

**Cour
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**International
Criminal
Court**

Original: **English**

No.: ICC-02/04-01/15
Date: 21 November 2016

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

With Confidential Annexes A and D

Public Redacted Versions of Prosecution's request that the Chamber receive as formally submitted P-0001's prior recorded testimony under rule 68(2)(b) and P-0096's prior recorded testimony under rule 68(2)(c), 28 October 2016, ICC-02/04-01/15-579-Conf

Source: The Office of the Prosecutor

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

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INTRODUCTION

1. In its filing “Prosecution’s Request to Add items to its List of Evidence and to include P-0001 to its List of Witnesses” dated 24 October 2016¹, the Prosecution requested that the Chamber grant leave to add Witness P-0001 to the list of witnesses and the list of evidence. Should such leave be granted, the Prosecution requests that Witness P-0001’s prior recorded testimony and related documents² be received as formally submitted into evidence under rule 68(2)(b).
2. In addition, following recent confirmation of the death of Witness P-0096, the Prosecution requests that P-0096’s prior recorded testimony and related documents be received as formally submitted into evidence under rule 68(2)(c).

CONFIDENTIALITY

3. This submission is classified as “Confidential” as it reveals the identity of Prosecution witnesses. The Prosecution will file a public redacted version of this submission.

SUBMISSIONS

A. Submission of P-0001’s prior recorded testimony under rule 68(2)(b)

Legal Framework

4. The Prosecution relies on the submissions concerning rule 68(2)(b) set out under the heading “legal framework” in its First and Second request for the

¹ ICC-02/04-01/15-577.

² Case law has established that in the case of introduction of written statements under rule 68, “any documentary evidence annexed is also to be considered submitted”, ICC-02/11-01/15-573-Red, para. 9.

introduction of prior recorded testimony filed on 16 June 2016 and 20 September 2016 respectively.³

Grounds to submit witness P-0001's prior recorded testimony

5. The Prosecution requests P-0001's prior recorded testimony and related documents to be received as formally submitted pending the filing of accompanying declarations pursuant to rules 68(2)(b)(ii) and (iii).⁴ The materials sought to be submitted are listed in Annex A of this filing.⁵
6. Submission of P-0001's prior recorded testimony is justified because: i) it goes to proof of matters other than the acts and conduct of the accused; ii) it relates to issues that are not materially in dispute; iii) it is of a cumulative and corroborative nature; iv) it relates to background information; v) it is in the interests of justice; and vi) it has sufficient indicia of reliability.⁶

a. P-0001's prior recorded testimony goes to proof of a matter other than the acts and conduct of the accused

7. P-0001's prior recorded testimony is relied on because he was an eyewitness to the scene of the attack at Pajule IDP camp after it had concluded. P-0001 describes the destruction at the camp as well as seeing dead bodies.

³ ICC-02/04-01/15-465-Conf-Corr, paras. 7-16; ICC-02/04-01/15-538-Conf, paras. 5-7.

⁴ If the Chamber determines that the rule 68(2)(b) documents should, in principle, be submitted, the Prosecution will obtain the requisite rule 68(2)(b) declarations. Regarding the proposed format of the declarations, the Prosecution intends to use the same template as that proposed in the Prosecution's initial submission pursuant to rule 68(2)(b). See [ICC-02/04-01/15-465-AnxB](#). The practice of formal submission under rule 68(2)(b) has been accepted in the jurisprudence of other Trial Chambers. The Prosecution notes in this context that Trial Chamber IX has recognised that it "always retains the discretion to rule on admissibility related issues upfront when appropriate" ([ICC-02/04-01/15-497](#), para.26).

⁵ The Prosecution has applied in its filing "Prosecution's Request to Add items to its List of Evidence and to include P-0001 to its List of Witnesses" 24 October 2016, to submit all relevant documents relating to witness P-0001 to its list of evidence.

⁶ See ICC-02/04-01/15-465-Conf-Corr, paras. 7-16; ICC-02/04-01/15-538-Conf, paras. 5-7.

8. The Prosecution also relies on P-0001 because he compiled contemporaneous records of the result of the attack.⁷ These documents record the number of civilians that were abducted as well as items pillaged from the camp. P-0001 also describes the process that was adopted to compile the contemporaneous records.
9. Although P-0001's statement makes reference to the accused's conduct,⁸ this reference is unrelated to the role played by the accused in the attack at Pajule IDP camp on 10 October 2003. The Prosecution therefore does not rely on such evidence. Consequently, P-0001's prior recorded testimony does not relate to the acts and conduct of the accused.

b. P-0001's prior recorded testimony relates to issues that are not materially in dispute; are of a cumulative or corroborative nature; and relates to background information

10. P-0001's prior recorded testimony relates to matters not in dispute because it is an agreed fact that on 10 October 2003, LRA fighters attacked Pajule IDP camp.⁹ P-0001 provides background information as to how Pajule IDP camp was managed and how records were maintained.¹⁰ His account is also corroborative of witnesses who have first-hand knowledge of the same facts and who will provide evidence live before the Chamber. In particular, P-0001's prior recorded testimony is corroborative of witnesses P-0009, P-0249 and P-0067.¹¹

⁷ UGA-OTP-0138-0002 at 0006-0007.

⁸ See UGA-OTP-0138-0002 at 0005, para. 11: "There have been four heavy attacks by the rebels at Pajule IDP camp: on 10 September 2002, 27 November 2002, 23 January 2003, and 10 October 2003. I heard from returning abductees abducted from each respective attack, that the attack on 10 September 2002 was led by Dominic Ongwen, 27 November 2002 was led by Raska Lukwiya, 23 January 2003 was led by Tabuley, and 10 October 2003 was led by Otti Vincent."

⁹ ICC-02/04-01/15-487-Conf-AnxA, p. 5.

¹⁰ UGA-OTP-0138-0002 at 0006-0008.

¹¹ UGA-OTP-0138-0002 at 0006.

c. Submission of P-0001's prior recorded testimony under rule 68 is the interests of justice

11. Submitting P-0001's prior recorded testimony under rule 68(2)(b) is in the interests of justice. First, his prior recorded testimony is relevant and probative.¹² Second, it ensures that the accused is tried in an efficient manner and without undue delay. The Prosecution estimates that introducing P-0001's evidence pursuant to rule 68(2)(b) would save two hours of court time. This time estimate will increase should other parties decide to cross examine P-0001. Third, it minimises disturbance to P-0001 life following his cooperation with the Court. Fourth, rule 68(2)(b) has the effect of reducing the financial cost to the Court by dispensing with the need to call P-0001 live.

d. P-0001's prior recorded testimony has sufficient indicia of reliability

12. P-0001's prior recorded testimony has sufficient indicia of reliability. It includes information as to how the witness came to know of particular facts, distinguishing between circumstances where a witness has direct knowledge of events from where the witness obtained the information from another source. It also contains information about the vantage point of the witness and his ability to perceive events. As indicated above, the testimony is also corroborated by the evidence of witnesses who will provide live testimony.¹³

13. In addition, P-0001's interview was conducted in accordance with procedures under the Statute and Rules and in the language that the witness fully speaks and understands.¹⁴ P-0001 provided his testimony voluntarily.¹⁵ Prior to signing his statement, P-0001's statement was read back to him and he was given the

¹² See *supra*, paras. 7-8.

¹³ See *supra*, paras. 10.

¹⁴ UGA-OTP-0138-0002 at 0013.

¹⁵ UGA-OTP-0138-0002 at 0004, 00012-0013.

opportunity to clarify, correct or add material.¹⁶ By signing the statement, the witness acknowledged that it was true and correct to the best of his knowledge and was given voluntarily in the knowledge that it would be used in criminal proceedings before this Court and that he might subsequently be called upon to testify.

B. Submission of P-0096's prior recorded testimony under rule 68(2)(c)

14. The Prosecution requests witness P-0096's prior recorded testimony and related documents to be received as formally submitted into evidence under rule 68(2)(c). The materials sought to be submitted are listed in Annex B of this filing.¹⁷

Legal Framework

15. Rule 68(2)(c) empowers the Chamber to submit into evidence the prior recorded testimony of a witness who has died or is unavailable to testify where it is satisfied that: i) the evidence is relevant and probative; ii) submission is not prejudicial to or inconsistent with the rights of the accused; iii) the necessity of measures under article 56 of the Statute could not be anticipated; and iv) the prior recorded testimony has sufficient indicia of reliability.¹⁸
16. P-0096's evidence does not relate to acts and conduct of the accused. Considerations under rule 68(2)(c)(ii) are therefore inapplicable in this instance.

a. P-0096 is unavailable to testify

¹⁶ UGA-OTP-0138-0002 at 0013.

¹⁷ With the exception of document UGA-OTP-0164-0073, all related documents were included on the Prosecution's list of evidence filed on 6 September 2016. The Prosecution has applied in its filing "Prosecution's Request to Add items to its List of Evidence and to include P-0001 to its List of Witnesses" dated 24 October 2016, to add document UGA-OTP-0164-0073 to the list of evidence.

¹⁸ See ICC-01/05-01/13-1481, para. 14; ICC-01/04-02/06-1029, para. 12; ICC-01/04-02/06-1029, para. 12; ICC-01/04-02/06-1325, para. 8.

17. P-0096 was interviewed by the Prosecution in 2005 at the [REDACTED]. The Prosecution was subsequently informed by [REDACTED] that P-0096 died in September 2007, after spending approximately one week at [REDACTED].¹⁹ The Prosecution has since taken investigative steps to confirm witness P-0096's death. A summary of the investigative steps taken by the Prosecution is attached as Annex C.

18. On 18 October 2016, Ugandan authorities confirmed witness P-0096's death and issued a death certificate. A copy of his death certificate is attached as Annex D.

b. P-0096's evidence is relevant and probative

19. Witness P-0096's prior recorded testimony is relied on to establish important contextual information relevant to the charge of persecution.

20. P-0096 was a [REDACTED].²⁰ [REDACTED].²¹ P-0096's prior recorded testimony is relevant because it provides evidence of the LRA's general policy of targeting civilians who were perceived to support the Ugandan government.²²

21. In particular, P-0096's testimony provides evidence of the persecutory nature of the Teso campaign, including the attack on civilians at Abia IDP camp in 2004.²³ P-0096 stated that prior to the attack on Abia in 2004,²⁴ [REDACTED] told the soldiers that they were going there to overthrow the government, so people should be courageous to "work",²⁵ which meant abducting, stealing, killing

¹⁹ UGA-OTP-0219-0081.

²⁰ P-0096, UGA-OTP-0228-1739-R01 at 1748.

²¹ P-0096, UGA-OTP-0228-1739-R01 at 1744.

²² See Prosecution's Pre-Trial Brief, ICC-02/04-01/15-533, paras. 167-173 (discussing the general LRA policy to target civilians perceived to support the government, including, as P-0096's evidence confirms, civilians suspected of revealing LRA positions or failing to reveal UPDF positions).

²³ See Prosecution's Pre-Trial Brief, ICC-02/04-01/15-533, paras. 178-180 (providing detail that explains the relevance of the [REDACTED] attack on Abia IDP camp to the persecution charges in this case).

²⁴ P-0096, UGA-OTP-0228-1851-R01 at 1857-1858.

²⁵ P-0096, UGA-OTP-0228-1901-R01 at 1909.

civilians and burning their houses.²⁶ P-0096 also stated that civilians in Abia and Teso were considered “stubborn” and were killed because they would give away LRA positions or refuse to reveal UPDF positions to the LRA.²⁷

22. P-0096’s prior recorded testimony is corroborated by other evidentiary material, including the testimony of other witnesses²⁸ as well as public radio recordings and intercept logbooks.²⁹

c. Introducing P-0096’s evidence under rule 68(2)(c) is consistent with the rights of the accused

23. Introducing P-0096’s evidence under rule 68(2)(c) causes no prejudice to the accused. First, P-0096’s prior recorded testimony does not go to the acts and conduct of the accused. Although P-0096 mentions the accused twice in his testimony, neither mention relates to any of the crimes charged.³⁰ In any event, the Prosecution does not rely on P-0096’s references to the accused.

24. Second, the Defence is unrestricted in its ability to call witnesses to rebut P-0096’s assertion that the LRA had a general policy of targeting civilians who were perceived to support the Ugandan government. The Defence will also be able to cross-examine other witnesses that testify live before the Chamber that corroborate P-0096’s assertions.

²⁶ P-0096, UGA-OTP-0228-1901-R01 at 1903-1904, 1907-1908.

²⁷ P-0096, UGA-OTP-0228-1901-R01 at 1906, 1908-1909.

²⁸ Other witnesses who are expected to give evidence about LRA commanders issuing orders to kill civilians for their perceived opposition to the LRA include P-0138, P-0258, P-0202, P-0045, P-0105, P-0200, and P-0245.

²⁹ See Prosecution’s Pre-Trial Brief, ICC-02/04-01/15-533, paras. 164, 172-173, 177, 179-180.

³⁰ P-0096, UGA-OTP-0228-1698-R01 at 1708 (the investigator confirms with the witness the identity of the five individuals under investigation by the Office of the Prosecutor), UGA-OTP-0228-1739-R01 at 1768 (witness mentions that he saw “Dominic” during the witness’s military training in Sudan).

d. Article 56 measures could not be anticipated as the witness's death was unforeseen.

25. Witness P-0096 is unavailable to testify because of his death. P-0096 was interviewed between 17 and 18 December 2005. At the time of his interview, the witness was approximately 18 years old and did not report any serious health issues.

26. Subsequent to being interviewed, the Prosecution were never at any stage notified of any health concerns in relation to P-0096. Moreover, prior to being informed of P-0096's death, the Prosecution had no reason to suspect or believe that the witness was anything but alive and healthy. Under such circumstances, the Prosecution had no information within its possession that would prompt consideration of evidence preserving measures under article 56.

e. P-0096's prior recorded testimony is reliable

27. P-0096's prior recorded testimony has sufficient indicia of reliability. It includes information as to how the witness came to know of particular facts, distinguishing between circumstances where a witness has direct knowledge of events from where the witness obtained the information from another source. It also contains information about the vantage point of the witness and his ability to perceive events. As indicated above, the testimony is also corroborated by the evidence of witnesses who will provide live testimony.

28. In addition, P-0096's prior recorded testimony was obtained by the Prosecution in the ordinary course of its investigations and in compliance with established procedures. P-0096's interview was recorded under article 55(2) of the Statute and has been transcribed verbatim. It includes annexes containing the signature

of P-0096 and the lead Prosecution investigator on each day of his interview.³¹ P-0096 provided his testimony voluntarily³² and in a language that he fully spoke and understood.³³ The prior recorded testimony is also internally consistent, without implausible narratives, and reflects no motive to distort given that at the time of his interview the accused was not in custody. Furthermore, as described above, P-0096's evidence is also corroborated by other evidence, including intercept material and witness testimony, further demonstrating its reliability.³⁴

29. The indicia of reliability listed above have been deemed sufficient by other Chambers at the Court.³⁵

RELIEF REQUESTED

30. For the foregoing reasons, the Prosecution requests the Chamber:

- a) to receive as formally submitted, P-0001's prior recorded testimony and related documents into evidence under rule 68(2)(b); and
- b) to receive as formally submitted, P-0096's prior recorded testimony and related documents into evidence under rule 68(2)(c).



Fatou Bensouda
Prosecutor

Dated this 21st day of November 2016
At The Hague, The Netherlands

³¹ UGA-OTP-0164-0071, UGA-OTP-0164-0072, UGA-OTP-0164-0073; UGA-OTP-0164-0074.

³² P-0096, UGA-OTP-0228-1698-R01 at 1703.

³³ P-0096, UGA-OTP-0228-1698-R01 at 1700-1701.

³⁴ See *supra*, para. 22.

³⁵ See ICC-01/04-02/06-1205, paras. 13-16; ICC-01/05-01/13-1481-Red, para. 20.