



Original: English

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

Date: 21 March 2017

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

**Prosecution request for the Trial Chamber to make supplementary Directions
concerning the use of documents in the course of proceedings**

Source: The Office of the Prosecutor

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

The Office of the Prosecutor

Ms Fatou Bensouda, Prosecutor
Mr James Stewart
Mr Benjamin Gumpert

Counsel for Uhuru Muigai Kenyatta

Mr Krispus Ayena Odongo
Mr Charles Achaleke Taku

Legal Representatives of Victims

Mr Joseph Akwenyu Manoba
Mr Francisco Cox
Ms Paolina Massida

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

Ms Paolina Massidda
Ms Caroline Walter
Mr Orchlon Narantsetseg

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

States Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Herman von Hebel

Defence Support Section

Victims and Witnesses Unit

Mr Nigel Verrill

Detention Section

**Victims Participation and Reparations
Section**

Other

Introduction

1. The use of documents in the questioning of witnesses has given rise to number of exchanges in the courtroom in the early stages of this trial. The Prosecution submits that the parties and participants would be assisted, and the efficiency of the proceedings improved, if the Chamber were to give written guidance on this subject, which is bound to recur in the course of a lengthy trial. The Prosecution accepts that a rigid practice leaving no room for discretion would be undesirable. But leaving the manner in which documents are used when questioning witnesses entirely to the submissions of the parties and determination of the Chamber on a 'case by case' basis runs the risk of losing valuable court time. This may be lost both while these submissions and determinations are made, but also, potentially, while witnesses are referred in detail to the form and content of documents about which they have no knowledge.
2. In short, the Prosecution submits that:
 - i) Witnesses should routinely be permitted to be reminded (if they cannot recall spontaneously) of what they have previously said about potentially important matters which occurred some time distant from the time of their testimony.
 - ii) When witnesses' testimony in court appears to be different, in a potentially material way, from assertions in their previous statements, parties should be permitted to remind the witness of the relevant assertions and ask the witness to explain the apparent contradiction.
 - iii) Once it is established that a witness has no previous knowledge of, or connection to, a document or other evidentiary material, parties should not be permitted to continue to use that document in the course of their

questioning of the witness, or to ask witnesses to reconsider their answers in the light of other evidence in the case.

- iv) The procedure governing the parties' approach to these three situations should be clearly established and followed on every occasion, save in exceptional circumstances.

Submissions

Memory refreshing

3. The general propriety of memory refreshing has not been challenged. It is almost inevitable that when witnesses are asked to recall events that happened over a decade ago they will not always recall precisely the same details of those events. They will forget things on one occasion and remember them on another. Sometimes witnesses are able to state they have forgotten something, on other occasions they are not aware that they have done so. One purpose of the formal, certified recording of a witness's recollection is to guard against the failure of memory caused by the elapse of time.
4. The Prosecution accepts that the use of previous statements with an apparently forgetful witness should not be the first step in the process of seeking to secure the fullest and most accurate account that a witness can give to the Chamber. The rephrasing of the question or the use of names, or 'key-words', by the questioner will often unlock the witness's full recollection.
5. But on some occasions these measures will not succeed. Then it may be necessary to remind the witness, as concisely as possible, of what they have previously stated.

6. The Prosecution accepts that the mere fact that a detail or event is contained within a previous statement does not mean that it is accurate, or that it is appropriate for the Chamber to accept it in evidence. Where a witness testifies that a passage in the previous statement is wrong, or potentially misleading, a Chamber may be slow to conclude that it represents the truth, although it may properly conclude that the that passage should be nonetheless be viewed as “submitted”, deferring any consideration of its credibility and weight for the deliberations stage. But where a witness tells the court that the statement is accurate, and that they have nothing further to add on the subject, or where the witness states that they still have no recollection of the matter, but know that when they made the previous statement they were telling the truth, then the Chamber must be at liberty to receive in evidence this confirmation of that previous statement.
7. For the Chamber to have no such power would be to turn the giving of evidence into a long-term memory test, and to incentivise persons accused of crimes to increase to the maximum the delay between the commission of crimes and the giving of oral evidence.
8. The Prosecution submits that the formalities of memory refreshing should be kept to a minimum. It should not be dependent upon the witness stating that they cannot remember something. It must be for the Chamber to decide when, and from what document, a witness’s memory may be refreshed.
9. An appropriate procedure (once all appropriate preliminary measures such as those outlined in paragraph 4 above have been exhausted), and one previously suggested by the Chamber in the course of this trial,¹ is for the relevant portion of the previous statement to be read out to the witness and

¹ T-39-CONF-ENG ET p.82 l.20.

for the witness to be asked whether that was, indeed, what they said previously and whether they would now say anything different.

10. Objections of the nature that this constitutes 'leading' the witness or a breach of the principle of orality of evidence should not, as a rule, be entertained. The objection to leading questions is that they may induce a witness to adopt evidence about which they have no real knowledge and which has been suggested to them by the questioner. Self-evidently, factual propositions which are contained in the witness's own words on a previous occasion are not caught by this objection. The orality principle is designed to ensure that important evidence is, wherever possible, given, and potentially challenged, in the presence of the witness in the courtroom. Again the procedure outlined above in no way breaches this principle.

11. The Prosecution accepts that the processes of receiving evidence and of memory refreshing are not mathematical exercises.² There will be occasions, depending on the nature of the evidence concerned or the witness, when the Chamber will rule against applications to refresh memory, or decide that a different procedure is appropriate. But the Prosecution submits that the reasons for refusing applications or adopting a different procedure should be clearly identified in such cases.

Previous inconsistent statements

12. Sometimes witnesses believe they have recollected details correctly but have in fact become confused by the passage of time so that their testimony is inaccurate. On other occasions witnesses giving evidence may, consciously or unconsciously, suppress, or embroider upon, relevant events or details accurately recounted in their previous statements.

² T-53-CONF-ENG ET p.33 l.4.

13. For the same reasons as have been outlined above, it will assist the Chamber in its duty to establish the truth for these inconsistencies to be explored by the parties in their questioning.
14. Again the Chamber is likely to wish to be satisfied that all possible efforts to trigger accurate and truthful recollection short of confronting the witness with the previous statement have been made by the questioning party. The Chamber will also be likely to consider that there should be a minimum 'threshold' of inconsistency and significance below which such exploration will be worthless.
15. The Prosecution submits that once these criteria are satisfied the procedure should again be simple. The questioner should read out the relevant passage from the statement, remind the witness of his current testimony, point out the apparent contradiction and ask the witness to explain it. Experience suggests³ that it is a more efficient procedure for the questioner to quote directly from statements and transcripts of testimony rather than using reported speech.

Documents and other material unconnected with the witness

16. The Prosecution accepts that it is legitimate for a questioning party to describe, or present, to a witness a document so as to establish by questioning whether they are familiar with it. This may be unavoidable where the party has had no prior opportunity to inquire with the witness whether they are familiar with the document.
17. Where no such questioning occurs, or where the witness responds that they have no knowledge of or connection with the document, the questioning party should make no reference (or no further reference) to documents or other material which is, or is proposed to be, evidence in the case.

³ Eg T-55-CONF-ENG-ET p. 25 l.23, p.35 l.22.

18. Witnesses in this trial have frequently been referred to the contents of documents with which they have no connection.⁴ In particular witnesses have repeatedly been told that documentary or other evidence exists which contradicts the answers they have given.⁵
19. The Prosecution submits that this practice should not be permitted. It is of no assistance to the Chamber for witnesses to be asked to comment on material of which they have no knowledge. It is equally valueless for witnesses to be confronted with an assertion that there is abundant evidence proving that their evidence is incorrect. Less robust witnesses may be overawed by the apparent authority of the questioner and the unseen material and give answers designed to avoid the risk of looking foolish by staying true to their own recollections. This would be detrimental both to the establishment of the truth and to the “fair evaluation” of the witness, in the terms of article 69 (4).
20. The Prosecution accepts that it is perfectly proper, indeed only fair to a witness, to confront them with factual propositions contrary to the evidence they have given, and to ask them what they have to say to those propositions. These propositions will, frequently, be derived from documentary or other evidence in the case. The questioning party may even be reading from such a document, or a transcript of evidence, in order to ensure scrupulous accuracy. But there is no value in counsel effectively themselves giving evidence about the provenance of the factual proposition being put, and this practice runs the risks outlined above.

Relief Requested

⁴ Eg T-54-CONF-ENG-ET p.66 l.13.

⁵ Eg T-55-CONF-ENG-ET p.33 l.11, p.40 l.2, p.43 l.17, p.48 l.11, p.50 l.7.

21. The Prosecution respectfully submits that the provision of clear written guidance on the issues dealt with above would ensure conformity of approach by the parties and expedite the proceedings. The Prosecution requests the Chamber to supplement the *Initial Directions on the Conduct of the Proceedings*⁶ by the addition of paragraphs 23A, 23B and 23C, in the terms set out below.

23A i) *Where the Chamber is satisfied that a witness is unable to recall, at the time of their testimony, a potentially material event or detail which is recorded in a document constituting a formal record of the witness's previous recollection, the Chamber may permit the questioning party to refresh the witness's memory*

 ii) *The questioning party shall identify to the Chamber the passage of the document which it is proposed shall be used to refresh the witness's memory. The Chamber may direct that a different or shorter passage is used.*

 iii) *The questioning party shall read the approved passage to the witness, and then ask whether those words are what the witness has said previously, and whether they would now say anything different.*

23B i) *Where the Chamber is satisfied that a witness has given testimony which is inconsistent, in respect of a material matter, with some portion of a document constituting a formal record of the witness's previous recollection, the Chamber may permit the questioning party to ask the witness about the inconsistency.*

 ii) *The questioning party shall identify to the Chamber the passage of the document which it is proposed shall be used to identify the*

⁶ ICC-02/04-01/15-497.

inconsistency. The Chamber may direct that a different or shorter passage is used.

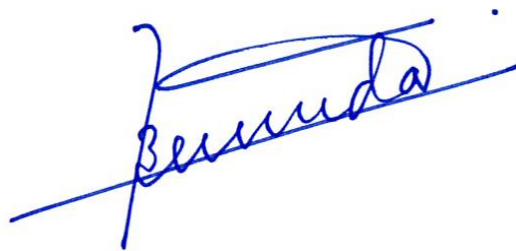
iii) The questioning party shall read out the relevant passage from the statement, remind the witness of his current testimony, point out the apparent contradiction and ask the witness to explain it.

23C

i) Before questioning a witness about a document, the questioning party must describe, or present, it to a witness so as to enable the witness to indicate whether they are familiar with it.

ii) Where the witness responds that they have no knowledge of or connection with the document, the questioning party shall ask no further questions with specific reference to the document itself. Factual propositions drawn from the document may still put to the witness for comment.

iii) With exception of material recognized by witnesses in accordance with sub-paragraph (i) above, witnesses shall not be referred to, asked to comment on, or to reconsider their previous answers in the light of, other evidential material which has been, or is intended to be, submitted in the case.



Fatou Bensouda,
Prosecutor

Dated this 21st day of March, 2017
At The Hague, The Netherlands