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Pénale
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**International
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Court**

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TRIAL CHAMBER V

Before: Judge Bertram Schmitt, Presiding Judge
Judge Péter Kovács
Judge Chang-ho Chung

SITUATION IN THE CENTRAL AFRICAN REPUBLIC II

**IN THE CASE OF
THE PROSECUTOR *v.* ALFRED YEKATOM AND
PATRICE-ÉDOUARD NGAÏSSONA**

Public

**Redacted Version of “Common Legal Representatives’ Joint Response to the
“Prosecution’s Request for the Formal Submission of the Expert Reports and
Associated Materials of P-0925, P-2193, P-2926, and P-2927 pursuant to rule 68(3)
and article 69(4)”, 1 February 2021, (ICC-01/14-01/18-860-Conf)**

Source: Common 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 Common Legal Representative of the Former Child Soldiers and the Common Legal Representatives of the Victims of the Other Crimes (jointly the “Common Legal Representatives”) hereby file their joint response to the “Prosecution’s Request for the Formal Submission of the Expert Reports and Associated Materials of P-0925, P-2193, P-2926, and P-2927 pursuant to rule 68(3) and article 69(4)” (the “Request”).¹

2. The Request to have admitted the Expert Reports (the “Reports”) and Associated Materials of P-0925, P-2193, P-2926, and P-2927 (or the “Experts”) under rule 68(3) of the Rules of Procedure and Evidence (the “Rules”) and article 69(4) of the Rome Statute (the “Statute”) should be granted.

3. The Common Legal Representatives support the Request as: A) the Reports were drafted by individuals who appear to have a relevant expertise and are reliable, relevant and probative; B) the Experts will appear before the Trial Chamber and the Parties and Participants will have an opportunity to examine them; and C) the admission of the Reports will also promote the rights of the Victims to expeditious proceedings.

II. PROCEDURAL BACKGROUND

4. On 26 August 2020, the Presiding Judge of Trial Chamber V (the “Chamber”) issued the “Initial Directions on the Conduct of the Proceedings” (the “Initial Directions”).²

¹ See the “Prosecution’s Request for the Formal Submission of the Expert Reports and Associated Materials of P-0925, P-2193, P-2926, and P-2927 pursuant to rule 68(3) and article 69(4)”, [No. ICC-01/14-01/18-834-Conf](#), 19 January 2021, with Confidential Annexes A [No. ICC-01/14-01/18-834-Conf-AnxA](#) and B [No. ICC-01/14-01/18-834-Conf-AnxB](#) (the “Request”).

² See the “Initial Directions on the Conduct of the Proceedings” (Trial Chamber V, Presiding Judge), [No. ICC-01/14-01/18-631](#), 26 August 2020 (the “Initial Directions”).

5. On 16 October 2020, the Chamber issued the “Decision on the Prosecution Extension Request and Initial Guidance on Rule 68 of the Rules” (the “Guidance on Rule 68 Decision”).³

6. On 19 January 2021, the Prosecution filed its Request.⁴

III. CLASSIFICATION

7. Pursuant to regulation 23bis (1) and (2) of the Regulations of the Court, the present submission is classified as confidential following the classification chosen by the Prosecution and because it refers to the content of documents likewise classified as confidential. A public redacted version will be filed in due course.

IV. SUBMISSIONS

8. The Common Legal Representatives recall that, in the Initial Directions, the Presiding Judge held that the Chamber will rule on applications under rule 68 of the Rules as follows:

“[...] Submission Approach [...] Article 69(4) of the Statute, as confirmed by the Appeals Chamber, gives the Chamber discretion on whether to rule on the admissibility of each piece of evidence upon its submission. [...] In accordance with the established practice of other chambers, this Chamber will adopt the so-called ‘Submission Approach’. Consequently, it will not rule on the admissibility of each item of evidence during the course of the proceedings. Rather, the Chamber will assess the standard evidentiary criteria (namely the relevance, probative value and potential prejudice) of each item as part of its holistic assessment when deliberating its judgment pursuant to Article 74(2) of the Statute. [Nonetheless] the Court’s legal framework contains a number of exclusionary rules, including procedural bars, obstacles and preconditions, which require the Chamber to rule on the admissibility of evidence prior to its assessment of evidence for the purposes of Article 74 of the Statute. [Thus] Chambers

³ See the “Decision on the Prosecution Extension Request and Initial Guidance on Rule 68 of the Rules (Trial Chamber V)”, [No. ICC-01/14-01/18-685](#), 16 October 2020 (the “Guidance on Rule 68 Decision”). See also the “Prosecution’s Request pursuant to Regulation 35 to vary the Time Limit for the Submission of Applications pursuant to Rule 68”, [No. ICC-01/14-01/18-652](#), 14 September 2020.

⁴ See the Request, *supra* note 1.

*thus have to rule on applications under Rule 68 of the Rules prior to the assessment of evidence for the purposes of Article 74 of the Statute”.*⁵

9. Moreover, the Chamber held in the “Guidance on Rule 68 Decision” that:

*“[...] Rule 68 of the Rules permits the “introduction of previously recorded audio or video testimony of a witness, or the transcript or other documented evidence of such testimony, provided that this would not be prejudicial to or inconsistent with the rights of the accused and that the requirements of one or more of the following sub-rules are met”. [While] the principle of orality enshrined in Article 69(2) of the Statute [...] provides that the “testimony of a witness shall be given in person” [...] Rule 68 of the Rules represents one of the statutory exceptions to the rule of orality and publicity. This means that this way of introducing prior recorded testimony is per se generally considered compatible with the rights of the accused. [...] Moreover, Rule 68 of the Rules is widely acknowledged as a useful tool to expedite and streamline the proceedings and its use therefore encouraged. [...] Nonetheless, it must be noted that Rule 68 of the Rules itself requires that its application is not “prejudicial to or inconsistent with the rights of the accused. [Moreover, Rule 68(3) of the Rules] allows the introduction of previously recorded testimony when a witness is present before the chamber, provided that the witness ‘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’. No further restrictions are imposed with regard to the instances under which Rule 68(3) of the Rules may be used”.*⁶

10. Furthermore, according to the jurisprudence of the Court, several factors may be relevant for the Chamber’s determination to allow the introduction of such type of testimony, including whether the evidence: (i) relates to issues that are not materially in dispute; (ii) is not central to core issues in the case, but only provides relevant background information; and (iii) is corroborative of other evidence.⁷ Yet, these are *only factors but not requirements* under rule 68(3) of the Rules and prior recorded testimonies may still be introduced even if they relate to issues that are materially in

⁵ See the Initial Directions, *supra* note 2, paras. 34, 52-56.

⁶ See the Guidance on Rule 68 Decision, *supra* note 3, paras. 20-26. See also, 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, 24 and 29.

⁷ See the “Decision on Prosecution’s Application to Introduce Prior Recorded Testimony and Related Documents Pursuant to Rule 68(3) of the Rules, [No. ICC-02/04-01/15-621](#), 5 December 2016, para. 7 (the “Ongwen Rule 68(3) Decision”).

dispute and central to core issues of the case or are uncorroborated.⁸ Expeditionousness is a further relevant consideration, as rule 68(3) of the Rules aims at reducing the amount of time devoted to in court testimony and contributes to expedite the proceedings.⁹

A. The Reports fall within the Experts’ respective areas of knowledge, and are reliable, relevant and probative

11. The Common Legal Representatives recall the Prosecution’s submissions on the qualifications of the concerned individuals¹⁰ and note that given their nature and content, the Reports fall within the Experts’ respective areas of knowledge: (i) P-0925’s on cross-cultural trauma psychiatry and conflict-related trauma;¹¹ (ii) P-2193’s on geospatial, remote sensing, and satellite imagery analysis and interpretation;¹² (iii) P-2926’s on political science and conflict analysis, the background of the CAR conflict;¹³ (iv) P-2927’s on anthropology and African history and culture, including the phenomenon of child soldiers in CAR.¹⁴ Associated materials to these Reports are an integral part of the testimony itself under the established practice of this Court.¹⁵ Accordingly, the Reports and Associated Materials contain evidence that is *prima facie* relevant to and probative of material issues at trial.

⁸ See the “Judgment on the appeals of Mr Laurent Gbagbo and Mr 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)’”, [No. ICC-02/11-01/15-744](#), 1 November 2016, paras. 67 and 69.

⁹ *Idem*, para. 61.

¹⁰ See the Request, *supra* note 1, paras. 7-38.

¹¹ See CAR-OTP-2122-9975.

¹² See the Request, *supra* note 1, paras. 25-28.

¹³ See CAR-OTP-2130-0304.

¹⁴ See CAR-OTP-2122-9908.

¹⁵ See the “Decision on the Prosecution’s Applications for Introduction of Prior Recorded Testimony under Rule 68(2)(b) of the Rules”, *supra* note 7, para. 10.

B. The Experts will appear before the Chamber and the Parties and Participants will have an opportunity to examine them

12. The formal submission of the Reports is not prejudicial to the rights of both Accused, given that the Experts will appear before the Chamber and both Defence teams will have the opportunity to examine each of them, along with the Prosecution and the Common Legal Representatives. As far as the latter are concerned, their anticipated questioning will primarily focus on Experts P-0925 and P-2927.

13. The Report drafted by Expert P-0925 contains relevant evidence on, *inter alia*, the traumatic effects of forcible transfer, child soldiering and sexual and gender-based crimes ("SGBC").¹⁶ Those are all issues at the core of the Victims' interests in these proceedings. However, the Common Legal Representatives inform the Chamber that – following the latter instruction on agreement as to the expertise of the proposed Prosecution's Experts – they intend to further benefit from the Witness' knowledge and expertise. In fact, the Common Legal Representatives have recently contacted Expert P-0925 to discuss the possibility of providing him with additional and separate instructions and obtaining an addendum to his Report on, *inter alia*, the following subjects: (i) interplay of CAR culture with trauma/PTSD; (ii) SGBC and mental health outcomes on individual victims, couples, families and communities; (iii) child soldiering and the longitudinal impact on the children well-being, behaviour and development, per gender and age category; and (iv) holistic approach to reparations.

14. In turn, both Reports - which Expert P-2927 co-authored -¹⁷ contain in-depth analysis of [REDACTED].¹⁸ Those issues, together with the mental health damage to children caused by the abduction and their active participation to the hostilities, are of particular relevance to the interests of the participating victims and will be further

¹⁶ See CAR-OTP-2127-6805.

¹⁷ [REDACTED].

¹⁸ See CAR-OTP-2122-9082 and CAR-OTP-2122-9155.

explored by the Common Legal Representative of the Former Child Soldiers at the course of his questioning of the Expert.

15. In this regard, while rule 68(3) of the Rules only expressly refers to the Parties and the Chamber, the Common Legal Representatives may be authorised to question witnesses appearing pursuant to this provision when the personal interests of their clients are affected by the concerned witnesses' testimony.¹⁹ Lastly, the Common Legal Representatives reserve their right to seek leave to call additional experts addressing issues of relevance to the Victims' interests should the need arise after having heard the Prosecution's evidence.

C) The admission of the Reports will enhance the efficiency of the proceedings

16. Additionally, the Common Legal Representatives posit that the introduction of the Reports and Associated Materials in their entirety will also enhance the efficiency of the proceedings, avoid unnecessary repetition of oral testimony and ultimately save Court's time and resources.²⁰ More importantly, the time saved by proceeding under rule 68(3) of the Rules furthers both Accused's right to an expeditious trial without undue delay.²¹

17. The Prosecution indicated that its questioning will be considerably streamlined and that it will be able to further reduce its limited examination of to one and a half hours, instead of two if the Request is granted.²² The Defence will be then able to test the entirety of the evidence, both in relation to the testimony given in court and the content of the Reports.²³ Accordingly, while the Prosecution is granted the opportunity to conduct a limited examination of the Experts, the Defence is not constrained to the amount of time used by the Prosecution.²⁴ The same will apply to the questioning of

¹⁹ See the Initial Directions, *supra* note 2, para. 19.

²⁰ See the Ongwen Rule 68(3) Decision, *supra* note 7, para. 31.

²¹ *Idem*, para. 10.

²² See the Request, *supra* note 1, para. 2. See the Guidance on Rule 68 Decision, *supra* note 3, para. 36.

²³ *Idem*, para. 30.

²⁴ See the Ongwen Rule 68(3) Decision, *supra* note 7, para. 32.

the Common Legal Representatives who will be able to fully represent the interests of the Victims.

18. Moreover, this course of event will also promote the rights of Victims to fair and expeditious proceedings. As constantly underlined by the Common Legal Representatives,²⁵ Victims have been awaiting justice for many years. They are concerned with the time the Prosecution's investigation has taken so far and the prospective of a lengthy trial. Any procedural step unnecessarily prolonging the duration of these proceedings further frustrate the legitimate expectations of Victims to promptly obtain justice.

²⁵ See *e.g.*, the "Common Legal Representatives' Joint and Consolidated Response to the Prosecution's Second and Third Request for the Formal Submission of Prior Recorded Testimonies pursuant to Rule 68(2)(b)", [No. ICC-01/14-01/18-761-Conf](#), 10 December 2020, para. 19.

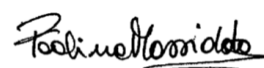
V. CONCLUSION

19. For the foregoing reasons, the Common Legal Representatives respectfully request the Chamber to grant the Prosecution's Request and considers the Reports and Associated Materials formally submitted under rule 68(3) of the Rules and/or article 69(4) of the Statute.

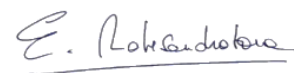


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Dated this 16th day of March 2021

At The Hague (The Netherlands), Bangui (Central African Republic), La Rochelle (France) and Saint Louis (Senegal)