

ANNEX XVI

PUBLIC

From:**Sent:****To:**

02 June 2017 17:45

Trial Chamber IX Communications;

Subject:

P-0024 Defence submission of items used during the hearing

Dear Trial Chamber IX,

In accordance with Decision 497, the Defence formally submits the following items of evidence used during the cross examination of witness P-0024 which concluded today on 2 June, 2017:

Tab	ERN	Description	Pages
1	UGA-OTP-0069-0189	P-0024 Statement	8
6	UGA-OTP-0263-1921	Contact Report	1
11	UGA-OTP-0069-0054	Annex C/2 to P-060's statement (UGA-OTP-0069-0034-R01)	35
13	UGA-D26-0012-0118	P-0024 Application for Individual Victims' Participation	7
14	UGA-OTP-0250-0222	Lukodi Memorial Site Photograph	1
19	UGA-D26-0012-0147	Application for Individual Victims' Participation	8
20	UGA-D26-0012-0155	Application for Individual Victims' Participation	5

Very best,

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[REDACTED]

From:

Sent:

[REDACTED]
05 June 2017 15:07

To:

Trial Chamber IX Communications; [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

Subject:

ICC-02/04-01/15: Prosecution's submission of items used with P-0024 during the hearing

Dear Trial Chamber IX,

The Prosecution does not intend to formally submit any items of evidence used during the examination of Witness P-0024, as per the Chamber's Decision #497, paragraph 28(i).

Items UGA-OTP-0023-0008, UGA-OTP-0023-0396, and UGA-OTP-0023-0397 used during the examination of Witness P-0024 have been conditionally introduced into evidence in Decision ICC-02/04-01/15-596-Conf dated 18 November 2016. In it, the Chamber decided that items UGA-OTP-0023-0008, UGA-OTP-0023-0396, and UGA-OTP-0023-0397 are introduced into evidence pursuant to rule 68(2)(b) of the Rules as documents related to prior recorded testimonies of Witnesses P-0017 and P-0036, subject to the receipt of their respective declarations under rule 68(2)(b)(ii) and (iii) of the Rules.

Regards,

[REDACTED]

From: [REDACTED] >
Sent: 08 June 2017 20:58
To: [REDACTED] Trial Chamber IX Communications
Cc: [REDACTED]

Subject: RE: P-0024 Defence submission of items used during the hearing

Dear Trial Chamber IX,

The Prosecution objection to the submission of the evidence in question should be rejected for the following reasons:-

First, regarding the Prosecution's remarks on the lack of authentication of the victims applications, the Defence recalls that it was the prosecution that brought to knowledge the existence of these applications to the Chamber and the Defence via email of Mr Gumpert of Wednesday 31 May 2017 at 21:28 titled "Notice of Disclosure Application to be made tomorrow morning". In that same notification, the prosecution acknowledged that the applications were made by the witness's family members. The Defence does not contend that the witness had anything to do with their content or creation. The Defence however asked the witness who confirmed that her family members applied to participate in the proceedings as victims. The prosecution did not make objections in this regard at the time. (See Transcript 78 pages 5-8 generally). As such, this objection has no merit and should be disregarded by the Chamber.

Second, the procedural provisions in Article 69(2) of the Rome Statute and Rule 68 of the Rules of Procedure and Evidence are not applicable in this case. The Defence is not seeking to admit the victims' applications of P-0024's daughter and husband for the truth therein but only to challenge the credibility of the witness's own testimony regarding the events following the attack on Lukodi. It is an established procedural right for a party to seek to challenge a witness's testimony and in this case, other statements made by close family members, on the same issue have high probative value. This is clearly distinguishable from the prosecution's intended purpose of submitting similar materials via the bar table that was rejected in Decision # 795. The role of the Prosecution of course, is distinct from that of the Defence and the mere fact that they were read into the record should not exclude their admissibility in their entirety. The contents of the husband's application (Tab 20, UGA-D26-0012-0155) were not read into the record (see Transcript 78 page 9 lines 9-14). The Chamber would be better equipped to evaluate the probative value of the evidence by having the document in whole.

Third, the Chamber has already pronounced itself on the admissibility of evidence by the parties on numerous occasions. The Chamber reiterated as such when the Prosecution raised an objection during the proceedings (See Transcript 78 page 10 lines 8-10) The Defence merely requests to formally submit the two victim applications and the Chamber can assess probative value and prejudice at a later stage. Furthermore, during the in court testimony, the Chamber pointed out the close relationship between the witness and the victims i.e. daughter and husband who talked (or omitted to talk) about very close family members. (See Transcript 78 page 9 lines 18-23; and page 10 lines 4-6 and 14-19)

In conclusion, the Defence requests the Chamber to dismiss the Prosecution request in its entirety.

Very best,

[REDACTED]

From: [REDACTED]
Sent: 07 June 2017 19:13
To: Trial Chamber IX Communications
Cc: [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

Subject: RE: P-0024 Defence submission of items used during the hearing

Dear Trial Chamber IX,

The Prosecution objects to formal submission and potential admission of two victim applications, UGA-D26-0012-0147 (Defence tab 19) and UGA-D26-0012-0155 (Defence tab 20), pursuant to articles 64 and 69 of the Statute, rule 68 of the Rules, and paras. 24-29 of Decision ICC-02/04-01/15-497 dated 13 July 2016.

First, the Prosecution objects to the submission of both items because it is precluded by procedural bars stipulated in article 69(2) of the Statute and rule 68 of the Rules. Both victim applications purport to be statements made to the VPRS by P-0024's daughter and husband narrating their personal suffering and harm as a result of the Lukodi attack. They are testimonial in nature, and should not be admitted through another live witness. The Prosecution recalls that the Chamber rejected the submission of similar materials in its Decision ICC-02/04-01/15-795 dated 28 March 2017 (para. 20) when the Prosecution requested to introduce into evidence police statements of Pajule attack victims via a bar table motion. Besides, the Defence have already confronted witness P-0024 regarding potential inconsistencies between her evidence and the information purportedly coming from her family members during P-0024's in-court testimony. This has been reflected in the court record in transcript T-78, page 8, line 19 to page 9, line 14 and page 13, lines 10-17. Submitting same applications will result in cluttering the case record with superfluous and prejudicial material. Therefore, the Chamber should dismiss the victim applications at the point of their submission.

Second, should the Chamber nonetheless recognise their formal submission, the Prosecution opposes the admission of the two victim applications due to their inherently low probative value and the prejudice of introducing such material into the case record. These applications were made to the VPRS for the limited purpose of determining if both individuals are prima facie qualified to participate in the proceedings pursuant to rule 89 of the Rules. While victim applications may be relevant for examination of dual status individuals, they have a limited probative value and insufficient indicia of reliability as self-standing statements. For that reason alone, they should not be admitted into the record of the case. Finally, the Defence have failed to authenticate the documents as victim applications belonging to P-0024's husband and daughter given that witness P-0024 had nothing to do with their contents or creation. The prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of witness P-0024 likewise renders them inadmissible.

Sincerely,

[REDACTED]

From: Trial Chamber IX Communications
Sent:
To: [REDACTED]
Cc: [REDACTED]
Subject: Decision on Submitted Materials for P-24
Attachments: P-0024 Defence submission of items used during the hearing; ICC-02/04-01/15: Prosecution's submission of items used with P-0024 during the hearing; RE: P-0024 Defence submission of items used during the hearing; RE: P-0024 Defence submission of items used during the hearing

Dear Counsel and Registry:

For P-24, the Chamber notes the relevant correspondence on submitted items related to this witness: the Prosecution (Email from the Prosecution, 5 June 2017 at 15:07) and Defence (Email from the Defence, 2 June 2017 at 17:45, *see also objection by* Prosecution, 7 June 2017 at 19:14 *and corresponding response by* Defence, 8 June 2017 at 20:58).

It is noted that the Prosecution does not intend to formally submit any items of evidence used during its examination of P-24 by way of the email procedure.

As to the Defence's submitted items, the Prosecution objects to the submission of victim applications UGA-D26-0012-0147 and UGA-D26-0012-0155. The Prosecution submits that these materials are testimonial in nature and cannot be recognised due to procedural bars stipulated in Article 69(2) of the Statute and Rule 68 of the Rules. The Prosecution also opposes formal submission due to these applications' 'inherently low probative value' and the 'the prejudice of introducing such material into the case record'.

The Defence responds that it does not submit these applications 'for the truth therein but only to challenge the credibility of the witness's own testimony regarding the events following the attack on Lukodi'.

As Trial Chamber VII held in ICC-01/05-01/13-1478-Red-Corr, para. 34 (citations removed):

[...] [T]he Chamber considers that Rule 68 of the Rules is only applicable in cases where the tendering party wishes to adduce the prior recorded testimony for the truth of its contents. The determining factor is the intention of the tendering party. If a party wishes to introduce the testimony only with the aim of proving that the witness stated something – irrespective of if it is true or not - or in order to prove inconsistencies in the witness's statements, it is not necessary to introduce the statements pursuant to Rule 68 of the Rules.

See also ICC-01/05-01/13-1989-Red para. 192 n. 201.

The Defence's position is that UGA-D26-0012-0147 and UGA-D26-0012-0155 are not submitted for the truth of their contents *per se*, but rather to challenge the credibility of P-24's evidence. The Chamber sees no reason to conclude that the Defence's position is advanced as a pretext. Therefore, even assuming that victim applications fall under Rule 68 of the Rules, as long as these items are submitted on the basis provided it is not necessary to satisfy the Rule 68 criteria. This is distinguishable from the finding made at para. 20 of decision ICC-02/04-01/15-795, where the Chamber did not recognise 47 victim statements purportedly taken by Ugandan police which were offered for the truth of their contents.

For these reasons, there is no procedural bar at issue and the Chamber recognises as formally submitted all items submitted by the Defence. Consistent with the Chamber's general approach of deferring its assessments of the standard evidentiary criteria until deliberating its judgment (ICC-02/04-01/15-497, para. 24), the parties' remaining arguments related to probative value and potential prejudice are not considered at this time.

The Registry is accordingly directed to proceed in accordance with paragraph 28(v) of the 'Initial Directions on the Conduct of the Proceedings, 13 July 2016, ICC-02/04-01/15-497.

Best,

Trial Chamber IX