

**Cour
Pénale
Internationale**

**International
Criminal
Court**



Original: **English**

No.: **ICC-02/04-01/15**
Date: **05 October 2016**

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 to the “Prosecution’s second request for introduction of prior 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. PROCEDURAL HISTORY

1. On 21 September 2016, the Prosecution filed its Second Request seeking the conditional admission of the previously recorded testimony and related documents of 6 witnesses (the “Request”)¹ pursuant to rule 68(2)(b) of the Rules of Procedure and Evidence (the “Rules”).

2. The Common Legal Representative representing 594 victims authorised to participate in the present case² submits her response to the Request.

3. Pursuant to regulation 23*bis*(2) of the Regulations of the Court, this response is filed confidentially following the classification chosen by the Prosecution. However, the Common Legal Representative indicates that the present submission does not contain confidential information and can be reclassified as public.

II. SUBMISSIONS

4. The Common Legal Representative recalls her previous submissions related to the first Prosecution’s application for introduction of prior recorded testimony pursuant to rule 68(2)(b) of the Rules filed on 25 July 2016 in relation to the criteria established by the relevant practice of the Court which are still applicable to the Request.³

¹ See the “Prosecution’s second request for introduction of prior recorded testimony pursuant to rule 68(2)(b) of the Rules”, No. ICC-02/04-01/15-538-Conf, 21 September 2016 (the “Request”).

² 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; 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, and “Decision concerning 300 Victim Applications and the Deadline for Submitting Further Applications”, (Trial Chamber IX, Single Judge), No. ICC-02/04-01/15-543, 26 September 2016, para. 8 and p. 5.

³ See the “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’”, No. ICC-02/04-01/15-505-Conf,

5. The Common Legal Representative also recalls that 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 shortening the trial period. This course of action should therefore be considered when the evidence is likely not to be disputed or where the testimony is not of central significance.⁴ The Common Legal Representative further submits that this specific procedural step also protects the rights of the participating victims to fair and expeditious proceedings.

6. Regarding, in particular, the introduction of the statements, including related documents, of witnesses P-0029, P-0256, P-0274, P-0281, P-0337 and P-0404 pursuant to rule 68(2)(b) of 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 observes that the Prosecution does not intend to rely on said documents to prove any facts relating to the acts and conduct of Mr Ongwen⁵. Having conducted a comprehensive assessment of the material subject of the Request, the Common Legal Representative contends that the previously recorded testimonies and related documents of the 6 witnesses concern specific and limited incidents related to the acts of persons other than Mr Ongwen and are not proximate to him, by nature.

7. In addition, the Common Legal Representative supports the Request as the evidence in question appears to be *prima facie* relevant, probative and authentic and its direct submission would result in enhancing the efficiency of the proceedings. Moreover, these testimonies and attached documents appear to possess sufficient

25 July 2016 (Pursuant to Trial Chamber IX's instructions, dated 05 September 2016, this document is reclassified as “Public”), paras. 10-23.

⁴ 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.

⁵ See the Request, *supra* note 1, paras. 8 and 9.

indicia of reliability and appear to be corroborative of evidence which will be provided by witnesses who will testify *viva voce* during the trial.⁶

8. Finally, the Common Legal Representative contends that the interests of justice will be best served by the introduction of the previously recorded testimonies and related documents of the 6 witnesses in so far as it will save court time, and spare the concerned witnesses the burden of appearing and the risk of being re-traumatised.⁷ This is especially true for witnesses P-0274 and P-0281 who are victims of the attacks on Odek and Abok IDP camps, respectively, for whom this course of event will avoid re-traumatisation and the heavy burden of recounting their painful memories and reliving their traumatic experiences.

9. Lastly, in accordance with the general criterion 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.⁸

10. In this regard, the Common Legal Representative submits that, due to the nature of the previously recorded testimonies and related documents of the 6 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 Mr Ongwen, their admission into evidence is not prejudicial to or inconsistent with the rights of the Accused.

⁶ See 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. 22. According to Trial Chamber I, the statements of witnesses 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. See also the Request, *supra* note 1, para. 14.

⁷ *Idem.*, para. 21. See also the Request, *supra* note 1, para. 11.

⁸ 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 in the prosecution's list of evidence'" (The Appeals Chamber), No. ICC-01/05-01/08-1386 OA5 OA6, 3 May 2011, para. 78. See also the Request, *supra* note 1, para. 13.

III. CONCLUSION

11. 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 witnesses P-0029, P-0256, P-0274, P-0281, P-0337 and P-0404, pursuant to rule 68(2)(b) of the Rules of Procedure and Evidence and subject to the fulfilment of rules 68(2)(b)(ii) and (iii).

A handwritten signature in black ink, appearing to read 'Paolina Massidda', with a horizontal line drawn underneath the name.

Paolina Massidda

Dated this 5th day of October 2016

At The Hague, The Netherlands