

**Cour
Pénale
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**International
Criminal
Court**

Original: English

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

Date: **4 June 2018**

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***

Confidential

**Defence Request to Introduce Previously Recorded Testimony Pursuant to Rule 68(2)(b)
of the Rules of Procedure and Evidence**

Source: Defence for Dominic Ongwen

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

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I. INTRODUCTION

1. Pursuant to Rule 68(2)(b) of the Rules of Procedure and Evidence ('Rules'), the Defence for Dominic Ongwen ('Defence') requests the admission into evidence of the prior recorded statements and associated documents ('materials') of nine witnesses, namely: D-0008, D-0012, D-0019, D-0020, D-0034, D-0049, D-0050, D-0077 and P-0028.
2. The Materials are admissible by reason of the fact that they: (a) go to the proof of matters other than the acts and conduct of the accused; (b) are corroborative and contextualise the evidence of other live trial witnesses; and (c) are the product of interviews with witnesses whose attendance for cross-examination is unnecessary. In accordance with the purpose of Rule 68, admission of the statements will 'reduce the length of [the] proceedings' and enable the Defence to 'streamline' the presentation of its evidence.¹
3. As concerns the requirement under Rules 68(2)(b)(i) and (ii) that each statement be accompanied by a properly witnessed declaration of truth, the Defence requests that the Trial Chamber authorise the Registry Legal Counsel to witness the statements.
4. 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)(b) 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.²

II. CONFIDENTIALITY

5. Pursuant to Regulation 23 *bis*(1) of the Regulations of the Court, the Defence submits this request as confidential, as it refers to the identity of Defence witnesses. A public redacted version will be issued as soon as practicable after filing.

¹ Assembly of State Parties, Study Group on Governance, Working Group on Lessons Learnt: Recommendation on a proposal to amend rule 68 of the Rules of Procedure and Evidence (Prior Recorded Testimony), 31 October 2013, para. 11.

² 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.

III. SUBMISSIONS

A. Law

6. Rule 68(2)(b) provides the Chamber with a discretion to permit the introduction of prior recorded testimony where it 'goes to proof of a matter other than the acts and conduct of the accused.'

i. Meaning of 'prior recorded testimony'

7. The notion of 'prior recorded testimony' under Rule 68 includes audio- and video-recorded testimony, transcripts of a witness' testimony and written statements taken under Rules 111 and 112.³ Further, a statement is capable of amounting to 'prior recorded testimony' when it is given by a person on the understanding that 'he or she is providing information which may be relied upon in the context of legal proceedings',⁴ *i.e.* where the person is 'questioned in the capacity as [a] witness in the context of or in anticipation of legal proceedings.'⁵ Annexes and documents that form an integral part of a witness' statement are also to be considered part of the testimony.⁶

ii. Acts and conduct of the accused

8. The Chamber has held that the 'expression 'acts and conduct of the accused"...must be interpreted in its plain natural meaning, referring to the personal actions and omissions of the accused, rather than a broader normative meaning, extended to the actions and omissions of others which are attributable to the accused under the modes of liability charged by the Prosecution.'⁷ The term 'acts and conducts of the accused' refers exclusively to the actions of the accused set out in the charges brought against him or which are relied upon to establish his criminal responsibility for the crimes charged.⁸

iii. Factors guiding the Chamber's discretion under 68(2)(b)(i)

³ *Prosecutor v. Dominic Ongwen*, 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-Conf, 18 November 2016, para. 9 ('Rule 68(2)(b) Decision').

⁴ Rule 68(2)(b) Decision, para. 9.

⁵ Rule 68(2)(b) Decision, para. 9.

⁶ Rule 68(2)(b) Decision, para. 10.

⁷ Rule 68(2)(b) Decision, para. 11.

⁸ Rule 68(2)(b) Decision, para. 11.

9. Rule 68(2)(b)(i) provides a non-exhaustive list of factors that the Chamber shall consider in the exercise of its discretion.⁹ The factors are not mandatory preconditions; they are intended to guide the Chamber's exercise of its discretion.¹⁰ These factors include whether the prior recorded testimony: (a) relates to issues that are not materially in dispute; (b) is of a cumulative or corroborative nature, in that other witnesses will give or have given oral testimony of similar facts; (c) relates to background information; (d) is such that the interests of justice are best served by its introduction; and (e) has sufficient indicia of reliability.

Issues that are not materially in dispute

10. In order for the Chamber to determine whether an issue is materially in dispute, it will 'consider whether the prior recorded testimony relates to matters which are soundly and conceivably disputed between the parties, and are crucial, or of at least sufficient significance for the Chamber's eventual determination of the charges against the accused in its judgment under Article 74 of the Statute.'¹¹ In reaching its determination, the Chamber will objectively assess the degree to which the prior recorded testimony impacts upon material matters actually contested in the proceedings.¹²

Cumulative or corroborative nature

11. In the *Ntaganda* case, Trial Chamber VI admitted prior recorded testimony under Rule 68(2)(b) on the that basis that, *inter alia*, 'other witnesses [had] provided potentially corroborative testimonies'¹³ on the same matters. In making its determination, Trial Chamber VI noted that 'the relevant consideration is whether other testimony has been, or will be, provided on "similar facts". It is not required that the accounts accord in every detail.'¹⁴

Background information

12. The determination of whether prior recorded testimony concerns background information will inevitably occur during the Chamber's assessment of whether an issue is 'materially in

⁹ Rule 68(2)(b) Decision, para. 6.

¹⁰ Rule 68(2)(b) Decision, para. 6.

¹¹ Rule 68(2)(b) Decision, para. 15.

¹² Rule 68(2)(b) Decision, para. 15.

¹³ *Prosecutor v. Bosco Ntaganda*, Public redacted version of Decision on Prosecution application for admission of prior recorded testimony of Witness P-0039 under Rule 68(2)(b), ICC-01/04-02/06-1715-Red, 12 January 2017, para. 15.

¹⁴ *Prosecutor v. Bosco Ntaganda*, Public redacted version of Decision on Prosecution application for admission of prior recorded testimony of Witness P-0039 under Rule 68(2)(b), ICC-01/04-02/06-1715-Red, 12 January 2017, para. 14.

dispute'. For example, Trial Chamber I in *Gbagbo & Blé Goudé* denied a request to introduce the prior recorded testimony of a witness on the basis that its content was 'significant to the determination of the core issues materially in dispute' contrary to 'mere background information'.¹⁵

Interests of justice

13. Within the context of Rule 68(2)(b), the Chamber has held that the interests of justice are better served by the admission of prior recorded testimony when such introduction allows, *inter alia*: (a) to ensure the expeditiousness of the proceedings; (b) streamline evidence presentations; (c) focus live testimony topics that are of the most relevance to the proceedings; (d) minimise cumulative in-court testimony on aspects which will be addressed by other witnesses; (e) save the resources of the institutions; (f) avoid witnesses having to travel in order to appear in court.¹⁶

Sufficient indicia of reliability

14. Insofar as formal procedures concerning prior recorded testimony are concerned, relevant indicia of reliability have been found to be that the statement was: (a) signed by witness and; (b) given voluntarily; (c) obtained in the presence of a qualified interpreter or a lawyer who is a native speaker; (d) declared to be accurate by the witness at the time of creation; and (e) includes information that the witness was given an explanation of the procedure and was informed of the significance of providing the statement.¹⁷ However, the Chamber has held that 'no single indicator is, in and of itself, conclusive or mandatory.'¹⁸

B. Request for Admission of Prior Recorded Statements

15. The Defence requests the admission of the statements pending the filing of declarations under Rules 68(2)(b)(ii) and (iii). The Defence will obtain the declarations if and only if the Chamber admits the statements.

¹⁵ *Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Decision on the Prosecutor's Application to Introduce Prior Recorded Testimony under Rules 68(2)(b) and 68(3), ICC-02/11-01/15-573-Red, 9 June 2016, para. 18 ('Gbagbo Decision'). See also para.15 of the Gbagbo Decision, which states that the 'Chamber notes, in light of the positions of the parties, that the precise unfolding and proper interpretation of the events which occurred in Abidjan on 16 December 2010 and in the days that followed constitute one of the core, and disputed, issues in the present case. The evidence which can reasonably assist the Chamber in the resolution of this matter therefore relates to issues that are materially in dispute, and not mere background information'.

¹⁶ Rule 68(2)(b) Decision, para. 16.

¹⁷ Rule 68(2)(b) Decision, para.18.

¹⁸ Rule 68(2)(b) Decision, para.18.

i. Factors relevant to the witnesses

D-0008 and D-0012

16. Witnesses D-0008 and D-0012 both discuss Mr Ongwen's abduction and childhood. These statements are background material and corroborative to D-0006's and D-0007's expected testimonies. These statements do not go to the alleged acts and conduct of Mr Ongwen. Both witnesses were made aware of the potential use of their respective statements, and agreed as such. Finally, the statements were signed by the witnesses, given voluntarily, obtained in the presence of lawyer who is a native speaker,¹⁹ declared to be accurate by the witnesses at the time of creation; and includes information that the witnesses were given an explanation of the procedure and were informed of the significance of providing the statements.

D-0019 and D-0020

17. Witnesses D-0019 and D-0020 are former members of the Uganda People's Army (UPA) who worked with the LRA throughout the latter half of the 1990s. Their statements are corroborative to D-0018 and cumulative to information given by a few Prosecution witnesses and by some Defence witnesses. These statements do not go to the alleged acts and conduct of Mr Ongwen. Both witnesses were made aware of the potential use of their respective statements, and voluntarily agreed to their use.

D-0034

18. Witness D-0034 is a former member of the LRA. His statement about his time in the LRA is cumulative. His statement is also corroborative.²⁰ His proposed testimony does not go to the alleged acts and conduct of Mr Ongwen. The witness was made aware of the potential use of his statement, and voluntarily agreed to its use. The statement was interpreted to him by an ICC certified field interpreter and agreed at the time of signing the statement that it was accurate.

¹⁹ The Defence notes that only D-0008 had his statement read to him in Acholi by a licensed attorney who is native in Acholi. Witness D-0012 is fluent in English.

²⁰ For example, compare UGA-D26-0022-0385, paras 38-39 with UGA-D26-0010-0486, para. 4(b).

D-0049 and D-0050

19. Witnesses D-0006, D-0049 and D-0050 are former wives to Joseph Kony. The Defence intends to call D-0006 as a live witness, and D-0049 and D-0050 as Rule 68(2)(b) witnesses.²¹
20. On the date of submission of this document, D-0049 has not signed her statement. The Defence gives notice that it will seek leave to admit D-0049's signed statement when it is ready.
21. For D-0050, her statement is corroborative of expected testimony from D-0006 in relation to Joseph Kony and the LRA. The witness statement is also corroborative and cumulative of expected defence witness testimonies about Mr Ongwen's presence in Teso and Lango. This statement does not go to the alleged acts and conduct of Mr Ongwen. The witness was made aware of the potential use of her statement, and voluntarily agreed to its use.

D-0077

22. D-0076, D-0077 and D-0081 all discuss the attack on Pajule. The Defence requests the conditional admission into evidence the statement of D-0077. His statement does not go to the alleged acts and conduct of Mr Ongwen. The witness was made aware of the potential use of his statement, and agreed as such. Finally, the statement was signed by the witness, given voluntarily, obtained in the presence of lawyer who is a native Acholi speaker,²² declared to be accurate by the witness at the time of creation; and includes information that the witness was given an explanation of the procedure and was informed of the significance of providing the statement.

P-0028

23. P-0028 was with the LRA from its formative years. He was an adviser to Joseph Kony and a liaison. He is one of the only surviving members from that period and was in charge of the women and children. He was able to listen to orders given on the radio and met some of the victims. It was during the earliest period of the LRA when the rules and regulations were being established by Joseph Kony and he will be able to discuss their creation. To date, the rules have been discussed during testimony; however, no witness has discussed their creation.

²¹ For example, see Witness Summary for D-0006, para. 35 and Witness Summary for D-0049, para. 34.

²² The Defence notes that only D-0077 had his statement read to him in Acholi by a licensed attorney who is native in Acholi.

24. P-0028's statements contain general information about the use of radios and about the spirituality of Joseph Kony in the LRA. P-0028 was in the LRA during the charged period and Operation Iron Fist and describes Joseph Kony's conduct before and during that period. P-0028 does not mention Mr Ongwen in his statements.
25. P-0028's statements are corroborated by and cumulative with other witnesses who have testified about the rules. His statements are also corroborated by Defence witnesses such as D-0032, D-0036 and D-0074.
26. Information available to the Defence indicates that P-0028 is unwilling to testify live during the trial but does not object to his statements being submitted into evidence.

IV. REQUEST

27. For the reasons set out above, the Defence respectfully requests that the Chamber:
 - a. Admit into evidence the statements, subject to the filing of declarations under Rules 68(2)(b)(ii) and (iii); and
 - b. Authorise the Registry Legal Counsel to witness the declarations.

Respectfully submitted,



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Hon. Krispus Ayena Odongo
On behalf of Dominic Ongwen

Dated this 4th of June, 2018
At Gulu, Uganda