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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 application to
introduce prior recorded testimony and related documents
pursuant to rule 68(3) 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:

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I. INTRODUCTION

1. The Common Legal Representative¹ submits that the application by the Prosecution to admit the prior recorded testimony and related documents of 14 witnesses (the "Application")² under rule 68(3) of the Rules of Procedure and Evidence (the "Rules") should be granted.

2. In particular, the Common Legal Representative submits that the requirements of rule 68(3) of the Rules are met regarding the documents identified by the Prosecution in the Application and in its Annex A. The introduction of previously recorded testimony will ensure the efficiency and expeditiousness of the proceedings and it will reduce the emotional burden of the concerned witnesses.

3. While the express wording of rule 68(3) of the Rules only refer to the possibility for the parties and the Chamber to question the witnesses concerned, the legal representatives of victims may also be authorised to question said witnesses if the personal interests of their clients are affected by the testimony.

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; the "Second decision on contested victims' applications for participation and legal representation of victims" (Pre-Trial Chamber II, Single Judge), No. ICC-02/04-01/15-384, 24 December 2015, pp. 20-22, "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, and the "Decision Concerning 610 Victim Applications (Registry Report ICC-02/04-01/15-544) and 1183 Victim Applications (Registry Report ICC-02/04-01/15-556)", No. ICC-02/04-01/15-586, 04 November 2016, p. 8, paras. 9, 15 and 16.

² See the "Prosecution's application to introduce prior recorded testimony and related documents pursuant to rule 68(3) of the Rules", No. ICC-02/04-01/15-575-Conf and No. ICC-02/04-01/15-575-Conf-AnxA, 21 October 2016, notified on 24 October 2016, (the "Application").

II. PROCEDURAL HISTORY

4. On 13 July 2016, the Single Judge of the Trial Chamber (the “Chamber”) issued the Initial Directions on the Conduct of the Proceedings, addressing, *inter alia*, the possibility for the calling participant to resort to rule 68(3) of the Rules.³

5. On 21 October 2016, the Prosecution filed the Application, requesting that the prior recorded testimony and related documents of 14 witnesses be conditionally introduced into evidence pursuant to rule 68(3) of the Rules.⁴

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

III. SUBMISSIONS

7. As recently recalled by the Appeals Chamber, rule 68(3) of the Rules provides for an exception to the principle of orality established in article 69(2) of the Rome Statute⁵ and allows for the introduction of previously recorded testimony if: (i) the witness who gave said testimony is present before the Chamber; (ii) he or she does not object to the submission of said testimony; and (iii) the parties and the Chamber have the opportunity to examine the witness during the proceedings. In assessing the

³ See the “Initial Directions on the Conduct of the Proceedings” (Trial Chamber IX, Single Judge), No. ICC-02/04-01/15-497, para. 18.

⁴ See the “Application”, *supra* note 2, para. 1.

⁵ See the “Judgment on the appeals of Laurent Gbagbo and Charles Blé Goudé against the decision of Trial Chamber I of 9 June 2016 entitled ‘Decision on the Prosecutor’s application to introduce prior recorded testimony under Rules 68(2)(b) and 68(3)’” (Appeals Chamber), No. ICC-02/11-01/15-744 OA5 OA6, 01 November 2016, para. 77 (“the Appeal Judgment”). See also, the “Decision on Prosecution application under Rule 68(3) of the Rules for admission of prior recorded testimony of Witness P-0055” (Trial Chamber VI), No. ICC-01/04-02/06-961, 29 October 2015, para. 8; and the “Preliminary ruling on Prosecution application under Rule 68(3) of the Rules for admission of prior recorded testimony of Witness P-0931” (Trial Chamber VI), No. ICC-01/04-02/06-845, 21 September 2015, para. 6.

introduction of previously recorded testimony, the Chamber shall ensure that it will not be prejudicial to or inconsistent with the rights of the accused in compliance with the *chapeau* element set out in rule 68(1) of the Rules.

8. The Common Legal Representative agrees with the Prosecution's approach according to which the introduction of previously recorded testimony under rule 68(3) would ensure the efficiency of the proceedings by: (i) enabling the Prosecution to present its evidence in a more concise and streamlined manner; and (ii) reducing the estimated duration of its case, while minimising unnecessary repetition of the evidence.⁶ In this regard, the introduction of evidence under rule 68(3) of the Rules has the potential to significantly enhance the expeditiousness of the proceedings.⁷ Indeed, the principal intention behind the amendment to the original rule 68, which resulted in the adoption of the current rule 68(3) of the Rules, was to reduce the length of the proceedings before the Court and streamline the presentation of evidence.⁸ This *rationale* is confirmed by the duty of the Chamber to ensure that the trial unfolds in a focused and expeditious manner in accordance with articles 64(2) and 67(1)(c) of the Rome Statute, while respecting the procedural rights of all participants.⁹ Therefore, this factor is relevant when implementing rule 68(3) of the Rules.¹⁰

9. The Common Legal Representative also shares the Prosecution's argument according to which the introduction of the prior recorded testimony will reduce the emotional burden of the concerned witnesses since they will not have to describe

⁶ See the "Application", *supra* note 2, paras. 2 and 13.

⁷ See the "Preliminary ruling on Prosecution application under Rule 68(3) of the Rules for admission of prior recorded testimony of Witness [REDACTED] and associated material" (Trial Chamber VI), 2 November 2016, No. ICC-01/04-02/06-1602-Red, 02 November 2016, para. 9. See also, the "Decision on Prosecution application under Rule 68(3) of the Rules for admission of prior recorded testimony of Witness P-0055", *supra* note 5, para. 13; and the "Preliminary ruling on Prosecution application under Rule 68(3) of the Rules for admission of prior recorded testimony of Witness P-0931", *supra* note 5, para. 8.

⁸ See the "Appeal Judgment", *supra* note 5, para. 60.

⁹ 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. 25.

¹⁰ See the "Appeal Judgment", *supra* note 5, paras. 1, 59, and 62.

again painful parts of their personal histories.¹¹ This is especially true for P-0006, P-0119, P-0199, P-0218, P-0275, P-0306, P-0352, P-0366, P-0374 and P-0396 who are particularly vulnerable dual status individuals and for whom *"the potential for re-traumatisation ought to be minimised where possible."*¹² Moreover, due to their personal victimisation, the documents related to these witnesses may be characterised as *"crime-base evidence"* for which their introduction under rule 68(3) of the Rules is more conducive, as recently recalled by the Appeals Chamber.¹³

10. In relation to the relevance and reliability of the documents that the Prosecution seeks to introduce, the Common Legal Representative notes that the prior recorded testimony, including the witness' statements, transcripts of interviews and associated exhibits, were taken pursuant to rules 111 and 112 of the Rules.¹⁴ The Common Legal Representative also submits that the documents are reliable since the formal requirements contained in the above mentioned provisions, which constitute the most important factor to be considered in this context,¹⁵ are fulfilled.

11. The Common Legal Representative further submits that the Accused will suffer no prejudice as a result of the introduction of the prior recorded testimony under rule 68(3). Indeed, said introduction carries a lower risk of interfering with the

¹¹ See the "Application", *supra* note 2, para. 3.

¹² See the "Decision on Prosecution application under Rule 68(3) of the Rules for admission of prior recorded testimony of Witness P-0010" (Trial Chamber VI), No. ICC-01/04-02/06-988, 06 November 2015, para. 13.

¹³ See the "Appeal Judgment", *supra* note 5, para. 80.

¹⁴ See the "Application", *supra* note 2, paras. 3 and 12. In the established practice of the Court, the statements recorded pursuant to rule 111 of the Rules constitute prior recorded testimony for the purposes of rule 68 of the Rules. See the "Decision on the Prosecutor's application to introduce prior recorded testimony under Rules 68(2)(b) and 68(3)", *supra* note 9, para. 5. See also, the "Corrigendum of public redacted version of Decision on Prosecution Rule 68(2) and (3) Requests (Trial Chamber VII)", 12 November 2015, No. ICC-01/05-01/13-1478-Red-Corr, paras. 29-31.

¹⁵ The Appeals Chamber concluded that the main considerations taken into account in specifically assessing indicia of reliability, were those related to the formal requirements for the taking of the witness statement and thus, in their assessment of indicia of reliability, Trial Chambers are not obliged to consider factors beyond formal requirements. See the "Appeal Judgment", *supra* note 5, paras. 3, and 103-104.

fair trial rights of the accused since the witness will still appear before the Chamber and he or she will be available for questioning by the Defence.¹⁶

12. In compliance with the *chapeau* element of rule 68(1) of the Rules, the Chamber shall also ensure that the introduction of previously recorded testimony would not be prejudicial to or inconsistent with the rights of the accused. This evaluation requires a cautious assessment and the Chamber may take into account, *inter alia* : (i) whether the evidence relates to issues that are not materially in dispute; (ii) whether that evidence is not central to core issues in the case, but only provides relevant background information; and (iii) whether the evidence is corroborative of other evidence.¹⁷ However, these elements are not *per se* requirements but, rather, factors that may be considered in assessing whether the introduction of prior recorded testimony under rule 68(3) of the Rules is prejudicial to or inconsistent with the rights of the accused or with the fairness of the trial generally.¹⁸

13. Furthermore, the Appeals Chamber also held that, while no one factor is determinative, where statements relate to issues that are materially in dispute, central to core issues of the case or are uncorroborated, a Chamber must be extra vigilant that the introduction of the prior recorded testimony in question will not be prejudicial to or inconsistent with the rights of the accused or the fairness of the trial generally.¹⁹ Whether such testimony may be introduced under rule 68(3) of the Rules

¹⁶ See the "Decision on the Prosecutor's application to introduce prior recorded testimony under Rules 68(2)(b) and 68(3)", *supra* note 9, para. 24.

¹⁷ See the "Appeal Judgment", *supra* note 5, para. 65.

¹⁸ *Idem.*, paras. 2, 73 and 81. As an example, Trial Chamber VI, in its assessment of rule 68(3) documents, took into account the centrality of the prior recorded testimony in question to the case against the accused (in other words, the nature and content of the tendered material, e.g. whether the statements address the direct acts and conduct of the accused person and whether they are corroborated by other evidence which has previously been heard in the case or which is expected to be heard). See the "Preliminary ruling on Prosecution application under Rule 68(3) of the Rules for admission of prior recorded testimony of Witness [REDACTED] and associated material", *supra* note 7, para. 9. See also, the "Decision on Prosecution application under Rule 68(3) of the Rules for admission of prior recorded testimony of Witness P-0010", *supra* note 12, par. 11; and the "Decision on Prosecution application under Rule 68(3) of the Rules for admission of prior recorded testimony of Witness P-0055", *supra* note 5, para. 10.

¹⁹ See the "Appeal Judgment", *supra* note 5, para. 69.

will, therefore, depend upon the circumstances of the case. Even when the statements sought to be introduced under rule 68(3) relate to facts which are central to the case, and are materially in dispute, there is no overriding reason preventing the streamlining of the presentation of evidence by allowing their admission, provided that the Defence is given adequate opportunity to examine the witnesses.²⁰

14. In order to make its determination under rule 68(3) of the Rules, a Chamber need to carry out an individual assessment of the evidence sought to be introduced based on the circumstances of each case, by analysing the importance of each witness' statement in light of the charges and the evidence already presented or intended to be presented before it.²¹ In this regard, the importance of the evidence for the case, and their volume and detail are relevant factors for said assessment.²²

15. Having assessed the content of the documents sought for introduction under rule 68(3) of the Rules against the above established principles in the practice of the Court, the agreed facts between the parties,²³ and the Defence's notifications pursuant to rule 79(2) and 80(1) of the Rules²⁴, the Common Legal Representative considers that the documents: (i) do relate to issues that are not materially in dispute; (ii) are not central to core issues in the case; and (iii) are corroborative of other evidence to be presented at trial.

²⁰ See the "Decision on the Prosecutor's application to introduce prior recorded testimony under Rules 68(2)(b) and 68(3)", *supra* note 9, para. 38.

²¹ See the "Appeal Judgment", *supra* note 5, para. 71.

²² See the "Decision on the Prosecutor's application to introduce prior recorded testimony under Rules 68(2)(b) and 68(3)", *supra* note 9, para. 25.

²³ See the "Annex A to the Joint Prosecution and Defence submission on agreed facts", No. ICC-02/04-01/15-487-Conf-AnxA, 01 July 2016.

²⁴ See the "Defence Notification Pursuant to Rule 79(2) of the Rules of Procedure and Evidence", No. ICC-02/04-01/15-519-Conf, 09 August 2016, para. 3. See also, the "Defence Notification Pursuant to Rule 79(2) of the Rules of Procedure and Evidence", No. ICC-02/04-01/15-518, 09 August 2016, para. 2; and the "Defence Notification Pursuant to Rules 79(2) and 80(1) of the Rules of Procedure and Evidence", No. ICC-02/04-01/15-517, 09 August 2016, para. 3.

16. Finally, the Common Legal Representative notes that the wording of rule 68(3) only envisages the Prosecutor, the Defence and the Chamber having the opportunity to question the witnesses concerned.²⁵ However, as acknowledged in the Application,²⁶ the legal representatives may also be allowed to question the witnesses concerned if deemed necessary to present the views and concerns of their clients.

17. In this regard, during the amendment process leading to the current version of rule 68(3) of the Rules, it was agreed that the rights of victims under article 68(3) of the Rome Statute would not be prejudiced by said amendment.²⁷ This was confirmed by the text of the resolution amending rule 68, where it was expressly provided that the current text for said rule would replace its former version “[w]ith the understanding that the rule as amended is without prejudice to article 67 of the Rome Statute related to the rights of the accused, and to article 68, paragraph 3, of the Rome Statute related to the protection of the victims and witnesses and their participation in the proceedings”.²⁸

18. Accordingly, the legal representatives may be authorised to question any of the 14 witnesses who are intended to be present in court pursuant to rule 68(3) of the Rules on any issue addressed in their statements, if said issues affect the personal interests of the victims which have not been fully addressed during the prior questioning by the Prosecution.

²⁵ See rule 68(3) of the Rules of Procedure and Evidence (“[...] if he or she does not object to the submission of the previously recorded testimony and the Prosecutor, the defence and the Chamber have the opportunity to examine the witness during the proceedings”).

²⁶ See the “Application”, *supra* note 2, para. 2.

²⁷ See Assembly of States Parties, “Report of the Working Group on Amendments”, No. ICC-ASP/12/44, 24 October 2013, para. 10 (“Some delegations who originally had concerns expressed appreciation that those concerns had been addressed and that these amendments [to Rule 68] appeared to help expedite the workings of the Court in addition to providing safeguards for the rights of the accused and without prejudice to Article 68(3) of the Rome Statute”) (Emphasis added).

²⁸ See Assembly of States Parties, Resolution No. ICC-ASP/12/Res.7 (Amendments to the Rules of Procedure and Evidence), 27 November 2013, para. 2 (Emphasis added).

19. Against this background, out of the 14 witnesses whose previously recorded testimonies the Prosecution seeks to introduce under rule 68(3) of the Rules, the Common Legal Representative already foresees the need to question the dual status individuals she is representing with respect to areas relevant to the interests of her clients and to the harm they suffered from as a result of the crimes charged.²⁹ In light of the purpose of rule 68(3) of the Rules, namely to shorten the in-court testimony of witnesses and expedite the proceedings,³⁰ the Common Legal Representative's questions will be limited to the extent of the victimisation and the prejudice suffered from by the witnesses concerned.

20. Concerning the other witnesses, the Common Legal Representative will further assess the need to preserve her clients' interests, and, also in concertation with the other legal representatives' team, she may eventually introduce a request for questioning, in compliance with the Chamber's instruction on the matter.

21. Last but not least, the Common Legal Representative notes that, by virtue of the fact that the Application – if granted – will reduce the time necessary for the Prosecution to question the concerned witnesses, the Chamber may consider reducing as well the time granted to the Defence for questioning. This approach would be consistent with the duty of the Court under article 68(1) of the Rome Statute to take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses. This approach will also further limit the risk of re-traumatising the witnesses and will be in their best interest.

²⁹ The witnesses concerned are P-0006, P-0199, P-0275, P-0352, P-0366, P-0374 and P-0396.

³⁰ See the "Corrigendum of public redacted version of Public redacted version of Decision on Prosecution Rule 68(2) and (3) Requests", *supra* note 14, paras. 31 and 48. See also, the "Preliminary ruling on Prosecution application under Rule 68(3) of the Rules for admission of prior recorded testimony of Witness P-0931", *supra* note 5, paras. 8 and 10.

III. CONCLUSION

For the foregoing reasons, the Common Legal Representative respectfully requests the Chamber to grant the Application.

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

Paolina Massidda
Principal Counsel

Dated this 15th day of November 2016

At The Hague, The Netherlands