

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-02/04-01/15
Date: 6 December 2017

TRIAL CHAMBER IX

Before: Judge Bertram Schmitt, Single Judge

SITUATION IN UGANDA

IN THE CASE OF *THE PROSECUTOR v. DOMINIC ONGWEN*

Public

Decision on Request for Rule 74 Assurances for P-40

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

The Office of the Prosecutor

Fatou Bensouda
James Stewart
Benjamin Gumpert

Counsel for the Defence

Krispus Ayena Odongo

Legal Representatives of Victims

Joseph Akwenyu Manoba
Francisco Cox
Paolina Massidda

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

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

States Representatives

Amicus Curiae

REGISTRY

Registrar

Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Others
Sarah Kerwegi

Judge Bertram Schmitt, acting as Single Judge on behalf of Trial Chamber IX ('Single Judge' and 'Chamber', respectively) of the International Criminal Court, in the case of *The Prosecutor v. Dominic Ongwen*, having regard to Rules 68 and 74 of the Rules of Procedure and Evidence ('Rules') and Regulations 23 *bis* and 73(2) of the Regulations of the Court, issues the following 'Decision on Request for Rule 74 Assurances for P-40'.

1. On 18 November 2016, the Chamber decided, subject to receipt of the respective declarations under Rule 68(2)(b)(ii) and (iii) of the Rules, to introduce P-40's prior recorded testimony into evidence ('Rule 68(2)(b) Decision').¹ The receipt of these declarations for P-40 is pending.
2. On 17 November 2017, Ms Sarah Kerwegi, in her capacity as duty counsel for P-40, filed a submission ('Request') requesting that: (i) assurances under Rule 74(2)-(3) are provided to P-40 and (ii) redactions be applied to the sections of the public version of P-40's statement that are protected by Rule 74 of the Rules.²
3. On 28 November 2017, the Defence for Mr Ongwen indicated that it did not oppose Rule 74 assurances for P-40 and was content to review redactions in accordance with already established procedures.³
4. On 4 December 2017, the Registry filed a report ('Registry Report'): (i) indicating that the Office of the Prosecutor ('Prosecution') only asked for a legal adviser to assist P-40 during the Rule 68(2)(b) declaration process and (ii) noting that 'there

¹ Decision on the Prosecution's Applications for Introduction of Prior Recorded Testimony under Rule 68(2)(b) of the Rules, ICC-02/04-01/15-596-Red.

² Request for Rule 74 Assurances for Witness P-0040, ICC-02/04-01/15-1076-Conf (notified 20 November 2017).

³ Email from the Defence to the Chamber and participants, 28 November 2017 at 11:20.

is no possibility for the appointment of a Rule 74 legal adviser in the context of a rule 68(2)(b) of the Rules certification process'.⁴

5. As for the request to apply redactions to information relating to self-incrimination, the Single Judge recalls that the Rule 68(2)(b) Decision: (i) ordered the Prosecution to file a proposed public redaction version of P-40's prior recorded testimony within 21 days of receipt of his declaration and (ii) instructed the other participants to raise objections to the redactions proposed or propose additional redactions within 21 days of receipt of the Prosecution's filing.⁵ As P-40's declaration has not yet been received, these timelines have yet to run. The Single Judge sees no reason to consider any redactions to P-40's prior recorded testimony outside the parameters of the pre-existing procedure, and defers this request accordingly.
6. The Single Judge will now consider the request for Rule 74 assurances for P-40. As a default rule, witnesses may object to making any statement that might tend to incriminate him or her.⁶ Granting assurances under Rule 74 constitutes a kind of exception to this rule. Specifically, a witness can be required to answer the question or questions after the Chamber assures that the evidence provided: (i) will be kept confidential and will not be disclosed to the public or any State; and (ii) will not be used either directly or indirectly against that person in any subsequent prosecution by the Court, except under Articles 70 and 71 of the Rome Statute.⁷ Rule 74 assurances are thus centred around the prospect of the Chamber compelling answers to questions. It is inapposite to give Rule 74 assurances for voluntary statements already made.

⁴ Report on the legal assistance provided to Witness P-0040, ICC-02/04-01/15-1095-Conf-Exp (notified 5 December 2017). This report comes after the applicable response deadline, but is nevertheless accepted as the Registry put this information on record at the behest of the Chamber.

⁵ Rule 68(2)(b) Decision, ICC-02/04-01/15-596-Red, page 111.

⁶ Rule 74(3)(a) of the Rules.

⁷ Rule 74(3)(c) of the Rules.

7. P-40 is not testifying directly, but is rather having his statement introduced pursuant to Rule 68(2)(b) of the Rules. The Single Judge considers that there is no discernible purpose for granting Rule 74 assurances in this context. The potentially incriminating conduct mentioned in the Request solely concerns P-40's past acts and conduct in the Lord's Resistance Army.⁸ There is no immediate prospect that such matters will be addressed anew when signing the Rule 68 declaration, noting that Rule 68(2)(b)(ii) requires that accompanying declarations 'may not contain any new information' beyond the prior recorded testimony. The Registry Report also confirms that the Prosecution did not ask for a Rule 74 adviser for P-40, and Ms Kerwegi was not even appointed as a 'Rule 74 legal adviser' *per se*. For these reasons, and without taking any position on whether P-40 requires legal assistance for other purposes, Rule 74 assurances would be procedurally inappropriate. This request is rejected.

FOR THE FOREGOING REASONS, THE SINGLE JUDGE HEREBY

DEFERS consideration of any redactions to P-40's prior recorded testimony in accordance with paragraph 5 above;

REJECTS the request to grant Rule 74 assurances for P-40; and

ORDERS the Registry to reclassify the Registry Report as 'confidential'.

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


Judge Bertram Schmitt, Single Judge

Dated 6 December 2017

At The Hague, The Netherlands

⁸ Request, ICC-02/04-01/15-1076-Conf, para. (v).