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**International
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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*

Public redacted version

**Decision on Prosecution Request to Introduce Evidence of Defence Witnesses
via Rule 68(2)(b)**

To be notified, in accordance with Regulation 31 of the *Regulations of the Court*, to:

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Trial Chamber IX ('Chamber') of the International Criminal Court ('Court'), in the case of *The Prosecutor v. Dominic Ongwen*, having regard to Articles 64(2), 67(1) and 69(2) of the Rome Statute ('Statute') and Rule 68(2)(b) of the Rules of Procedure and Evidence ('Rules'), issues the following 'Decision on Prosecution Request to Introduce Evidence of Defence Witnesses via Rule 68(2)(b)'.

I. Procedural history and submissions

1. On 19 July 2018, the Office of the Prosecutor ('Prosecution') filed a motion requesting that the prior recorded testimony for seven of the witnesses the defence of Mr Ongwen ('Defence') intends to call be introduced via Rule 68(2)(b) of the Rules ('Request').¹
2. The Prosecution argues, that the prior recorded testimonies of Defence witnesses D-7, D-18, D-88, D-125, D-130, D-131 and D-132 fulfil the requirements of Rule 68(2)(b) of the Rules,² that it 'does not request an opportunity to test their evidence through oral examination'³ and that the Chamber should elect to introduce them into evidence via this means.⁴
3. On 30 July 2018, the Defence filed its response, seeking that the Request be rejected ('Response').⁵ It submits that the Prosecution is trying to submit prior recorded testimony of seven Defence witnesses into evidence, after the closure of the Prosecution case.⁶ Further, it states that the Prosecution cannot make a request based on Rule 68 of the Rules 'on behalf of the other party'⁷ and that the accused's right to have adequate time for the preparation of his defence and the

¹ Prosecution's request to introduce prior recorded testimony of seven Defence witnesses under rule 68(2)(b), ICC-02/04-01/15-1310-Conf. A public-redacted version was filed on the same day, ICC-02/04-01/15-1310-Red.

² Request, ICC-02/04-01/15-1310-Red, paras 12-17.

³ Request, ICC-02/04-01/15-1310-Red, para. 11.

⁴ Request, ICC-02/04-01/15-1310-Red, para. 11.

⁵ Defence Response to "Prosecution's request to introduce prior recorded testimony of seven Defence witnesses under rule 68(2)(b)", ICC-02/04-01/15-1316-Conf, with a confidential annex, ICC-02/04-01/15-1316-Conf-AnxA. A public redacted version of the Response was filed on the same day, ICC-02/04-01/15-1316-Red.

⁶ Response, ICC-02/04-01/15-1316-Red, paras 17-18.

⁷ Response, ICC-02/04-01/15-1316-Red, para. 23.

right to obtain the attendance and examination of witnesses on his behalf are infringed by the Request.⁸ It also avers that all of these witnesses are important to the Defence case.⁹

II. Analysis

A. Applicable law

4. The Chamber recalls its prior decisions regarding Rule 68 of the Rules.¹⁰ It notes that Article 69(2) of the Statute sets out the principle of orality for witnesses. However, Rule 68 of the Rules, *inter alia*, operates as an exception to this principle.¹¹ The Chamber repeats¹² that the motivation behind introduction into evidence of prior recorded testimony via Rule 68(2)(b) is that in certain circumstances – in light of its content and significance to the case – it is not necessary for the evidence to be tested orally in court.
5. The Chamber considers that, as a general principle, it is for the each party to determine the organisation of its case and their evidence.¹³ This includes the decision of who to call, whether to request introduction of evidence by means other than through witnesses, the order of appearance of witnesses, and the

⁸ Response, ICC-02/04-01/15-1316-Red, para. 26

⁹ Response, ICC-02/04-01/15-1316-Red, para. 35

¹⁰ Decision on the Prosecution's Applications for Introduction of Prior Recorded Testimony under Rule 68(2)(b) of the Rules, 18 November 2016, ICC-02/04-01/15-596-Conf. A public redacted version was issued on the same day, ICC-02/04-01/15-596-Red ('Rule 68(2)(b) Decision'). Decision on Prosecution Request to Add Items to its List of Evidence, to include a Witness on its List of Witnesses and to Submit Two Prior Recorded Testimonies under Rule 68(2)(b) and (c), 22 November 2016, ICC-02/04-01/15-600. Decision on Prosecution's Application to Introduce Prior Recorded Testimony and Related Documents Pursuant to Rule 68(3) of the Rules, 5 December 2016, ICC-02/04-01/15-621. Decision on Defence Request to Introduce Previously Recorded Testimony Pursuant to Rule 68(2)(b) of the Rules of Procedure and Evidence, 2 July 2018, ICC-02/04-01/15-1294.

¹¹ Article 69(2) of the Statute reads: 'The testimony of a witness at trial shall be given in person, except to the extent provided by the measures set forth in article 68 or in the Rules of Procedure and Evidence'.

¹² Rule 68(2)(b) Decision ICC-02/04-01/15-596-Red, paras 6-7.

¹³ *See, for instance*: Decision Setting the Commencement Date of the Trial, 30 May 2016, ICC-02/04-01/15-449; Initial Directions on the Conduct of the Proceedings, 13 July 2016, ICC-02/04-01/15-497 and Preliminary Directions for any LRV or Defence Evidence Presentation, 13 October 2017, ICC-02/04-01/15-1021. *See also*, Trial Chamber III, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Public Redacted Version of the Chamber's 11 November 2011 Decision regarding the prosecution's witness schedule, 15 November 2011, ICC-01/05-01/08-1904-Red, para. 24.

manner in which evidence provided by witnesses is brought into the proceedings. The opposing party cannot dictate the way in which evidence must be presented.

6. However, this does not mean that the application of Rule 68(2)(b) in these cases is automatically excluded. Rule 68 of the Rules allows the Chamber to introduce prior recorded testimony of witnesses, either upon request by a party or *proprio motu*. In the latter case, this amounts to the Chamber overriding the calling participants' general discretion to present evidence as it wishes and imposing a requirement that a witness's testimony will be received only in writing. While the fact that the calling party does not support the request is certainly an important factor that has to be taken into consideration, nothing in the wording or structure of Rule 68 of the Rules suggests that a party cannot make a Rule 68 request solely because the prior recorded testimony stems from a witness who is being called by another party or participant.¹⁴
7. This is in line with the fact that the Chamber can also decide *proprio motu* that the introduction of prior recorded testimony fulfils the requirements of Rule 68(2)(b) of the Rules and is not prejudicial to or inconsistent with the rights of the accused.¹⁵ The mere fact that the Defence does not agree to such introduction does not necessarily create any inconsistency with the rights of the accused.

¹⁴ In fact, a decision relied upon by the Defence in its Response (Trial Chamber II, *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on Defence Request to Admit into Evidence Entirety of Document DRC-OTP-1017-0572, 25 May 2011, ICC-01/04-01/07-2954) concerned a situation where a defence team made a Rule 68(b) request (what is now Rule 68(3) of the Rules) in respect of a witness who was called by the Prosecution.

¹⁵ See, for instance, Trial Chamber VIII, *The Prosecutor v. Ahmad Al Faqi Al Mahdi*, Decision on Defence's Request for Postponement of Trial Commencement, 8 August 2018, ICC-01/12-01/15-152-Red. The Trial Chamber rejected a motion to postpone the start of trial by the defence in order to facilitate the *viva voce* testimony of two of its witnesses. However, it indicated that the defence would be allowed to file a request introduction witness statements in writing, *de facto* deciding on the manner in which evidence of a Defence witness would be introduced into trial. Similarly, Trial Chamber VII, *The Prosecutor v. Jean-Pierre Bemba Gombo et al.*, Decision on Relevance and Propriety of Certain Kilolo Defence Witnesses, 4 February 2016, ICC-01/05-01/13-1600, wherein the Trial Chamber permitted one of the defence teams to present character witnesses, under the condition that the evidence is introduced under Rule 68(2)(b) of the Rules.

8. The Defence argues that the mere fulfilment of the requirements of Rule 68(2)(b) of the Rules does not, in and of itself, require the introduction of the testimony as a prior recorded statement. The Chamber confirms this understanding since, as previously stated,¹⁶ the wording of Rule 68(2) of the Rules indicates that a Chamber 'may' allow the introduction of prior recorded testimony. It is therefore discretionary in nature. If the mere fulfilment of the requirements were to suffice, the Chamber would not be accorded a discretionary power but be obliged to allow the introduction.
9. In the same vein, the Defence's argument that Article 67(1)(e) of the Statute prevents the introduction of prior recorded testimony via Rule 68(2)(b) of the Rules against its will is flawed. The possibility of introduction of prior recorded statements pursuant to Rule 68(2)(b) of the Rules does not apply only to statements of witnesses who are called by the Defence but also to Prosecution witnesses. Therefore, the examination and attendance of witnesses testifying for the accused is conducted 'under the same conditions as witnesses against him or her'.
10. As stated by other Chambers, the right of the accused, pursuant to Article 67(1)(e) of the Statute, to obtain the attendance and examination of witnesses is not unlimited.¹⁷ Article 67(1)(e) of the Statute does not give the accused the right to have all the witnesses the Defence calls examined in a manner it prefers without any oversight or intervention by the Chamber.
11. The nature of the Request before the Chamber is different from previous Rule 68 requests since it is the non-calling party proposing that the testimony of witnesses is introduced via Rule 68(2)(b) of the Rules. Unlike what is asserted

¹⁶ Rule 68(2)(b) Decision ICC-02/04-01/15-596-Red, para. 6.

¹⁷ Trial Chamber VII, *The Prosecutor v. Jean-Pierre Bemba Gombo et al.*, Decision on the 'Application for Leave to Appeal "Decision on Relevance and Propriety of Certain Kilolo Defence Witnesses (ICC-01/05-01/13-1600)"', 17 February 2016, ICC-01/05-01/13-1635, para. 10.

by the Defence, the Prosecution does not make the Request 'on behalf' of the Defence, but rather on its own accord.

12. As a final legal consideration, the Chamber notes how the Defence invokes on several occasions the accused's right pursuant to Article 67(1)(b) of the Statute to have adequate time for the preparation of the defence.¹⁸ The Chamber fails to see how the question of whether prior recorded testimony is introduced via Rule 68 of the Rules or not affects this right. Rule 68 of the Rules concerns how evidence is presented and ultimately introduced into trial. It has no bearing on the time accorded to the accused for the preparation of his or her defence.

B. Analysis and conclusions

13. The Chamber considers that none of the prior testimonies in question go to the acts and conducts of the accused, as previously defined by the Chamber.¹⁹
14. It will now assess for each witness individually whether, despite the general principle that the Defence should be permitted to call its evidence in the manner it sees fit, the Chamber exceptionally considers it appropriate that his or her testimony is introduced via Rule 68(2)(b) of the Rules. The Chamber notes that the factors listed in Rule 68(2)(b)(i) of the Rules are not exhaustive.²⁰ In this particular instance, the objection of the calling party to introduce the evidence via Rule 68 of the Rules is an important factor which the Chamber will take into consideration when deciding whether to use its discretion under Rule 68(2)(b) or not.

¹⁸ Response, ICC-02/04-01/15-1316-Red, paras 26, 27 and 28.

¹⁹ Rule 68(2)(b) Decision, ICC-02/04-01/15-596-Red, paras 11-13.

²⁰ Rule 68(2)(b)(i) reads: 'In determining whether introduction of prior recorded testimony [...] may be allowed, the Chamber shall consider, *inter alia*, [...]'. See also, Rule 68(2)(b) Decision, ICC-02/04-01/15-596-Red, para. 6 and the further material cited in Fn 16.

D-7

15. D-7 [REDACTED]. The content of the prior recorded testimony²¹ relates to events outside of the charged period, is not materially disputed by the Prosecution and is corroborated by other witnesses.²² However, due to the fact that [REDACTED], the witness is able to provide unique information about the accused which might also potentially be of importance during a later stage of the proceedings. Additionally, the Defence objects to the introduction of D-7's testimony via Rule 68(2)(b) of the Rules. The Chamber rejects the request with regard to D-7.

D-18, D-130 and D-131

16. D-18,²³ D-130²⁴ and D-131's²⁵ prior recorded testimonies all contain details of extensive contact and personal interaction with Joseph Kony. The Defence indicates that their testimony is relevant to the duress defence of Mr Ongwen. For these reasons, and taking the Defence's objection into consideration, the Chamber finds that it is not appropriate to introduce the prior recorded statements under Rule 68(2)(b) of the Rules. The Chamber rejects the Request with regard to D-18, D-130 and D-131.

D-88

17. D-88 [REDACTED].²⁶ He describes the trauma and other symptoms observed in the returnees and the lives they led during their time in the bush. The Chamber notes that the testimony covers a time period just before the charged period,

²¹ UGA-D26-0010-0263.

²² Public Redacted Version of "Defence Request to Introduce Previously Recorded Testimony Pursuant to Rule 68(2)(b) of the Rules of Procedure and Evidence", filed on 4 June 2018, 27 June 2018, ICC-02/04-01/15-1271-Red, para. 16.

²³ UGA-D26-0010-0204.

²⁴ UGA-D26-0025-0001.

²⁵ UGA-D26-0025-0010.

²⁶ UGA-D26-0021-0280.

that it does not directly go to the charges and that the Prosecution does not seem to contest the issues arising from the content of the testimony.

18. However, the Defence states that it plans to use D-88's testimony for its intended Article 31 defences and therefore objects to this aspect of the Request.²⁷ The Chamber is of the view that, even if the content of the testimony covers only the period just before the charges, D-88's testimony could provide some information which might be of relevance to the defences the Defence intends to advance. For these reasons, the Chamber finds that it is inapposite to introduce the prior recorded testimony of D-88 under Rule 68(2)(b) of the Rules.

D-125

19. D-125 is testifying that Dominic Ongwen did not enter Teso at a certain point in time, a fact which is disputed by the Prosecution.²⁸ This, in addition to the fact that the Defence objects to the introduction of D-125's prior recorded testimony under Rule 68(2)(b) of the Rules, is sufficient for the Chamber to find that P-125's testimony should be elicited *viva voce*. Accordingly, it rejects the Request with regard to D-125.

D-132

20. D-132 started working for [REDACTED] in 2005 with returnees and marginalised communities [REDACTED]. He was also present [REDACTED] and met the accused on one occasion.²⁹
21. The Chamber notes that D-132's testimony says nothing of consequence related the accused or other persons of interest in the case. Further, the content of the

²⁷ Response, ICC-02/04-01/15-1316-Red, para. 35 c.

²⁸ UGA-D26-0025-0031.

²⁹ UGA-D26-0025-0021.

prior recorded testimony does not go to central issues of the charges or the alleged crimes. The Defence submits that D-132's testimony 'shall discuss, amongst other issues, practises of the rehabilitation centre with LRA escapees'.³⁰ The Chamber finds this to be background information. Accordingly, the Chamber considers the content of D-132's testimony to be of such nature that its introduction, without presenting it *viva voce*, is not prejudicial to or inconsistent with the rights of the accused. Therefore, even taking the Defence objection to the application of Rule 68(2)(b) for this witness into account, the Chamber decides that D-132's testimony may only be introduced under Rule 68(2)(b) of the Rules.

III. Conclusion

22. In light of the above, the Chamber concludes that the evidence of D-132 will only be considered by the Chamber if introduced under Rule 68(2)(b) of the Rules.
23. As noted in the Chamber's Rule 68(2)(b) Decision, the introduction is subject to a declaration by the witness who has provided the testimony pursuant to Rule 68(2)(b)(ii) and (iii).³¹ The Chamber hereby repeats,³² that the procedure introduced in paragraph 222 of the Rule 68(2)(b) Decision also applies for Defence witnesses.
24. The Chamber further wishes to emphasise that the mere fact that it rejected the Request for the other six Defence witnesses does not mean that it considers the entirety of their testimony to be of high relevance. For instance, large parts of P-18's prior recorded testimony concerns the witness's education and statements about political developments in the 1980's and 1990's, which the

³⁰ Request, ICC-02/04-01/15-1316-Red, para. 35 g.

³¹ Rule 68(2)(b) Decision, ICC-02/04-01/15-596-Red, para. 222.

³² Decision on Defence Request to Introduce Previously Recorded Testimony Pursuant to Rule 68(2)(b) of the Rules of Procedure and Evidence, ICC-02/04-01/15-1294, page 13.

Chamber considers to be of marginal relevance at best. The Chamber expects the Defence to limit the questioning of its witnesses to topics and issues relevant to the case. Further, it invites the Defence to consider whether it wishes to make a Request under Rule 68(3) of the Rules for any of the prior recorded testimony of the remaining six witnesses.

25. Lastly, the Chamber underlines that the analysis above has been taken under the assumption that the appearance of all concerned witnesses will go smoothly. Any undue delays in the appearance of witnesses may prompt the Chamber to take appropriate action to further the fair and expeditious conduct of the proceedings, including further *proprio motu* Rule 68(2)(b) rulings.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

DECIDES that, subject to the receipt of the declarations required under Rule 68(2)(b)(ii) and (iii) of the Rules, the prior recorded testimony of D-132 (UGA-D26-0025-0021) must be introduced into evidence pursuant to Rule 68(2)(b) of the Rules;

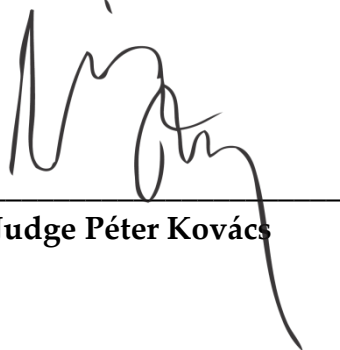
ORDERS the Registry, upon filing the declaration under Rule 68(2)(b) of the Rules for D-132, to reflect in the e-court metadata the introduction of the prior recorded testimony of D-132; and

REJECTS the remainder of Request.

Done in both English and French, the English version being authoritative.



Judge Bertram Schmitt, Presiding Judge



Judge Péter Kovács



Judge Raul C. Pangalangan

Dated 16 August 2018

At The Hague, The Netherlands