

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: **ICC-02/04-01/15**

Date: **22 June 2020**

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

Public Redacted Version of “Defence Request Pursuant to Rule 68(2)(c) of the Rules of Procedure and Evidence”, filed on 4 June 2018 as ICC-02/04-01/15-1270-Conf

Source: Defence for Dominic Ongwen

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

The Office of the Prosecutor

Fatou Bensouda, Prosecutor
James Stewart, Deputy Prosecutor
Colin Black

Counsel for the Defence

Krispus Ayena Odongo
Chief Charles Achaleke Taku
Beth Lyons

Legal Representatives of the Victims

Joseph Akwenyu Manoba
Francisco Cox

Common Legal Representative for Victims

Paolina Massidda

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

The Office of Public Counsel for Victims

Paolina Massidda
Caroline Walter
Orchlon Narantsetseg

States' Representatives

**The Office of Public Counsel for the
Defence**

Xavier-Jean Keita

Amicus Curiae

REGISTRY

Registrar

Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Nigel Verrill

Detention Section

**Victims Participation and Reparations Other
Section**

I. INTRODUCTION

1. Pursuant to Rule 68(2)(c) of the Rules of Procedure and Evidence ('Rules'), the Defence for Dominic Ongwen ('Defence') requests the submission into evidence the prior recorded testimony and associated documents ('Statements')¹ for P-0039, namely [REDACTED].²
2. The Statements are admissible by reason of the fact that it relates to issues that are not materially in dispute and are corroborative of Prosecution and Defence testimony. Finally, [REDACTED] is deceased.
3. In order to preserve Mr Ongwen's right to raise the matter on appeal in the event of conviction, the Defence maintains that the applicability of Rule 68(2)(c) is excluded in these proceedings by virtue of Article 51(4) of the Statute, which provides that amendments to the Rules must not be applied retroactively to the detriment of the person who is being investigated or prosecuted or who has been convicted.³

II. CONFIDENTIALITY

4. Pursuant to Regulation 23 *bis*(1) of the Regulations of the Registry, the Defence files this request as confidential because it gives the name of a potential witness who is currently classified as a confidential interviewee. The Defence avers that this request should be reclassified as public unless the Prosecution can demonstrate why the protection of confidentiality is required now that the potential witness is deceased.

III. APPLICABLE LAW

5. Rule 68(2)(c) of the Rules empowers the Trial Chamber to allow the introduction of prior recorded testimony that comes from a person who has died, is presumed dead, or is, due to obstacles that cannot be overcome with reasonable diligence, unavailable to testify orally.
6. The Trial Chamber VII in the *Bemba et al.* case held that

¹ UGA-OTP-0012-0475; UGA-OTP-0115-0145; UGA-OTP-0215-0286-R01; UGA-OTP-0215-0319-R01; UGA-OTP-0215-0357-R01; UGA-OTP-0215-0388-R01; and UGA-OTP-0215-0420-R01.

² The Defence notes that P-0039's [REDACTED].

³ Defence Response to the Prosecution Application to Admit Testimony Pursuant to Rule 68(2)(b) of the Rules of Procedure and Evidence, ICC-02/04-01/15-509-Corr-Red2, 27 July 2016, paras. 15-41; Defence Response to Prosecution's Second Request Pursuant to Rule 68(2)(b), ICC-02/04-15/15-555-Conf, 5 October 2016, para. 9.

Rule 68(2)(c) of the Rules provides that if the witness who gave the previously recorded testimony is not present before the Trial Chamber, the Chamber may allow the introduction of that previously recorded testimony, *inter alia*, where it comes from a person 'who has subsequently died, must be presumed dead, or is, due to obstacles that cannot be overcome with reasonable diligence, unavailable to testify orally'. The Rule further provides, that in such a case: (i) 'Prior recorded testimony falling under sub-rule (c) may only be introduced if the Chamber is satisfied that the person is unavailable as set out above, that the necessity of measures under article 56 could not be anticipated, and that the prior recorded testimony has sufficient indicia of reliability. (ii) The fact that the prior recorded testimony goes to proof of acts and conduct of an accused may be a factor against its introduction, or part of it'.⁴

7. Further, the Trial Chamber VII in the *Bemba et al.* case held that

The Chamber recalls that in exercising its discretion in allowing the introduction of previously recorded testimony under Rule 68(2)(c) of the Rules, it may take into consideration, *inter alia*, the following factors: (i) whether the evidence relates to issues that are not materially in dispute; (ii) whether the evidence is central to the allegations or the case; and (iii) whether the evidence is purportedly corroborative.⁵

IV. REQUEST

1. Witness P-0039 – [REDACTED]

8. The Defence requests the Trial Chamber to admit five transcripts of interviews of Prosecution Interviewee P-0039⁶ and two associated documents⁷ pursuant to Rule 68(2)(c) of the Rules. These five transcripts of interviews were taken by the Prosecution investigators on 27-28 August 2004. Item UGA-OTP-0012-0145 is a UPDF debriefing report created after the escape and surrender of P-0039. Finally, UGA-OTP-0115-0145 is [REDACTED].
9. The Prosecution has decided not to call P-0039 as its witness and not to introduce P-0039's Statements pursuant Rule 68(2)(c) of the Rules. Hence, the Defence submits this request.
10. Witness P-0039's Statements are admissible because (i) P-0039 is deceased; (ii) P-0039 transcripts of interviews hold sufficient indicia of reliability;⁸ and (iii) the necessity of measures under Article 56 could not be anticipated in this case.⁹

⁴ ICC-01/05-01/13-1481-Red-Corr, para.14.

⁵ ICC-01/05-01/13-1481-Red-Corr, para. 21. *See also* ICC-01/05-01/08-1386 (OA 5 & OA6), para. 78.

⁶ UGA-OTP-0215-0286-R01; UGA-OTP-0215-0319-R01; UGA-OTP-0215-0357-R01; UGA-OTP-0215-0388-R01; UGA-OTP-0215-0420-R01.

⁷ UGA-OTP-0012-0475 and UGA-OTP-0115-0145.

⁸ *See* ICC-01/09-01/11-1353, para. 15. *See also* ICTY, Prosecutor v *Popović et al*, IT-05-88-AR73.2, Decision on Joint Defence Interlocutory Appeal Concerning the Status of Richard Butler as an Expert Witness, 30 January

The witness is unavailable to testify

11. The Defence avers that witness P-0039 is unavailable to testify before this Trial Chamber. During the course of its investigations, the Defence learned that P-0039 died in 2010 or early 2011. The Defence is currently in the process of locating and obtaining P-0039's death certificate.

The prior recorded testimony has sufficient indicia of reliability

12. P-0039's transcripts of interviews are relevant to and are *prima facie* probative of issues in the Ongwen case proceedings, *inter alia*: the witness corroborates D-0036's discussion about what "[REDACTED]" is in the context of persons escaping from the LRA;¹⁰ the witness corroborates the punishment meted to persons disobeying Kony's orders; the witness corroborates testimony that Joseph Kony talked to Spirits; the witness corroborates testimony of previous Prosecution witnesses about the deaths of Otti Lagony and Okello Can-Odongo (aka Okello Director) and the reasons for the executions. These issues are central to the Article 31(1)(d) affirmative defence of Mr Ongwen and corroborative of Defence **and** Prosecution evidence.
13. The Defence submits that P-0039's transcripts of interviews bear sufficient indicia of reliability as defined by the chambers of this Court. In particular, P-0039's transcripts of interviews appear to be authentic, truthful and voluntarily provided.¹¹ The Defence also notes that these five transcripts of interviews were: (i) obtained by the Prosecution in the ordinary course of its investigations on 27-28 August 2004;¹² (ii) provided by P-0039 before three Prosecution investigators and one Acholi interpreter; (iii) given voluntarily by P-0039; and (iv) declared to be accurate by P-0039 at the time of giving it.¹³

2008, para. 22: (“[p]rima facie proof of reliability on the basis of sufficient indicia is enough at the admissibility stage.”).

⁹ ICC-01/05-01/13-1481-Red-Corr, para. 19: (“the Chamber considers that this requirement is to avoid introducing evidence through Rule 68(2)(c)(i) when Article 56 measures would have been a viable alternative at an earlier stage.”).

¹⁰ Compare P-0039, UGA-OTP-0215-0286-R01, p. 0314, ln. 792 to p. 0314, ln. 830 with D-0036, UGA-D26-0011-0529, p. 0540, ln. 352 to p. 0541, ln. 368 and UGA-D26-0022-0153, p. 0160, ln. 218 to p. 0161, ln. 240.

¹¹ ICC-01/04-01/06-1399, paras 28-29.

¹² UGA-OTP-0215-0286-R01; UGA-OTP-0215-0319-R01; UGA-OTP-0215-0357-R01; UGA-OTP-0215-0388-R01; UGA-OTP-0215-0420-R01.

¹³ UGA-OTP-0215-0420-R01, at 0435-0436.

The necessity of measures under Article 56 of the Statute could not have been anticipated

14. The Defence notes that it was not in the position to anticipate the necessity to take measures under Article 56 of the Statute as P-0039 died before Mr Ongwen surrendered.¹⁴ In addition, an event of *force majeure* – sudden death in this case – should not preclude the Trial Chamber from granting the Defence request to admit the five transcripts of interviews of P-0039¹⁵ pursuant to Rule 68(2)(c) of the Rules.
15. Therefore, granting of the Defence request to introduce five transcripts of interviews that were conducted by the members of Prosecution and introduced in the evidence database of this Court will make the presentation of Defence evidence fair and expeditious.

V. RELIEF

16. For the abovementioned reasons, the Defence respectfully requests the submission into evidence UGA-OTP-0012-0475, UGA-OTP-0115-0145, UGA-OTP-0215-0286-R01, UGA-OTP-0215-0319-R01, UGA-OTP-0215-0357-R01, UGA-OTP-0215-0388-R01, and UGA-OTP-0215-0420-R01

Respectfully submitted,



.....
Hon. Krispus Ayena Odongo

On behalf of Dominic Ongwen

Dated this 22nd day of June, 2020

At Kampala, Uganda

¹⁴ The Defence is unsure of the actual date of death, but has learned that P-0039 died sometime in 2010 or early 2011.

¹⁵ UGA-OTP-0215-0286-R01; UGA-OTP-0215-0319-R01; UGA-OTP-0215-0357-R01; UGA-OTP-0215-0388-R01; UGA-OTP-0215-0420-R01.