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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

Response of the Legal Representatives of Victims to the “Prosecution’s request for introduction of previously recorded testimony pursuant to rule 68(2)(b) of the Rules”

Source: Legal Representatives of Victims

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

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I. INTRODUCTION

1. The present submissions respond to the “Prosecution’s request for introduction of previously recorded testimony pursuant to rule 68(2)(b) of the Rules” (the “Request”).¹
2. The Legal Representatives (LRVs) of 1434 victims authorised to participate in the case consider that the Prosecution’s request to for the conditional admission of the prior recorded testimonies and related documents of 38 witnesses² should be granted.
3. The LRVs, are satisfied that the prior recorded statements, including related documents (collectively, “rule 68(2)(b) documents”) of 38 witnesses (“rule 68(2)(b) witnesses”) go to the proof of matters other than the acts and conduct of the accused and that their admission would not be prejudicial or inconsistent with the rights of the accused.

II. CONFIDENTIALITY

4. 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. PROCEDURAL HISTORY

5. On 13 June 2016, the Prosecution submitted its request for introduction of previously recorded testimony pursuant to rule 68(2) (b) of the Rules.³ The

¹ 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’, ICC-02/04-01/15-465-Conf-Corr, 17 June 2016.

² P-0007, P-0008, P-0015, P-0047, P-0061, P-0084, P-0130, P-0270, P-0274, P-0268, P-0325, P-0185, P-0195, P-0196, P-0026, P-0035, P-0036, P-0017, P-0060, P-0279, P-0282, P-0284, P-0287, P-0027, P-0032, P-0126, P-0291, P-0301, P-0303, P-0370, P-0384, P-0385, P-0386, P-0400, P-0242, P-0038, P-0028, and P-0040.

³ Prosecution’s request for introduction of previously recorded testimony pursuant to rule 68(2)(b) of the Rules, ICC-02/04-01/15-465-Conf, 13 June 2016.

Prosecution later filed a corrected version of the request on 16 June 2016 (the Prosecution's Request) seeking the conditional admission into evidence of the prior recorded statements of 38 witness and documents related to those statements.⁴

6. On 16 June 2016, the Defence, following consultations with the parties and participants, submitted a request for the variation of the time limit to respond to the Prosecution's request by 26 July 2016.⁵
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, granting the request and permitting the Defence as well as the legal representatives of victims to submit their responses by 26 July 2016.⁶ On 22 July 2016, the Office of the Public Counsel for Victims (OPCV) submitted its response supporting the Prosecution's request.⁷

IV. SUBMISSIONS

8. The 1434 victims permitted to participate in this case are materially interested in the expediency of the proceedings, having waited for over 10 years to have those most responsible for the crimes committed against them face prosecution before the ICC.
9. The LRVs considers that the procedures for the introduction of evidence in the absence of a witness under Rule 68 are geared toward ensuring the expediency of proceedings, where the application of the rule would not be prejudicial or inconsistent with the rights of the accused. To this point, the LRVs note that the

⁴ ICC-02/04-01/15-465-Conf-Corr.

⁵ 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, ICC-02/04-01/15-470, para 13, 16 June 2016.

⁶ 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.

⁷ 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" ICC-02/04-01/15-505-Conf, 22 July 2016.

travaux préparatoires of Rule 68 (as amended) asserts that the rules were meant to “allow Judges of the Court to reduce the length of Court proceedings and streamline evidence presentation by increasing the instances in which prior recorded testimony could be introduced instead of hearing the witness in person, while paying due regard to the principles of fairness and the rights of the accused”.⁸

10. The LRVs notes that the prosecution have explicitly stated that the rule 68(2)(b) documents go to proof of matters other than the acts and conduct of the accused.⁹ The Prosecution has also set out to establish the five factors that may guide the considerations by the Chamber under Rule 68(2)(b)(i), namely, that the prior recorded testimonies in question:- (1) relates to issues that are not materially in dispute; (2) are of a cumulative and/or corroborative nature;¹⁰ (3) relates to background information;¹¹ (4) are such that the interests of justice are best served by its introduction;¹² and (5) has sufficient indicia of reliability.¹³ The LRVs agree with the Prosecution’s arguments on the first three factors.

11. The LRVs are not convinced that the interests of justice are served by keeping the witnesses from testifying based on the contemplation that the recalling of their

⁸ The Report of the Working Group on Amendments, ICC-ASP/12/44, para 8; https://asp.icc-cpi.int/iccdocs/asp_docs/ASP12/ICC-ASP-12-44-ENG.pdf (sourced 25/07/2016). The LRV notes further that In The Working Group on Lessons Learnt, in their Second report to the Assembly of State Parties (ICC-ASP/12/37/Add.1, Annex II.A, para 18; http://www.legal-tools.org/uploads/tx_ltpdb/ICC-ASP-12-37-Add1-ENG.pdf) commented that the amended Rule 68 (2) (b), was primarily intended to “expedite proceedings by allowing the introduction of a limited class of evidence, without the need to arrange for a witnesses to travel in order to appear in Court”. And further, that “[a]llowing such testimony to be admitted in the witness’ absence, provided that certain procedural steps are met, would expedite proceedings and have additional budgetary benefits. The application of the sub-rule is strictly limited to testimony that does not go to the proof of the acts or conduct of the accused.” The working Group also noted that the “list of factors under rule 68(2)(b)(i) is not exhaustive and was developed to guide the Trial Chamber’s exercise of its discretion under rule 68(2)(b). The list covers factors both for and against introducing the prior recorded testimony” (ICC-ASP/12/37/Add.1, Annex II.A, para 23).

⁹ ICC-02/04-01/15-465-Conf-Corr, para 13.

¹⁰ Ibid.

¹¹ Id.

¹² ICC-02/04-01/15-465-Conf-Corr, para 14.

¹³ ICC-02/04-01/15-465-Conf-Corr, para 16.

victimization would be distressful or unduly inconveniencing.¹⁴ These arguments should be supported by the individual views of the witnesses on this matter, as anticipated by Article 68(2). The LRVs note that while testifying before the Court may potentially have various negative effects for witnesses, especially vulnerable victim witnesses, it may also be perceived by the witnesses as a valuable opportunity to tell their stories and contribute to the judicial process. Where the balance lies between these desirable and undesirable features of providing testimony will inevitably vary from one witness to another. Nevertheless, the LRV agrees with the Prosecution's argument in the Request the interests of justice would be served by admitting the rule 68(2)(b) documents, if it would save the court the time and the financial costs that would otherwise be spent on viva-voce hearings.

12. On the indicia of reliability, the LRVs agree with the submissions of the Prosecution.¹⁵ The LRVs note further that previous Chambers have adopted a case by case analysis of indicia of reliability under rule 68(2), distinguishing between the nature of the reliability assessment for purposes of rule 68(2) and that relevant to admission under Article 69(4), adopting a reasonably lower threshold in the former instance.¹⁶

13. The LRVs recall that the Presiding Judge in this case has, in his initial directions on the conduct of the proceedings, adopted the position that the Chamber will consider the relevance, probative value and potential prejudice of each item of evidence submitted when deliberating the judgment, though it may not necessarily discuss these aspects for every item submitted in the judgment itself.¹⁷

¹⁴ Ibid, para 14.

¹⁵ ICC-02/04-01/15-465-Conf-Corr, para 16.

¹⁶ Prosecutor vs William Samoei Ruto and Joshua Arap Sang, Decision on Prosecution Request for Admission of Prior Recorded Testimony, ICC-01/09-01/11-1938-Corr-Red2, 28 August 2015, para 65: - The majority of the Trial Chamber in that decision noted *inter alia* that "These indicia of reliability are non-exhaustive, and no one indicator is definitive, even where one or more of the indicia are absent the Chamber may still admit the material, and can consider the absence of such indicia, together with other relevant factors, when ultimately weighing all of the evidence before it."

¹⁷ Initial Directions on the Conduct of the Proceedings, ICC-02/04-01/15-497, 13th July 2016, para 24.

Concordantly the, LRV propose that the Chamber, consider adopting a similar approach to the assessment of the indicia of reliability factor at this stage of the proceedings so as to facilitate consistency in its approach to the assessment of the testimony under Article 69(4) when deliberating the judgment.

V. RELIEF SOUGHT

14. In light of the foregoing, the LRVs respectfully request the Chamber to grant the Prosecution's Request.

Respectfully submitted,



Joseph A. Manoba



Francisco Cox

Dated this 26th day of July 2016

At Kampala, Uganda and at Santiago, Chile