

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

No.: ICC-02/04-01/15
Date: 6 November 2019

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 "Defence Requests to Add Eleven Items to its List of
Evidence and Submission of Prior Recorded Testimony of UGA-D26-P-0036
pursuant to Rule 68(2)(a) 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 Achaleke 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 opposes the Defence Request¹ because Witness D-0036's prior recorded testimony does not meet the conditions for introduction under rule 68(2)(a) of the Rules of Procedure and Evidence ("Rules").

Confidentiality

2. The Prosecution files this response confidentially pursuant to regulation 23 *bis* of the Regulations of the Court because it responds to a confidential filing of the Defence. The Prosecution requests that the Chamber reclassify this filing as public.

Submissions

The Prosecution does not oppose inclusion of the transcripts on the Defence LoE

3. The Prosecution does not oppose the addition of the 11 proposed items to the Defence's List of Evidence, because the volume of transcripts is not significant and the Prosecution is familiar with their content.

Witness D-0036's transcripts are inadmissible under rule 68(2)(a)

4. The Defence requests the introduction into evidence of Witness D-0036's previously recorded testimony because he no longer wishes to testify in the case.² The Defence Request concerns three separate sets of interviews conducted with Witness D-0036 in July 2015, March 2016, and December 2017. The Defence is incorrect in stating that there exists no procedural bar to such introduction under rule 68(2)(a).³ The text of the provision makes it plain that Witness D-0036's evidence cannot be introduced under rule 68(2)(a), because it requires that both the

¹ ICC-02/04-01/15-1650-Conf ("Defence Request").

² Defence Request, para. 13.

³ Defence Request, para. 29.

Prosecution and the Defence have “had the opportunity to examine the witness during the recording”.

5. Although there is no jurisprudence on the application of rule 68(2)(a), the Court’s application of article 69(2) of the Rome Statute and rule 68 of the Rules is instructive here. Pursuant to article 69(2), the “testimony of a witness at trial shall be given in person” save for certain exceptions, including those listed in rule 68. In the *Bemba* case, the Appeals Chamber ruled that in light of article 69(2) requirements, “[w]itness statements may only be introduced under rule 68 of the Rules of Procedure and Evidence if the strict conditions of that rule are met.”⁴

6. In *Bemba et al*, the Appeals Chamber confirmed that testimonial evidence is inadmissible if it does not meet specific conditions for the introduction of prior recorded testimony:

“[T]he legal instruments of the Court provide that testimonial evidence may only be relied upon by the parties when the person appears to testify at trial or, when previously recorded, under certain conditions, such as those under rule 68 of the Rules or when measures under article 56 of the Statute have been taken. Evidence which is testimonial in nature is thus inadmissible – irrespective of the “purpose” for which it would be relied upon by a party – when not elicited orally or when the conditions for the introduction of the prior recorded testimony specifically provided for in the Court’s applicable law are not met.”⁵

7. Turning to the specific conditions of rule 68(2)(a), namely that the parties “had the opportunity to examine the witness during the recording”, its interpretation in accordance with treaty interpretation rules under the Vienna Convention on the Law of Treaties⁶ does not support the Defence Request.

⁴ ICC-01/05-01/08-1386, para. 80.

⁵ ICC-01/05-01/13-2275-Red, para. 581.

⁶ ICC-01/05-01/13-2275-Red, para. 675; ICC-01/04-01/07-573, para. 5; ICC-01/04-01/06-1432, para. 55.

8. First, rule 68(2)(a) requires that the opposing party had a chance to “examine” Witness D-0036. The Oxford Dictionary defines “examine” in a legal context to mean “formally question (a defendant or witness) in court”,⁷ suggesting that questioning during an interview does not suffice. However, even if the term “examine” were interpreted to mean investigative interviewing as well as in-court examination under oath, the parties did not in fact have an opportunity to question D-0036 during each other’s interviews. As correctly noted in the Defence Request,⁸ the Prosecution was formally present during the Defence’s interview of Witness D-0036 in March 2016, but could not question him because the requisite protocol on contact between a party and a witness of the opposing party did not permit that.⁹ Meanwhile, the opposing Party had no opportunity to examine Witness D-0036 during his interviews with the Prosecution in July 2015 and with the Defence in December 2017, because the opposing parties were absent from those interviews.

9. Second, rule 68(2)(a) requires that the parties have had the chance to examine Witness D-0036 “during the recording” of his previously recorded testimony. This language cannot reasonably be stretched to cover three separate interviews in July 2015, March 2016, and December 2017. To do so would be particularly problematic where, as here, the Prosecution had no chance whatsoever to question the witness during or since the last interview by the Defence in 2017, at which the Prosecution was not present. In no ordinary sense can the Prosecution’s initial questioning of D-0036 in 2015 be considered to somehow continue “during” the two subsequent Defence interviews in 2016 and 2017.

10. Finally, the Defence Request conflates the requirements of rule 68(2)(a) with certain requirements of rule 68(2)(b) or (c), such as whether the witness speaks of the

⁷ Stevenson, A. (ed.), *Oxford Dictionary of English* (Oxford University Press: New York, 2010), p. 608.

⁸ Defence Request, footnote 46.

⁹ ICC-02/04-01/15-339-Anx, para. 36.

alleged acts and conduct of the accused, or the need for a declaration before a certifying officer.¹⁰ The Chamber should not incorporate those requirements into rule 68(2)(a).

11. In sum, the requirements of rule 68(2)(a) are clear. The recorded interviews of Witness D-0036 with the Prosecution and the Defence do not meet those requirements, and the Defence Request should be denied.

Introduction of Witness D-0036's transcripts under rule 68(2)(a) would undermine fair trial

12. Introduction of Witness D-0036's previously recorded testimony would jeopardise the fairness of these proceedings.

13. Witness D-0036 is a former high-ranking LRA officer with an important insight into the LRA's policies and operations, as well as personal knowledge of Mr Ongwen. His evidence would be of clear relevance to this case. However, Witness D-0036 has refused to testify. Neither the Prosecution nor the Chamber have had an opportunity to examine him in court, under oath, about apparent gaps, inconsistencies, or contradictions in his three interviews, or to confront him with facts demonstrated by other witnesses or documentary evidence, particularly intercept evidence. This is more than a mere procedural formality. Such questioning would have been the parties' and the Chamber's only opportunity to test and assess the veracity and reliability of Witness D-0036's evidence.

14. One clear example of the danger of receiving Witness D-0036's interview transcripts into evidence is the witness's false statements regarding his own location at the time of the charged Pajule attack. During his interview with the Prosecution,

¹⁰ Defence Request, paras. 48, 56-58.

D-0036 distanced himself from the Pajule attack, emphasising the limited and second-hand nature of his knowledge (referring to “the information I have” and “the information I got”), and alleging that he “was injured” and in Sudan at the time of the attack.¹¹ Witness D-0036 was somewhat more forthcoming when interviewed by the Defence, but still maintained that he “wasn’t there at the time with Otti.”¹² The intercept evidence makes clear that these statements were at best inaccurate, and probably dishonest. For example, intercepted communications show that during 2003 the witness was often inside Uganda searching for weapons and ammunition hidden by the LRA.¹³

15. Logbooks suggest that Witness D-0036 was together with Vincent Otti both before and immediately after the October 2003 attack at Pajule IDP camp. Specifically, Witness D-0036 was reported as being together with Otti and other commanders on 15 and 16 September 2003.¹⁴ On 1 October 2003, Witness D-0032 sent a message to Otti about one of D-0036’s wives having died,¹⁵ while on 8 October 2003 (two days before the attack), Otti asked Kony about another of D-0036’s wives.¹⁶ Those communications strongly suggest that D-0036 was with Otti at that time. A UPDF report of 11 October 2003, the day after the attack, places Witness D-0036 together with Otti, Raska Lukwiya, Dominic Ongwen, and other commanders moving east from the area of Pajule IDP camp.¹⁷ This intercept evidence, at the very least, raises serious concerns about the veracity and reliability of D-0036’s statements about Pajule specifically, and by extension about his credibility more generally.

¹¹ UGA-OTP-0244-0018 at 0028-0029.

¹² UGA-D26-0011-0579 at 0583-0584.

¹³ *See, for example*, UGA-OTP-0063-0002 at 0116, 0128-0129 (April 2003); UGA-OTP-0232-0234 at 0350, 0355-0361 (September 2003).

¹⁴ UGA-OTP-0232-0234 at 0405, 0408-0409.

¹⁵ UGA-OTP-0232-0234 at 0505. *See also* UGA-OTP-0133-0289 at 0374.

¹⁶ UGA-OTP-0133-0289 at 0390.

¹⁷ UGA-OTP-0255-0053.

16. Introducing D-0036's unsworn previously recorded testimony via rule 68(2)(a), without an opportunity for questioning by the non-calling party and the Chamber, would deprive the Prosecution of a fundamental procedural right, and prevent the Chamber from making a fully informed evaluation of Witness D-0036's testimony.

Conclusion

17. For the reasons stated above, the Prosecution opposes the Defence Request.



Fatou Bensouda, Prosecutor

Dated this 6th day of November 2019

At The Hague, the Netherlands