

**Cour
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**International
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Court**

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Date: **11 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

**Prosecution's Response to the Defence Request Pursuant to Rule 68(2)(c) of the
Rules of Procedure and Evidence**

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
Mr James Stewart
Mr Benjamin Gumpert

Counsel for Dominic Ongwen

Mr Krispus Ayena Odongo
Mr Charles Taku
Ms Beth Lyons

Legal Representatives of Victims

Mr Joseph Akwenyu Manoba
Mr Francisco Cox
Ms 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

Mr Peter Lewis

Counsel Support Section

Victims and Witnesses Section

Mr Nigel Verrill

Detention Section

**Victims Participation and Reparations
Section**

Other

INTRODUCTION

1. The Prosecution requests the Chamber to defer consideration of whether to introduce into evidence five interview transcripts of P-0039¹ until the Defence has sufficiently established the death of P-0039.

2. The Defence in its Request pursuant to rule 68(2)(c) ("Request")² asserts that during the course of its investigations it "learned that P-0039 died in 2010 or early 2011"³. It also claims that it is still "in the process of locating and obtaining [a] death certificate"⁴. The Request provides no other information or documentation in support of its claim that P-0039 is dead. The Prosecution submits that the Defence's failure to be specific about the timing of P-0039's death or to substantiate its claim means that the fact of P-0039's death is insufficiently established.

3. The Prosecution also submits that "two associated documents",⁵ namely a UPDF note⁶ and a GUSCO file relating to P-0039 cannot be characterised as "prior recorded testimony" within the meaning of rule 68(2)(c). As such, the request to submit them into evidence should be rejected.

CONFIDENTIALITY

4. This filing is classified as confidential in accordance with regulation 23*bis* of the Regulations of the Court. The Prosecution requests that the Chamber grant its authority for this filing to be reclassified as public because it contains no confidential information capable of identifying P-0039.

¹ UGA-OTP-0215-0286-R01; UGA-OTP-0215-0319-R01; UGA-OTP-0215-0357-R01; UGA-OTP-0215-0388-R01; and UGA-OTP-0215-0460-R01.

² ICC-02/04-01/15-1270-Conf.

³ ICC-02/04-01/15-1270-Conf, para. 11.

⁴ ICC-02/04-01/15-1270-Conf, para. 11.

⁵ ICC-02/04-01/15-1270-Conf, para. 8.

⁶ UGA-OTP-0012-0145.

SUBMISSIONS

A. P-0039's unavailability to testify orally

5. The Prosecution does not oppose the introduction into evidence of prior recorded testimony of P-0039, should his death be established. Whilst the Prosecution has heard similar information concerning P-0039's death from P-0078, the Defence has not provided sufficient information capable of substantiating this fact.

6. Jurisprudence demonstrates that information sufficient to substantiate a person's death includes: i) detailed investigation notes outlining people spoken to who are able to confirm the death of the individual;⁷ ii) statements from individuals who knew the deceased and attended their burial;⁸ or iii) provision of a reliable and credible death certificate.⁹

7. Where information has been insufficient to establish the death of a person, the practice of this Court has been to defer consideration of the matter. For example, consideration of whether to admit the prior recorded testimony under rule 68(2)(c) was deferred by this Court in a different case where provision of a death certificate was possible but not yet obtained.¹⁰

8. The Defence in this case is unable to state in which year P-0039 died.¹¹ The Request fails to provide any information substantiating its claim. Unlike the practice of the Prosecution, when it made a similar request to admit the prior recorded

⁷ ICC-02/04-01/15-600.

⁸ ICC-01/04-02/06-1029 + Anx, paras. 17-19.

⁹ ICC-02/04-01/15-600.

¹⁰ ICC-01/04-02/06-1029 + Anx, para. 43.

¹¹ ICC-02/04-01/15-1270-Conf, para. 11.

testimony of P-0096,¹² the Defence Request fails to provide any information as to the investigative steps that were taken to verify P-0039's death. The Defence also fails to explain why it has been unable to provide the Chamber with a death certificate before making its request.

9. The Defence's failure in the Request to provide the above information means that P-0039's death has not been sufficiently established for the Chamber to make an order under the provisions of rule 68(2)(c). The Chamber should therefore defer consideration of whether to introduce into evidence five interview transcripts of P-0039¹³ until this is remedied.

B. Submission of associated documents

10. Jurisprudence of this Court establishes that "not any information provided by a person can be considered to be prior recorded testimony".¹⁴ In order for such information to qualify, "the person must understand, when providing his or her statement 'that he or she is providing information which may be relied upon in the context of legal proceedings'".¹⁵ For this purpose, this includes "documentary evidence annexed [to prior recorded testimony]".¹⁶

11. The UPDF note¹⁷ and the GUSCO file relating to P-0039 do not qualify as "prior recorded testimony". Neither of these documents was made in the context of or in anticipation of legal proceedings.

¹² ICC-02/04-01/15-579-Red, paras. 16-18.

¹³ UGA-OTP-0215-0286-R01; UGA-OTP-0215-0319-R01; UGA-OTP-0215-0357-R01; UGA-OTP-0215-0388-R01; and UGA-OTP-0215-0460-R01.

¹⁴ ICC-01/05-01/13-1478-Red-Corr, paras. 31-32.

¹⁵ ICC-01/05-01/13-1478-Red-Corr, paras. 31-32.

¹⁶ ICC-02/11-01/15-573-Red, para. 9.

¹⁷ UGA-OTP-0012-0145.

12. In relation to the UPDF note, there is no information as to how it was created, no certainty as to whether P-0039 provided the information contained therein, or that he was even present when it was created. The UPDF note does not contain P-0039's signature and omits information as to its author. Similarly, the GUSCO file contains no substantive testimony and cannot reasonably be argued to have been made in the context of or in anticipation of legal proceedings. Finally, neither of these documents is annexed to or referenced in any of P-0039's interview transcripts, nor were they shown to him at the time the "prior testimony" was recorded.

13. In such circumstances, even if P-0039's death had been properly substantiated, the UPDF note and GUSCO file are inadmissible under rule 68(2)(c).

CONCLUSION

14. The Prosecution requests the Chamber to:

- i) defer its consideration of whether to introduce into evidence five interview transcripts of P-0039¹⁸ until the Defence has sufficiently established the death of P-0039.
- ii) reject the Defence's request to introduce into evidence the UPDF note and the GUSCO file.



Fatou Bensouda, Prosecutor

Dated this 11th day of June 2018
At The Hague, The Netherlands

¹⁸ UGA-OTP-0215-0286-R01; UGA-OTP-0215-0319-R01; UGA-OTP-0215-0357-R01; UGA-OTP-0215-0388-R01; and UGA-OTP-0215-0460-R01.