

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 19 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*

Public

**Decision on Defence Request Pursuant to Rule 68(2)(c) of the Rules of
Procedure and Evidence**

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
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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

Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Others

Trial Chamber IX ('Chamber') of the International Criminal Court ('Court'), in the case of *The Prosecutor v. Dominic Ongwen*, having regard to Articles 64(9)(a) and 69(2) of the Rome Statute ('Statute'), Rule 68(2)(c) of the Rules of Procedure and Evidence ('Rules') and Regulation 23 *bis* of the Regulations of the Court, issues the following 'Decision on Defence Request Pursuant to Rule 68(2)(c) of the Rules of Procedure and Evidence'.

I. Procedural history and submissions

1. On 4 June 2018, the defence for Mr Ongwen ('Defence') filed a request seeking the submission into evidence of five interview transcripts of P-39 ('Statements')¹ and two associated documents ('Associated Documents')² pursuant to Rule 68(2)(c) of the Rules ('Request').³
2. The Defence submits that the individual is unavailable to testify as 'during the course of its investigations, the Defence learned by P-0039 died in early 2010 or early 2011'.⁴ The Defence further stipulates that it is currently in the process of locating and obtaining P-39's death certificate.⁵
3. On 11 June 2018, the Office of the Prosecutor ('Prosecution') filed a submission requesting the Chamber to defer its decision until the Defence has sufficiently established P-39's death, and to reject the Request in relation to the Associated Documents ('Response').⁶
4. The Prosecution does not oppose the introduction of the Statements into evidence, if the Defence is able to provide sufficient information capable of

¹ Transcripts of interviews conducted on 27 and 28 August 2004, UGA-OTP-0215-0286-R01, UGA-OTP-0215-0319-R01, UGA-OTP-0215-0357-R01, UGA-OTP-0215-0388-R01 and UGA-OTP-0215-0420-R01.

² UPDF Debriefing Report, UGA-OTP-0012-0475; GUSCO File, UGA-OTP-0115-0145.

³ Defence Request Pursuant to Rule 68(2)(c) of the Rules of Procedure and Evidence, ICC-02/04-01/15-1270-Conf.

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

⁵ Request, ICC-02/04-01/15-1270-Conf, para. 11.

⁶ Prosecution's Response to the Defence Request Pursuant to Rule 68(2)(c) of the Rules of Procedure and Evidence, ICC-02/04-01/15-1280-Conf.

substantiating P-39's death.⁷ According to the Prosecution, this includes: (i) detailed investigation notes outlining people spoken to who are able to confirm P-39's death; (ii) statements from individuals who knew P-39 and attended the funeral; or (iii) provision of a reliable and credible death certificate.⁸

5. The Prosecution further submits that the Associated Documents do not qualify as 'prior recorded testimony', and neither document (i.e. a 'UPDF note' and a 'GUSCO file' relating to P-39) was annexed to or referenced in any of the Statements. There is no evidence that the Associated Documents or the information contained therein were provided in the context of or in anticipation of legal proceedings.⁹
6. The Prosecution also requests that the Chamber authorise its Response to be reclassified as public.¹⁰

II. Applicable law and analysis

7. The Chamber, pursuant to Rule 68(2)(c) of the Rules, may allow the introduction of prior recorded testimony from a person who, *inter alia*, has subsequently died or must be presumed dead *only if* the Chamber is satisfied of the person's unavailability.¹¹ In addition, it must be demonstrated that the necessity of measures under Article 56 of the Statute could not be anticipated and that the prior recorded testimony has sufficient indicia of reliability.¹²
8. The Chamber recalls that prior recorded testimony includes written statements taken under Rules 111 and 112 of the Rules.¹³ The individual providing the

⁷ Response, ICC-02/04-01/15-1280-Conf, para. 5.

⁸ Response, ICC-02/04-01/15-1280-Conf, para. 6.

⁹ Response, ICC-02/04-01/15-1280-Conf, paras 10-13.

¹⁰ Response, ICC-02/04-01/15-1280-Conf, para. 4.

¹¹ Rule 68(2)(c)(i) of the Rules.

¹² Rule 68(2)(c)(i) of the Rules.

¹³ Decision on the Prosecution's Applications for Introduction of Prior Recorded Testimony under Rule 68(2)(b) of the Rules, 18 November 2016, ICC-02/04-01/15-596-Red, para. 9 ('Rule 68(2)(b) Decision').

statement must understand that the information may subsequently be relied upon in the context of legal proceedings. The prior recorded testimony includes any annexes to the statement, or document otherwise associated with it, that is used or explained by the witness, and which, as such, forms an integral part of the testimony itself.¹⁴

9. In the present case, the Chamber considers that the Defence does not substantiate its assertion that P-39 is unavailable to testify. The Defence in its Request merely asserts P-39's death and is able to provide only a tentative time frame as to when he is thought to have died. The Defence indicates that it is currently in the process of 'locating and obtaining' a death certificate.¹⁵ However, the Chamber cannot allow the submission of the Statements into evidence under Rule 68(2)(c) of the Rules on this basis. Therefore, before a decision granting this Request can be rendered, the Defence must submit relevant information substantiating its allegation regarding P-39's death, such as providing the Chamber with a death certificate or statements from individuals who knew P-39 and are able to confirm his death.
10. In relation to the Associated Documents, the Chamber considers that the Prosecution misconceives the jurisprudence on associated documents and their applicability in this trial. Associated documents to prior recorded testimony do not have to independently qualify as prior recorded testimony themselves.¹⁶ All

¹⁴ Rule 68(2)(b) Decision, ICC-02/04-01/15-596-Red, paras 9-10.

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

¹⁶ Contrary to what is suggested in the Response, the *Gbagbo/Blé Goudé* Trial Chamber did not conclude that associated documents had to independently qualify as prior recorded testimony. Response, ICC-02/04-01/15-1280-Conf, para. 10 n. 16, *citing* Trial Chamber I, Decision on the Prosecutor's application to introduce prior recorded testimony under Rules 68(2)(b) and 68(3), 9 June 2016, ICC-02/11-01/15-573-Red, para. 9 (with citations removed and emphasis added by the Chamber: 'First, it must be stated, in general, that a rule that documents can only be submitted "through a witness" has no basis in the Statute or the Rules and does not form part of the Court's applicable law. In any case, the Chamber notes that the annexes in question are referred to in the witness statements themselves and therefore need to be joined in order to allow the Chamber and the parties to properly appreciate the content of the witness statements. As regards the disputed documents annexed, the Chamber notes that as per the Directions on the Conduct of Proceedings, documentary evidence can be submitted by way of direct application to the Chamber, and not only during the

that is required is that the associated document is ‘used or explained by the witness, and which, as such, forms an integral part of the testimony itself’.¹⁷ In the present case, the documents are not annexed or referenced in any of the Statements; nor were they shown to P-39 at any time during the recording of the Statements. For these reasons, the Chamber rejects the submission into evidence of the Associated Documents under Rule 68(2)(c) of the Rules. However, the Chamber notes that, consistent with its general approach to considering evidence, the Defence still has the option to submit the Associated Documents independently of any witness *via* a written ‘bar table’ application.¹⁸

course of witness examination. Therefore, there is no risk that the Prosecutor would use the relatively more stringent procedure of Rule 68(3) of the Rules instead of the relatively less stringent procedure for introduction of documentary evidence other than through a witness. *In case of introduction of written statements under Rule 68 of the Rules, any documentary evidence annexed is also to be considered submitted. The Chamber will then consider, in the appropriate context, the witness statement and its annexes, and determine their relevance and probative value’).*

¹⁷ Paragraph 8 above.

¹⁸ Initial Directions on the Conduct of the Proceedings, 13 July 2016, ICC-02/04-01/15-497, paras 24-27.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

REJECTS the Request for the reasons provided in paragraphs 9 and 10 above;

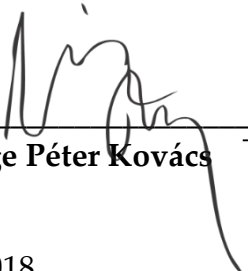
ORDERS the Registry to reclassify the Response (ICC-02/04-01/15-1280-Conf) as 'public'; and

ORDERS the Defence to file a public redacted version of its Request, or otherwise request its reclassification, within 10 days of notification of the present decision.

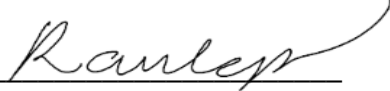
Done in both English and French, the English version being authoritative.



Judge Bertram Schmitt, Presiding Judge



Judge Péter Kovács



Judge Raul C. Pangalangan

Dated 19 June 2018

At The Hague, The Netherlands