

ANNEX XI

PUBLIC

[REDACTED]

From: [REDACTED]
Sent: 02 October 2017 19:03
To: [REDACTED]
 Trial Chamber IX Communications; [REDACTED]
 [REDACTED]
 [REDACTED]

Subject: RE: P-0047: Prosecution's submission of items used during the hearing

Dear Trial Chamber IX, Prosecution and Legal Representatives,

On behalf of the Defence and pursuant to paragraph 28(iii) of Decision 497, I reply to the arguments of the Prosecution below.

Firstly, the Defence does not submit the entirety of UGA-OTP-0207-0196-R01 ('Statement') for its truth. The Defence submits the statement for, as the Presiding Judge mentioned during the questioning of P-0245, the completeness of the record.

Secondly, the Defence states that it does not rely on the material not discussed with P-0047 for the truth of its content, much like the Chamber noted the Prosecution's argument for the admittance of the transcripts of interviews from P-0040 (see Decision 596-Conf, para. 216). Nothing bars the Judges, who are professional judges, from admitting this statement with the limited purpose of reference material when reviewing the testimony of P-0047 during deliberations.

Finally, the Defence avers that P-0052's statement is akin, but not exactly the same, as victim applications of relatives of witnesses. Witness P-0052 served under P-0047, and P-0047 could have talked about the issues discussed in his testimony. It is alleged in the Statement that P-0052 was with P-0047 proximate to the time of the photograph of the naked and 1/2 naked suspected LRA killed at Pajule and shown to P-0047 during his testimony.

Again, the Defence is not submitting that the entirety of the Statement should be relied upon for the truth of its content, but merely for completeness of the record and differences between P-0047's testimony and the Statement of his colleague.

Very best,

[REDACTED]

Ext. 9580

From: [REDACTED]
Sent: Thursday, September 28, 2017 6:24 PM
To: [REDACTED] Trial Chamber IX Communications; [REDACTED]
 [REDACTED]
 [REDACTED]

Subject: RE: P-0047: Prosecution's submission of items used during the hearing

Dear Trial Chamber IX, parties and participants,

I write on behalf of Ben Gumpert.

The Prosecution objects to the submission of P-0052's statement (UGA-OTP-0207-0196-R010) by the Defence, and the reasoning advanced.

If the objective is to impeach the credibility of P-0047, the relevant evidence is the testimony given by P-0047 himself in response to any alleged inconsistency, not the statement of P-0052.

In the view of the Prosecution, in seeking to highlight inconsistencies between the statements of P-0047 and P-0052, it necessarily follows that the Defence considers the contents of P-0052's statement to be "truthful." If not, there would be no inconsistency between the two statements. As such, the Prosecution submits that the proper vehicle for entering the statement into the record for the truth of its contents is rule 68.

Should further witness statements continue to be entered into the case record in this manner, the Prosecution considers that this would amount to a circumvention of rule 68.

Kind regards,

[REDACTED]

Dévouement - Intégrité - Respect
Dedication - Integrity - Respect

From: [REDACTED]

Sent: 28 September 2017 16:12

To: [REDACTED] Trial Chamber IX Communications; [REDACTED]

Subject: RE: P-0047: Prosecution's submission of items used during the hearing

Dear Trial Chamber IX, parties and participants,

The Defence formally submits the following items used in the cross examination of Prosecution Witness P-0047 (John Lubwama) whose testimony concluded today on 28 September 2017, in accordance with the Trial Chamber's Decision ICC-02/04-01/15-497;

Tab	ERN No.	Description	Pages
6.	UGA-OTP-0207-0196-R01	P-52 Witness Statement dated 7 August 2007	All
7.	UGA-OTP-0139-0149-R01	P-84 Witness Statement dated 5 February 2005	All

These items are not being submitted for the truth contained therein but to illustrate the inconsistencies in P-47's testimony from people who allegedly were involved in the events to which he testified about. The Defence notes that Tab 7 has been submitted under Rule 68(2) in Trial Chamber's Decision ICC-02/04-01/15-596, para. 63.

Very best,

[REDACTED]

From: [REDACTED]
 Sent: 28 September 2017 13:13
 To: [REDACTED]; Trial Chamber IX Communications; [REDACTED]

Subject: P-0047: Prosecution's submission of items used during the hearing

Dear Trial Chamber IX, parties and participants,

In accordance with the Trial Chamber's Decision #497 and #621, the Prosecution formally submits the following items of evidence used during the hearing of the evidence of Witness P-0047 (John LUBWAMA), whose testimony concluded on 28 September 2017:

Tab	ERN (E-Court) / TRIM Ref.	Description	Pages
1.	UGA-OTP-0027-0177 - R01	Witness Statement dated 19 November 2004	All
2.	UGA-OTP-0037-0281- R01	Photograph dated 10 October 2003	All
3.	UGA-OTP-0037-0282- R01	Copy of handwritten report dated 10 October 2003 and typed report dated 30 October 2003	All
4.	UGA-OTP-0027-0198	Sketch of Pajule IDP camp. Discussed in witness statement UGA-OTP-0027-0177 -R01 at para 41: UGA-OTP-0027-0184 -R01	All

Kind regards

[REDACTED]
 Trial Lawyer
 Office of the Prosecutor, International Criminal Court
 Oude Waalsdorperweg 10, 2597 AK, The Hague, The Netherlands

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www.icc-cpi.int

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From: Trial Chamber IX Communications
Sent: 12 October 2017 14:25
To: [REDACTED]
Cc: Trial Chamber IX Communications; [REDACTED]
Subject: Decision on Submitted Materials for P-47
Attachments: P-0047: Prosecution's submission of items used during the hearing; RE: P-0047: Prosecution's submission of items used during the hearing; RE: P-0047: Prosecution's submission of items used during the hearing; RE: P-0047: Prosecution's submission of items used during the hearing

Dear Counsel and Registry:

1. For P-47, the Chamber recognises as formally submitted all items submitted by the Prosecution (Email from the Prosecution, 28 September 2017 at 13:13), confirming that the witness's statement and its associated documents are introduced by virtue of the procedural pre-requisites of Rule 68(3) of the Rules being satisfied.

A. P-52's Statement – Procedural Context

2. For this witness, the Defence submits the witness statements of P-52 and P-84 (Email from the Defence, 28 September 2017 at 16:12). The Defence submits these statements to 'illustrate the inconsistencies in P-47's testimony from people who allegedly were involved in the events to which he testified about'.
3. As noted by the Defence, the Chamber has already allowed the introduction of P-84's prior recorded testimony (ICC-02/04-01/15-596-Red, pages 107 and 109; ICC-02/04-01/15-909-Conf-AnxVI) and there is thus no need to submit it again through the email procedure (*see generally* ICC-02/04-01/15-497, para. 28 fn 20).
4. As regards P-52's statement (UGA-OTP-0207-0196-R01), the Prosecution objects to its submission (Email from the Prosecution, 28 September 2017 at 18:24). The Prosecution argues that, 'in seeking to highlight inconsistencies between the statements of P-0047 and P-0052, it necessarily follows that the Defence considers the contents of P-0052's statement to be "truthful"' and therefore amounts to a 'circumvention' Rule 68 of the Rules.
5. The Defence replies that P-52's statement is not introduced for the truth of its contents, but 'merely for completeness of the record and differences between P-0047's testimony and the Statement of [P-52]' (Email from the Defence, 2 October 2017 at 19:03).

6. P-52's statement was referenced by the Defence in the course of examining P-47 on the following points (all from ICC-02/04-01/15-T-115-ENG): (i) why P-52 joined the Local Defence Units (page 20 lines 2-12); (ii) that P-52 escaped the LRA in 2000 at 16 and joined the government forces in 2001 (page 20 lines 13-19); (iii) whether civilians were killed by a UPDF mortar shell damaging a civilian house (page 22 lines 9-18); (iv) whether a letter of warning was sent by the LRA before attacking Pajule (page 22 line 19 to page 23 line 18); (v) whether civilians in the Pajule camp had warned the UPDF before it was attacked by the LRA (page 24 lines 2-5); (vi) whether captured LRA soldiers following Pajule were injured (page 28 lines 3-13); and (vii) whether Rwot Oywak was abducted at Pajule to help the LRA identify the wives of UPDF soldiers among the abductees (page 38 line 21 to page 39 line 2). P-47 denied having any knowledge on these points except for (iii) ('Yes, I learned about that [...] [n]o civilians were killed by that shell') and (vi) ('No. No, they hadn't sustained any injuries. There were no wounded among them.').

B. Determination on the Submission of P-52's Statement

7. In a principle previously endorsed by this Chamber, Rule 68 of the Rules is only applicable in cases where the tendering party wishes to adduce the prior recorded testimony for the truth of its contents. The determining factor is the intention of the tendering party. Decision on Submitted Materials for P-24, ICC-02/04-01/15-985-AnxXVI, pages 6-7; ICC-01/05-01/13-1478-Red-Corr, para. 34. *See also* ICC-01/04-01/06-2595-Red-Corr, para. 50; ICTR, Appeals Chamber, *Aloys Simba v. The Prosecutor*, Judgement, 27 November 2007, para. 20 (two decisions permitting admission of out-of-court statements relevant to witness credibility without requiring compliance with, respectively, the pre-amendment version of Rule 68 of the ICC Rules or Rule 92 *bis* of the ICTR Rules).
8. The Chamber notes that, unlike previous contexts where the Defence submitted victim applications to challenge P-24 and P-9s' credibility (ICC-02/04-01/15-985-AnxXVI; Decision on Submitted Materials for P-9, ICC-02/04-01/15-985-AnxXVIII), P-47 is not being confronted with the prior recorded testimony of either himself or his family members. The primary use of P-52's statement was also not to challenge P-47's account on events he alleged to have personally experienced. Challenging credibility is not even the Defence's stated intention for submitting P-52's statement. Rather, the stated intentions are to complete the record and to illustrate the differences between P-47's testimony and P-52's statement.
9. To the extent the statement is submitted for completeness of the record, this is unnecessary. P-47's responses to the factual propositions drawn from P-52's statement are perfectly intelligible without P-52's statement being recognised as formally submitted.
10. To the extent the statement is submitted to illustrate inconsistencies between P-47 and P-52, the Chamber considers that, from the manner in which P-52's statement was used in the course of P-47's questioning, P-47 was effectively asked to comment on whether P-52's

statement was true on a series of factual propositions drawn out by the Defence. All the factual propositions were related to issues P-52 purported to have seen, heard about or experienced. In response, P-47 denied having any knowledge on most of the propositions put to him. To submit P-52's statement after using it in this way is tantamount to submitting it for the truth of its contents. Asking a testifying witness to comment on what he/she knows about the prior recorded testimony of others cannot, in and of itself, relieve the tendering party of fulfilling the Rule 68 criteria. Were this otherwise, then parties could put any statement to a testifying witness – even with no expectation that the testifying witness could meaningfully comment on its contents – and circumvent Rule 68 of the Rules.

11. The Chamber does not consider that the Defence is attempting to mislead the Chamber when it argues that P-52's statement is not submitted for the truth of its contents. However, in the Chamber's assessment as to how P-52's statement was used with P-47, the only purpose in submitting P-52's statement is to establish the truth of the facts contained within it. Rule 68 of the Rules is therefore engaged.
12. Because the Defence has not met the procedural pre-requisites required by this rule, the Chamber is procedurally barred from considering P-52's statement in deliberating its judgment at this time. The Defence may still introduce P-52's evidence, but must do so by other means. The Defence can rely on P-52 as a defence witness by either: (i) calling him *viva voce*; (ii) introducing his statement after satisfying the Rule 68(2) criteria or (iii) introducing his statement after satisfying the Rule 68(3) criteria.
13. For these reasons, the Chamber does not recognise the formal submission of UGA-OTP-0207-0196-R01.

C. Conclusion

14. To the extent evidence is recognised as formally submitted, the Registry is accordingly directed to proceed in accordance with paragraph 28(v) of the Initial Directions on the Conduct of the Proceedings, 13 July 2016, ICC-02/04-01/15-497.

Best,

Trial Chamber IX