

**Cour
Pénale
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**International
Criminal
Court**

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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

Public Redacted version of “Prosecution’s request to introduce prior recorded testimony of seven Defence witnesses under rule 68(2)(b)”, ICC-02/04-01/15-1310-Conf, dated 19 July 2018

Source: The Office of the Prosecutor

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

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Introduction

1. The Office of the Prosecutor (“Prosecution”) requests the Trial Chamber to introduce into evidence the prior recorded testimony of Defence Witnesses D-0007, D-0018, D-0088, D-0125, D-0130, D-0131 and D-0132 (collectively “the seven witnesses”) pursuant to rule 68(2)(b) of the Rules of Procedure and Evidence (“Rules”). The request is further based on articles 64(2), 64(8)(b), 67(1)(c), 69(2) of the Rome Statute (“Statute”) and regulation 43 of the Regulations of the Court (“RoC”).

2. The Trial Chamber can apply rule 68(2)(b) of the Rules, *proprio motu* or at the request of either Party, to reduce the length of trial proceedings and focus evidence presentation. The advantages in this case of introducing the statements of the seven witnesses *in lieu* of their live testimony clearly outweigh any countervailing considerations. Their prior recorded testimony meets all the requirements of rule 68(2)(b) of the Rules, and the Prosecution as the non-calling party does not request an opportunity to test their evidence through oral examination. Applying rule 68(2)(b) would streamline the proceedings and save substantial court time and other resources, without any prejudice to the rights of the Accused, and would thus best serve the interests of justice.

Procedural History

3. On 4 June 2018, the Defence filed its List of Witnesses (“Defence LoW”), which included 72 individuals.¹ The Defence has indicated it intends to expand its LoW further.²

¹ ICC-02/04-01/15-1272.

² *Ibid.* See also ICC-02/04-01/15-1289.

4. On 4 June 2018, the Defence requested the introduction into evidence of prior recorded testimony of nine witnesses pursuant to rule 68(2)(b) of the Rules.³ On 2 July 2018 the Trial Chamber granted the request in respect of seven witnesses (D-0008, D-0012, D-0020, D-0034, D-0050, D-0077, P-0028).⁴

5. On 5 July 2018, in *inter partes* discussions, the Prosecution proposed to the Defence that, *inter alia*, the prior recorded testimony of the seven witnesses could and should be introduced into evidence pursuant to rule 68(2)(b) of the Rules. On 6 July 2018, the Defence rejected the Prosecution's proposal.

Confidentiality

6. The request is classified as confidential, because it discusses evidence of Defence Witnesses, some of whom have been granted protective measures. The Prosecution files a public redacted version concurrently.

Submissions

A. The applicable law and jurisprudence of the Trial Chamber

7. Rule 68(1) of the Rules provides that "the Trial Chamber may, in accordance with article 69, paragraphs 2 and 4, and after hearing the parties, allow the introduction of previously recorded audio or video testimony of a witness, or the transcript or other documented evidence of such testimony, provided that this would not be prejudicial to or inconsistent with the rights of the accused and that the

³ ICC-02/04-01/15-1271, supplemented on 8 June 2018 ICC-02/04-01/15-1277.

⁴ ICC-02/04-01/15-1294.

requirements of one or more of the following sub-rules are met.” Sub-rule 68(2)(b) then specifies that the prior recorded testimony of a witness who is not present before the Chamber may be introduced where “the prior recorded testimony goes to proof of a matter other than the acts and conduct of the accused,” and sets out a non-exclusive list of relevant factors for consideration, including whether the testimony relates to issues not materially in dispute, is cumulative or corroborative of the past or expected oral testimony of other witnesses, relates to background information, is such that its introduction best serves the interests of justice, and/or bears sufficient indicia of reliability. The Prosecution notes that rule 68 was amended to its current text in November 2013 specifically “to reduce the length of ICC proceedings and to streamline evidence presentation”.⁵

8. This Trial Chamber has held that “the entire purpose of Rule 68(2)(b) of the Rules is to identify certain situations where it is not necessary to examine witnesses while preserving the fair and expeditious conduct of the proceedings. The crucial question under consideration is whether a testimony which was previously recorded may, in light of its content and significance to the case, be introduced without the need that the provided information be ‘tested’ through oral examination of the witness at trial.”⁶

9. The ordinary meaning of the language in rule 68, read in light of its object and purpose, makes it plain that the provision can be invoked by either Party or by the Trial Chamber itself, as long as both Parties are heard before the prior recorded testimony is introduced. Nothing in the rule suggests that its application is conditioned upon a request or approval from the calling party (or participant). The Trial Chamber has already interpreted the rule in this manner on at least two

⁵ Working Group on Lessons Learnt: Recommendation on a proposal to amend rule 68 of the Rules of Procedure and Evidence, ICC-ASP/12/37/Add.1, p. 21.

⁶ ICC-02/04-01/15-596, para. 7, citing in part also to Trial Chamber VII, Bemba et al, Decision on Prosecution Rule 68(2) and (3) Requests, ICC-01/05-01/13-1478-red-Corr, para. 106.

occasions in this case. First, the Presiding Judge, without any request from the calling party, decided to receive the evidence of the Prosecution's mental health experts pursuant to rule 68(3) of the Rules.⁷ Second, the Trial Chamber introduced into evidence one of D-0050's statements that was not included in the Defence's Rule 68(2)(b) Request.⁸ None of the Parties objected to or appealed these decisions.

10. The Prosecution acknowledges that, as a general principle, it is for the Parties to determine how they wish to present their evidence, including the manner of witness testimony. This discretion, however, is subject to judicial oversight in accordance with articles 64(2) and 64(8)(b) of the Statute and regulation 43 of the RoC. As this Trial Chamber has emphasised: "[While] the parties are entitled to a degree of deference in the selection and presentation of evidence, their discretion is not unlimited and is without prejudice to the Chamber's exercise of its general management powers, including recourse to Rule 68(2)(b) as a method to streamline the proceedings and avoid calling witnesses to testify live at trial when their prospective evidence appears of marginal significance or of limited relative importance."⁹

B. The seven witnesses' prior recorded testimony should be introduced under rule 68(2)(b) of the Rules

11. The Prosecution submits that the statements of Defence Witnesses D-0007, D-0018, D-0088, D-0125, D-0130, D-0131 and D-0132 should be introduced into evidence *in lieu* of their live testimony, since they all meet the requirements of rule 68(2)(b) of the Rules. Considering the content and significance of their evidence, the Prosecution does not request an opportunity to test their evidence through oral

⁷ See ICC -02/04-01/15-1024 and ICC-02/04-01/15-1073, referring also to ICC-02/04-01/15-497. Rules 68(2)(b) and 68(3) both stipulate that "the Chamber may allow the introduction of that previously recorded testimony [...]".

⁸ ICC-02/04-01/15-1294, paras. 22-25.

⁹ ICC-02/04-01/15-596, para. 7 ft. 18.

examination. This does not mean that the Prosecution necessarily accepts the totality of these witnesses' evidence as the truth. However, when balancing the significance of the disputes, the anticipated evidence, and the costs to the witnesses and the Court, the Prosecution has concluded that requiring the witnesses' presence in The Hague for the purpose of a very limited cross-examination is not justified. Applying the said rule would streamline the proceedings and save substantial court time and other resources, without any prejudice to the rights of the Accused, and would thus best serve the interests of justice.

B.1. The prior recorded testimony fulfils all requirements of rule 68(2)(b)

12. The seven witnesses are currently designated to travel to The Hague and to testify live for an estimated total of 35-41 hours in direct examination alone, amounting to 8-10 court days.¹⁰ However, as demonstrated below, their prior recorded testimony is the epitome of evidence that could and should be introduced pursuant to rule 68(2)(b), subject to the receipt of declarations required under rule 68(2)(b)(ii) and (iii) of the Rules.

13. First, the evidence of each of the seven witnesses relates to "a matter other than the acts and conduct of the accused". The expression "acts and conduct of the accused" has consistently been interpreted by the Trial Chamber as "referring exclusively to those actions of the accused which are described in the charges brought against him or her or which are otherwise relied upon to establish his or her criminal responsibility for crimes charged".¹¹ To the extent that the prior recorded testimony includes references to the Accused and the charged period, they are of

¹⁰ The calculation is based on the Defence's LoW, circulated to the Trial Chamber, the Parties and Participants on 2 July 2018.

¹¹ ICC-02/04-01/15-596, para. 12; ICC-02/04-01/15-1294, para. 4.

limited importance, do not constitute the core of the witness's testimony and, in any event, do not warrant calling the witness to testify live.

14. Second, the overwhelming majority of the witnesses' prior recorded testimony relates to background material and issues that are not materially in dispute. Moreover, most if not all of the seven witnesses' evidence is cumulative or corroborative of other Defence evidence, including Defence witnesses who are expected to testify *viva voce*.

15. Third, the prior recorded testimony of each witness comes in the form of a signed and dated witness statement. Every statement includes an acknowledgement by the witness that he gave the statement voluntarily to the best of his knowledge and recollection, and that the statement may be used in legal proceedings before the Court.

16. Fourth, introducing these witnesses' prior recorded testimony into evidence pursuant to rule 68(2)(b) obviates their need to travel to The Hague, thereby minimising the impact on their professional and personal lives. It may also facilitate the protection of their identities, as ordered by the Trial Chamber for witnesses D-0130 and D-0131.¹² As an additional, albeit not dispositive consideration, the use of rule 68(2)(b) would also reduce the financial costs to the Court and the Parties and Participants.

17. Fifth, prior recorded testimony of the seven witnesses is not prejudicial to or inconsistent with the rights of the Accused. Using rule 68 in no way limits the substantive evidence the Defence wishes to elicit. To the contrary, it ensures that the totality of the information contained in the prior recorded testimony will be included

¹² See ICC-02/04-01/15-1301.

in the record. Once the evidence is admitted, the Court's statutory framework makes no formal distinction between witness evidence received live or through rule 68 of the Rules. Furthermore, the evidence received pursuant to the rule is also publicised in a similar manner as transcripts of court hearings.¹³

B.2. Individual analysis of the seven witnesses' prior recorded testimony

18. The Prosecution will address each of the seven witnesses in turn, to illustrate how their evidence satisfies the rule 68(2)(b) criteria. In accordance with the Trial Chamber's jurisprudence,¹⁴ the Prosecution's request includes associated materials to the extent they are referenced in the witness's statement.

Witness D-0007¹⁵

19. D-0007 states that he was abducted [REDACTED].¹⁶ P-0007 escaped [REDACTED]. His evidence is therefore of marginal importance for the Trial Chamber's determination of Mr Ongwen's criminal responsibility.

20. Witness D-0007 does not discuss any acts or conduct of the Accused. He does discuss Dominic Ongwen's childhood and abduction. The Defence has described similar evidence by Witnesses D-0008 and D-0012 as background material.¹⁷ That Mr Ongwen was abducted by the LRA is not disputed between the Parties. The only disputed issue is the Accused's age at the time of his abduction. This however is not of crucial significance for the Chamber's eventual determination of Mr Ongwen's

¹³The Trial Chamber has established a procedure to ensure publicity of prior recorded testimony introduced under rule 68(2)(b). See ICC-02/04-01/15-596, ICC-02/04-01/15-1294.

¹⁴ See ICC-02/04-01/15-596, para. 10.

¹⁵ UGA-D26-0010-0263 (witness statement). The Prosecution notes that the last page of the witness statement is a photograph.

¹⁶ UGA-D26-0010-0263, paras. 1 and 4.

¹⁷ ICC-02/04-01/15-1271, para. 16.

guilt or innocence, and hence it should not be a reason for rejecting D-0007's prior recorded testimony under rule 68(2)(b) of the Rules.

21. The Prosecution observes that the Trial Chamber referred to evidence of D-0007 when accepting prior recorded testimony of D-0008 and D-0012 pursuant to rule 68(2)(b) of the Rules.¹⁸ The three witnesses, and Witness D-0006, largely corroborate each other. Given that their evidence is not central to the determination of the charges, the Prosecution sees no reason why D-0007 should testify live.

Witness D-0018¹⁹

22. D-0018's evidence relates to the political background of the LRA and the armed conflict in Northern Uganda, including Joseph Kony's rise to power within the armed group. The witness gives a detailed description of his own actions and activities [REDACTED].²⁰ D-0018's evidence consists entirely of background and overview information. The witness makes no mention of Dominic Ongwen at all. The Defence has acknowledged that D-0018's statement is corroborative of D-0019,²¹ who will be testifying live,²² and D-0020,²³ whose testimony has already been introduced into evidence pursuant to rule 68(2)(b) of the Rules.²⁴

23. D-0018's associated documents consist of [REDACTED] and an article discussing Juba Peace talks.²⁵ Like his statement, these documents relate to

¹⁸ ICC-02/04-01/15-1294, para. 7.

¹⁹ UGA-OTP-0010-0204 (witness statement) and UGA-D26-0010-0224, UGA-D26-0010-0225, UGA-D26-0010-0226, UGA-D26-0010-0227, UGA-D26-0010-0228, UGA-D26-0010-0229, UGA-D26-0010-0230, UGA-D26-0010-0231, UGA-D26-0010-0232, UGA-D26-0010-0233, UGA-D26-0010-0245, UGA-D26-0010-0248, UGA-D26-0010-0252 (associated materials).

²⁰ UGA-D26-0010-0204, paras. 46-52.

²¹ ICC-02/04-01/15-1271, para. 17.

²² ICC-02/04-01/15-1294, paras. 18-20.

²³ ICC-02/04-01/15-1271, para. 17.

²⁴ ICC-02/04-01/15-1294, paras. 9-10.

²⁵ UGA-D26-0010-0252.

background information and are not directly related to the charges against Dominic Ongwen.

Witness D-0088²⁶

24. D-0088 [REDACTED].²⁷ The witness discusses, *inter alia*, [REDACTED]²⁸ He also discusses the difficulties encountered by the returning abductees in the society. His evidence relates to a period before 2002, is background information and of general nature, not specific to the charges against the Accused. D-0088 makes no mention of Dominic Ongwen.

Witness D-0125²⁹

25. D-0125's evidence centres on [REDACTED].³⁰ The witness discusses the presence of senior LRA commanders such as Tabuley, Otti and Raska Lukwiya in Teso in 2003.³¹ He also discusses the death of Tabuley.³² He states that Dominic Ongwen did not enter Teso.³³ Whilst the Prosecution does not accept this latter assertion as accurate, it does not require the benefit of cross-examination to contest it. Several Defence witnesses, who will testify *viva voce*, are expected to discuss the LRA operations in Teso in 2003, including the presence (or lack thereof) of Dominic Ongwen in the area, for example D-0033,³⁴ D-0079,³⁵ and D-0105³⁶. The Prosecution further notes that D-0125's evidence is similar to the evidence of D-0124, [REDACTED].³⁷

²⁶ UGA-D26-0021-0280 (witness statement).

²⁷ UGA-D26-0021-0280, para. 2.

²⁸ UGA-D26-0021-0280, paras 33-36.

²⁹ UGA-D26-0025-0031 (witness statement).

³⁰ UGA-D26-0025-0031, para. 4.

³¹ UGA-D26-0025-0031, para. 2.

³² UGA-D26-0025-0031, paras. 8-9.

³³ UGA-D26-0025-0031, para. 14.

³⁴ Anticipated testimony of witness D-0033, ICC-02/04-01/15-1272-Conf, AnxC, p. 69.

³⁵ Anticipated testimony of witness D-0079, ICC-02/04-01/15-1272-Conf, AnxC, pp. 131-132.

³⁶ Anticipated testimony of witness D-0105, ICC-02/04-01/15-1272-Conf, AnxC, pp. 161-162.

³⁷ Anticipated testimony of witness D-0124, ICC-02/04-01/15-1272-Conf, AnxC, pp. 194-195.

Witnesses D-0130³⁸ and D-0131³⁹

26. [REDACTED] D-0130 and D-0131 provide no information relating to the charges against Dominic Ongwen. Indeed, the Prosecution fails to see the relevance of these two witnesses to the case. [REDACTED] The prior recorded testimony of these two witnesses is therefore not related to issues materially in dispute, is at most background information, and overall has little, if any, significance to the case.

Witness D-0132⁴⁰

27. [REDACTED].⁴¹ His anticipated testimony centres around [REDACTED] activities during the Juba Peace Talks when [REDACTED]. His evidence does not relate to issues materially in dispute between the Parties. The witness spoke with Dominic Ongwen only once,⁴² and does not discuss any acts or conduct of the Accused.

C. The Parties do not have unfettered discretion in how they choose to present their evidence

28. The Prosecution notes the Defence's apparent objection to the seven witnesses' evidence being introduced under rule 68(2)(b) of the Rules.⁴³ Whilst the Parties have certain discretion to determine the manner in which they present their evidence, this discretion, as discussed above, is not unfettered. The particular circumstances related to the seven witnesses suggest that introduction of their prior recorded testimony will further the interests of the Accused, as well as those of the

³⁸ UGA-D26-0025-0001(witness statement).

³⁹ UGA-D26-0025-0010 (witness statement).

⁴⁰ UGA-D26-0025-0021 (witness statement).

⁴¹ UGA-D26-0025-0021, para. 5.

⁴² UGA-D26-0025-0021, para. 13.

⁴³ The Defence rejected the Prosecution's proposal to this effect during *inter partes* discussions on 5-6 July 2018.

Court, by ensuring that the trial proceedings are expeditious and that Mr Ongwen is tried without undue delay. The Trial Chamber should accordingly exercise its trial management powers and accept the introduction of the prior recorded testimony despite potential opposition from the Defence.

Conclusion

29. For the above reasons, the Prosecution requests the Trial Chamber to receive into evidence, *in lieu* of oral testimony, the prior recorded testimony of witnesses D-0007, D-0018, D-0088, D-0125, D-0130, D-0131 and D-0132 pursuant to rule 68(2)(b) and subject to the receipt of declarations required by rule 68(2)(b)(ii) and (iii) of the Rules.



Fatou Bensouda, Prosecutor

Dated this 20th day of July 2018
At The Hague, The Netherlands