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TRIAL CHAMBER IX

Before: Judge Bertram Schmitt, Presiding Judge
Judge Péter Kovács
Judge Raul C. Pangalangan

SITUATION IN UGANDA

IN THE CASE OF *THE PROSECUTOR v. DOMINIC ONGWEN*

Confidential

Common Legal Representative's response to the "Prosecution's request for introduction of previously recorded testimony pursuant to rule 68(2)(b) of the Rules"

Source: Office of Public Counsel for Victims

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

The Office of the Prosecutor

Ms Fatou Bensouda
Mr Benjamin Gumpert

Counsel for the Defence

Mr Krispus Ayena Odongo
Mr Chief Charles Taku

Legal Representatives of the Victims

Mr Joseph Akwenyu Manoba
Mr Francisco Cox
Ms Paolina Massidda
Ms Jane Adong

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
Victims**

Ms Paolina Massidda
Mr Orchlon Narantsetseg
Ms Caroline Walter

**The Office of Public Counsel for the
Defence**

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

I. INTRODUCTION

1. The Common Legal Representative representing 592 victims authorised to participate in the present case¹ submits her response to the “Prosecution’s request for introduction of previously recorded testimony pursuant to rule 68(2)(b) of the Rules” (the “Request”).²

2. The Common Legal Representative submits that the Request to have conditionally admitted prior recorded testimonies and related documents of 38 witnesses should be granted.

3. Regarding the introduction of the statements, including related documents, of witnesses P-0007, P-0008, P-0015, P-0017, P-0026, P-0027, P-0028, P-0032, P-0035, P-0036, P-0038, P-0040, P-0047, P-0060, P-0061, P-0084, P-0126, P-0130, P-0185, P-0195, P-0196, P-0242, P-0268, P-0270, P-0274, P-0279, P-0282, P-0284, P-0287, P-0291, P-0301, P-0303, P-0325, P-0370, P-0384, P-0385, P-0386, P-0400 pursuant to rule 68(2)(b) of the Rules of Procedure and Evidence (the “Rules”), the Common Legal Representative submits that these documents go to “*proof of a matter other than acts and conduct of the accused*” and the Prosecution does not intend to rely on said documents to prove the alleged conduct of Mr Ongwen.

4. In addition, the Common Legal Representative supports the Request as the evidence in question is *prima facie* relevant, probative and authentic and its direct submission would result in enhancing the efficiency of the proceedings.

¹ See the “Decision on contested victims’ applications for participation, legal representation of victims and their procedural rights” (Pre-Trial Chamber II, Single Judge), No. ICC-02/04-01/15-350, 27 November 2015, p. 19; the “Decision on issues concerning victims’ participation” (Pre-Trial Chamber II, Single Judge), No. ICC-02/04-01/15-369, 15 December 2015, pp. 10-11; and the “Second decision on contested victims’ applications for participation and legal representation of victims” (Pre-Trial Chamber II, Single Judge), No. ICC-02/04-01/15-369, 24 December 2015, pp. 20-22.

² See the “Prosecution’s request for introduction of prior recorded testimony pursuant to rule 68(2)(b) of the Rules”, No. ICC-02/04-01/15-465-Conf, 13 June 2016 (the “Request”).

II. PROCEDURAL HISTORY

5. On 14 June 2016, the Prosecution filed the Request seeking the conditional admission of the previously recorded testimony and related documents of 38 witnesses pursuant to rule 68(2)(b) of the Rules.³ A corrected version was filed on 17 June 2016.⁴ A public redacted version was filed on 20 June 2016.⁵

6. On 16 June 2016, the Defence filed an application for variation of the time limit for filing a response to the Request seeking the extension of time limit of three weeks.⁶ On the same day, the Common Legal Representative informed the Chamber by e-mail that she did not oppose the Defence's application and asked that the legal representatives could respond within the same deadline, if granted, in light of the amount of material to be reviewed for the purpose of responding to the Prosecution's Request.⁷

7. On 17 June 2016, the Single Judge of Trial Chamber IX rendered the decision on the Defence's application for variation of the time limit, extending the relevant deadline for the Defence and the legal representatives of victims until 26 July 2016.⁸

³ *Idem*.

⁴ See the "Corrected version of 'Prosecution's request for introduction of previously recorded testimony pursuant to rule 68(2)(b) of the Rules', 13 June 2016, ICC-02/04-01/15-465-Conf", No. ICC-02/04-01/15-465-Conf-Corr+Conf-AnxA-Corr+Conf-Corr-Anx, 17 June 2016.

⁵ See the "Public redacted version of 'Corrected version of Prosecution's request for introduction of previously recorded testimony pursuant to rule 68(2)(b) of the Rules', 16 June 2016, ICC-02/04-01/15-465-Conf-Corr", No. ICC-02/04-01/15-465-Corr-Red, 20 June 2016.

⁶ See the "Corrected Version of 'Defence Request for Variation of the Time Limit for its Response to the Prosecution's Request Pursuant to Rule 68(2)(b) of the Rules' filed on 16 June 2016", No. ICC-02/04-01/15-470-Corr+Anx, 16 June 2016.

⁷ See Email to the Chamber from the Common Legal Representative of Victims sent on 17 June 2016 at 14:28.

⁸ See the "Decision on the 'Defence Request for Variation of the Time Limit for its Response to the Prosecution's Request Pursuant to Rule 68(2)(b) of the Rules'" (Trial Chamber IX, Single Judge), No. ICC-02/04-01/15-475, 17 June 2016.

8. Pursuant to regulation 23bis(2) of the Regulations of the Court, this response is filed confidentially because it refers to submissions filed with the same classification. A public redacted version of this response will be filed in due course.

III. SUBMISSIONS

9. These submissions are not filed jointly with the other legal representatives' team because said Legal Representatives objected to the use of the terms "Common Legal Representative" to refer to the appointed counsel of the OPCV.

10. The Common Legal Representative recalls the relevant practice according to which "[...] *although the Rome Statute framework highlights the desirability of witnesses giving oral evidence [...] there is a clear recognition that a variety of other means of introducing evidence may be appropriate. Article 68, which is expressly referred to in the first sentence of Article 69(2) as providing instances when there may be a departure from the expectation of oral evidence, deals directly with the particular exigencies of trials before the ICC, and most particularly there is an express recognition of the potential vulnerability of victims and witnesses, [...] which may require 'special means' to be used for introducing evidence*".⁹ One of these special means to introduce evidence is rule 68 of the Rules which is "*particularly useful for especially vulnerable witnesses such as children, victims of sexual and gender violence and persons with disabilities*".¹⁰

11. The admission into evidence of prior recorded testimony under rule 68 of the Rules offers material advantages such as avoiding witnesses unnecessarily repeating their evidence once it has been recorded and shorten the trial period. This course of

⁹ See the "Decision on the admissibility of four documents" (Trial Chamber I), No. ICC-01/04-01/06-1399, 13 June 2008, para. 22. See also the "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'" (The Appeals Chamber), No. ICC-01/05-01/08-1386 OA5 OA6, 03 May 2011, para. 77.

¹⁰ See HELEN BRADY, *Protective and Special Measures For Victims and Witnesses*, in LEE (R.S.) (Ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, Ardsley, N.Y., Transnational Publishers, 2001, p. 455.

action should therefore be considered when the evidence is likely not to be disputed or where the testimony is not of central significance.¹¹ The Common Legal Representative further submits that this course of event also protects the rights of the participating victims to fair and expeditious proceedings.

12. Regarding the understanding of the pre-requisite included in rule 68(2)(b) of the Rules that the prior recorded testimony goes to proof of *"a matter other than acts and conduct of the accused"*, the Common Legal Representative notes that Trial Chamber VII in the *Bemba* et al. case pondered this formal pre-requisite by considering not only the content of the testimony sought to be introduced, but also the intended use thereof by the party requesting its introduction.¹² Accordingly, Trial Chamber VII admitted prior recorded statements where they only concerned the acts and conduct of persons other than the Accused¹³, and rejected the introduction of a similar testimony submitted with the primary intention to prove that the Accused carried out the alleged conduct.¹⁴

13. In turn, Trial Chamber VI interpreted a similar pre-requisite included in rule 68(2)(c) of the Rules as not allowing the introduction of testimony if it is *"[s]o proximate to the accused, [...] that it would be unfair to allow its admission under Rule 68(2)(c) of the Rules."*¹⁵

¹¹ See the "Decision on the prosecution's application for the admission of the prior recorded statements of two witnesses" (Trial Chamber I), No. ICC-01/04-01/06-1603, 15 January 2009, paras. 22 and 24.

¹² See the "Decision on Prosecution Request to Add P-242 to its Witness List and Admit the Prior Recorded Testimony of P-242 Pursuant to Rule 68(2)(b) of the Rules" (Trial Chamber VII), No. ICC-01/05-01/13-1430, 29 October 2015, para. 6; and "Corrigendum of public redacted version of Public redacted version of Decision on Prosecution Rule 68(2) and (3) Requests" (Trial Chamber VII), No. ICC-01/05-01/13-1478-Red-Corr, 12 November 2015, para. 34. See also the "Decision on the Prosecutor's application to introduce prior recorded testimony under Rules 68(2)(b) and 68(3)" (Trial Chamber I), No. ICC-02/11-01/15-573-Red, 09 June 2016, para. 10.

¹³ See the "Corrigendum of public redacted version of Public redacted version of Decision on Prosecution Rule 68(2) and (3) Requests", *supra* note 12, para. 102.

¹⁴ See the "Decision on Prosecution Request to Add P-242 to its Witness List and Admit the Prior Recorded Testimony of P-242 Pursuant to Rule 68(2)(b)", *supra* note 12, para. 8.

¹⁵ See the "Decision on Prosecution application under Rule 68(2)(c) of the Rules for admission of prior recorded testimony of Witness P-0103" (Trial Chamber VI), No. ICC-01/04-02/06-1205, 11 March 2016, para. 18.

14. In these circumstances, the Common Legal Representative understands that the issue under rule 68(2)(b) of the Rules is not only whether the acts and conduct referred to in the prior recorded testimony are those of the Accused or of other persons, but rather relates to the proposed use by the Prosecution of the testimonies.

15. In this regard, the Common Legal Representative submits that the Prosecution explicitly states that it does not seek to rely upon the previously recorded testimonies and related documents of 38 witnesses to prove any disputed or critical and live issues, or a matter that is proximate to the Accused in the case.¹⁶ The Prosecution further affirms that the evidence sought to be admitted is cumulative or corroborative in nature, in that other witnesses will provide live testimony regarding the same, often in greater detail.¹⁷

16. Consequently, the Common Legal Representative submits that, based on their content and their intended use by the Prosecution, the testimonies and related documents in question go “to proof of a matter other than the acts and conduct of the accused”. Having conducted a detailed assessment of the material subject of the Request, the Common Legal Representative also contends that the previously recorded testimonies and related documents of 38 witnesses concern specific and limited incidents related to the acts of persons other than Mr Ongwen and are not proximate to him, by nature.

17. In relation to the specific requirements for admission of previous recorded testimony under rule 68(2)(b) of the Rules, as indicated in the Request, the Trial Chamber shall consider, *inter alia*, whether the prior recorded testimony in question: (a) relates to issues that are not materially in dispute; (b) is of a cumulative or corroborative nature, in that other witnesses will give or have given oral testimony of

¹⁶ See the Request, *supra* note 2, para. 13.

¹⁷ *Idem*.

similar facts; (c) relates to background information; (d) is such that the interests of justice are best served by its introduction; and (e) has sufficient *indicia* of reliability.

18. The Common Legal Representative submits that Chambers have repeatedly clarified that the expression “*previously recorded testimony*” encompasses not only “*testimony sworn under oath or affirmation*”, but also “*written statements*”, “*transcripts of interviews*” and “[e]xhibits associated with these recordings [...] so long as the witness uses or explains them in the prior recorded testimony, and particularly when these are necessary to read and understand the prior recorded testimony being introduced”.¹⁸ Accordingly, the Common Legal Representative contends that the materials identified in the Request do indeed constitute “*previously recorded testimony*” within the meaning of rule 68(2)(b) of the Rules. Moreover, these testimonies and attached documents appear to possess sufficient *indicia* of reliability.¹⁹

19. Furthermore, the Common Legal Representative contends that the interests of justice are best served by the introduction of the previously recorded testimonies and related documents of 38 witnesses in so far it saves court time and spares the witness the burden of appearing and to same extent to be re-traumatised.²⁰

¹⁸ See the “Public Redacted Version of Corrigendum: Decision on Prosecution Request for Admission of Prior Recorded Testimony” (Trial Chamber V(a)), No. ICC-01/09-01/11-1938-Corr-Red2, 28 August 2015, paras. 32-33. See also the “Corrigendum of public redacted version of Public redacted version of Decision on Prosecution Rule 68(2) and (3) Requests”, *supra* note 12, para. 29; the “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” (Trial Chamber VI), No. ICC-01/04-02/06-1029, 20 November 2015, paras. 23 and 35; the “Decision on Prosecution application under Rule 68(2)(c) of the Rules for admission of prior recorded testimony of Witness P-0103, *supra* note 15, paras. 7 and 15; and Decision on the Prosecutor’s application to introduce prior recorded testimony under Rules 68(2)(b) and 68(3), *supra* note 12, para. 5.

¹⁹ See the “Decision on the Prosecutor’s application to introduce prior recorded testimony under Rules 68(2)(b) and 68(3)”, *supra* note 12, para. 22. According to Trial Chamber I, the statements of witness, taken by the Office of the Prosecutor pursuant to rule 111 of the Rules and under all applicable guarantees, including Article 54(1) of the Statute, bear sufficient *indicia* of reliability.

²⁰ See the “Decision on the Prosecutor’s application to introduce prior recorded testimony under Rules 68(2)(b) and 68(3)”, *supra* note 12, 9 June 2016, para. 21.

20. This is especially true for witnesses P-0007, P-0008, P-0061, P-0130 (related to the attack on Pajule), P-0270, P-0274, P-0268, P-0325 (related to the attack on Odek), P-0185, P-0195, P-0196, P-0026, P-0060 (related to the attack on Lukodi), P-0279, P-0282, P-0284 and P-0287 (related to the attack on Abok). These witnesses experienced horrific acts of violence and were grossly victimised during the attacks at the camps where they resided. Hence, the admission of their previously recorded testimonies and related documents will spare these witnesses heavy burden of recounting their painful memories and reliving their traumatic experiences.²¹

21. Therefore, the Common Legal Representative contends that granting the Request will also be in line with the Trial Chamber's duty to ensure that not only a trial is fair and expeditious but also is conducted with due regard to the protection of victims and witnesses pursuant to article 64(2) of the Rome Statute. Equally, this also falls in with the Trial Chambers' obligation to take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses, according to article 68(1) of the Rome Statute.

22. Lastly, in accordance with the general condition of rule 68(1) of the Rules, when receiving into evidence any prior recorded witness testimony, the Trial Chamber must ensure that doing so is not prejudicial to or inconsistent with the rights of the Accused.²²

²¹ See also in this regard the Proposal for a Directive of the European Parliament and of the Council establishing minimum standards on the rights, support and protection of victims of crime, COM (2011) 275 final, 18 May 2011, pp. 9-10. This proposal for EU's minimum standards on victims states that "[a] victims of crime are per se vulnerable and accordingly require sensitive and careful treatment. However, some victims are particularly vulnerable to further victimisation or intimidation by the accused or suspected person or his associates. In addition, some victims are particularly at risk of being further distressed or harmed by their involvement in criminal proceedings whether through the giving of evidence or through other forms of participation. Such victims require special measures in order to minimise the likelihood of further harm occurring. [...] [S]econdary victimisation [should be prevented] by ensuring that the victim is interviewed as early as possible and that interaction with authorities should be as easy as possible whilst limiting the number of unnecessary interactions the victim has with them." See also for UN standards - Handbook on Justice for Victims on the use and application of the Declaration of Basic Principles and Justice for Victims of Crime and Abuse of Crime, 1999, pp. 34-40, 69-71.

²² See the "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

23. In this regard, the Common Legal Representative submits that, due to the nature of the previously recorded testimonies and related documents of 38 witnesses which (a) do not cover disputed or critical and live issues; (b) are cumulative or corroborative of other evidence and; (c) go to proof of a matter other than the acts and conduct of the Accused, their admission into evidence is not prejudicial to or inconsistent with the rights of the Accused.

IV. CONCLUSION

24. For the foregoing reasons, the Common Legal Representative respectfully requests the Trial Chamber to conditionally admit into evidence the prior recorded statements, including related documents of 38 witnesses, pursuant to rule 68(2)(b) of the Rules.



Paolina Massidda

Dated this 22th day of July 2016

At The Hague, The Netherlands

in the prosecution's list of evidence''' (The Appeals Chamber), No. ICC-01/05-01/08-1386 OA5 OA6, 3 May 2011, para. 78.