rules because it is consonant with the obligations and discretion of the Court to protect vulnerable witnesses and victims. Rule 68 may be used in conjunction with Rule 88 (Special Measures) and in the spirit of Article 68, both related to the protection of victims and witnesses. As submitted, Rule 68 enables the efficient use of depositions and statements taken before trial while fully respecting the rights of the parties to examine the witnesses.⁸
16. Not subjecting such witnesses to lengthy questioning would be consistent with the discretion of the Trial Chamber to ensure as much as possible that the process of giving evidence by certain witnesses is efficient and less traumatic, whilst respecting the rights of the accused. It is submitted that Rule 68 (b) effects this, and, as Rule 88 prescribes, can be a special measure "...to facilitate the testimony of a traumatised victim or witness, a child, an elderly person or a victim of sexual violence, pursuant to Article 68, paragraphs 1 and 2."⁹
17. In sum, the ICC Statute and Rules permit the introduction of statements taken in accordance with Rule 111 and 112 into evidence as exhibits so long as, a) the parties have had the opportunity to examine the witness during

because the witness is available for cross-examination and questions from the Bench, such a requirement is redundant as the veracity of the statement is confirmed under oath by the witness. This procedure has been used with all categories of witnesses, to wit: vulnerable witnesses, crime base, insiders and UN personnel.

⁸ ROY.S.LEE *"The International Criminal Court, Elements of Crimes and Rules of Procedure and Evidence"*, 2001. Even though this Rule is not included in the section dealing with victims and witnesses, Roy submits that Rule 68 "dovetails" with Rule 112 (4), which permits the Prosecutor to invoke the manner of questioning persons questioned pursuant to Article 55(2) (video-audio recording) with victim witnesses of sexual violence *et al*, so as to minimise further traumatisation. Rule 88(1). It is noted that the Trial Chamber specifically underscored the importance of ensuring the "psychological well being..." of witnesses during testimony, pursuant to Article 68 and Rule 88 in its confidential Decision on 30 November 2007: "Decision Regarding the Practices Used to Prepare and Familiarise Witnesses for Giving Testimony at Trial" ICC-01/04-01/06-1049, Confidential, 30 November 2007, paragraph 32 ("Proofing Decision").

questioning if the witness is not present, and; b) if the witness is present and can be questioned by parties and the Bench (Rule 68(b)).

ii) Advantages of the admission of prior recorded testimony

18. The Prosecution maintains that the admission of prior recorded statements in the manner promulgated above provides four main advantages to the trial process. None of them infringe upon the rights of the accused as enshrined in Article 67 of the Statute. They are:
 - i. facilitates the evidence giving process of vulnerable witnesses;
 - ii. saves valuable court time ; and
 - iii. permits that exhibits contained in the statement can be admitted as an integral part of that statement.
19. Firstly, with respect to vulnerable witnesses, admission of the statement would not subject the witness to the rigours of questioning by the calling party thereby reducing the exposure of the witness to possible re-victimisation. As mentioned above, this can be invoked as a Special Measure pursuant to Rule 88 to ensure that the process of giving evidence is less traumatic for certain witnesses.
20. Secondly, it is a time-saving mechanism, thereby expediting the trial and further enforcing the right of the accused to be tried with undue delay, as enshrined in Article 67 (1) (c).
21. Thirdly, and in conjunction the time saving advantage, the Prosecution submits that any exhibits that are an integral and inseparable part of the statement should/would also be admissible with the statement, without the need to show them to the witness. For example a witness might have

commented about a particular document in his statement, verifying its authenticity and accuracy; in such circumstances this document should be viewed as an integral part of the statement and thus once the witness attests to the authenticity and accuracy of his statement under oath the exhibits should be automatically admitted along with the admission of the statement. This is of course does not prevent the opposing party and the Bench to ask questions of the witness in relation to those exhibits.

iii) Spontaneity of evidence

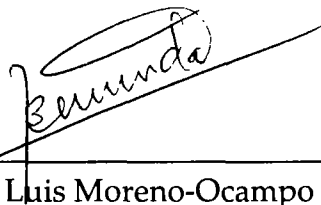
22. It could be argued that the procedure described above would impact on the spontaneity of the presentation of evidence before the Trial Chamber.¹⁰ The Prosecution submits that the key issue is the discretion afforded to the Trial Chamber under Rule 68. In the Prosecution's submission, it is within the power of the Trial Chamber to strike a balance between the necessity to preserve the spontaneity of the evidence on the one hand and the need, as the case may arise, to expedite the trial proceedings and facilitate the testimony of certain witnesses on the other.

23. Further, when determining Rule 68 applications that pertain to statements that contain both critical and non-critical evidence, the Prosecution submits that it is also within the discretion of the Trial Chamber to order a party to lead the critical evidence live and admit into evidence the other less critical component of the statement.

¹⁰ The Prosecution recalls the Proofing Decision of 30 November 2007, wherein the Chamber in paragraph 52 stated, in part: "The spontaneous nature of testimony can be of paramount importance to the Court's ability to find the truth, and the Trial Chamber is not willing to loose such an important element in the proceedings".

III. Relief Sought

24. The Prosecution asks the Trial Chamber to render a preliminary ruling that Rule 68 (b) permits the introduction into evidence of prior recorded statements, especially statements taken in accordance with Rule 111 and 112, as substantive evidence.



Luis Moreno-Ocampo
Prosecutor

Dated this 04th Day of April 2008

At The Hague, Netherlands