

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

No.: **ICC-02/04-01/15**
Date: **13 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*

Public

Decision on Defence Request to Submit the Prior Recorded Testimony of D-0036 and related documents pursuant to Rule 68(2)(a) of the Rules

To be notified, in accordance with Regulation 31 of the *Regulations of the Court*, to:

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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

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Amicus Curiae

REGISTRY

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Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Others

Trial Chamber IX of the International Criminal Court, in the case of *The Prosecutor v. Dominic Ongwen*, having regard to Article 64(2) of the Rome Statute (the ‘Statute’) and Rule 68(2)(a) of the Rules of Procedure and Evidence (the ‘Rules’), issues the following ‘Decision on Defence Request to Submit the Prior Recorded Testimony of D-0036 and related documents pursuant to Rule 68(2)(a) of the Rules’.

I. Procedural history and submissions

1. On 4 June 2018, the Defence filed, *inter alia*, its final List of Witnesses and List of Evidence.¹
2. On 1 October 2018, the Defence called its first witness.²
3. On 21 August 2019, the deadline of 30 September 2019 was set for the parties and participants to submit any outstanding motions related to the introduction of evidence.³
4. On 16 October 2019, the Defence informed the Chamber that it was withdrawing D-0036 from testifying live before the Chamber.⁴
5. On 28 October 2019, the Defence filed a request, seeking to add the transcripts of three interviews the Defence and the Office of the Prosecutor (the ‘Prosecution’) conducted with D-0036 to its List of Evidence and to submit these as prior recorded testimony pursuant to Article 69(2) of the Statute and Rule 68(2)(a) of the Rules (the ‘Request’).⁵ The Defence argues that some of the documents have been available to the Prosecution since 2015 and all of them at least since 4 June 2018.⁶ It also submits that D-0036 is a highly relevant witness and will assist the Court to establish the truth.⁷ The Defence

¹ Public Redacted Version of ‘Defence notification of List of Witnesses and Evidence in compliance with ICC-02/04-01/15-1021 and Request for Leave to Add Witnesses its List of Witnesses and Materials to its List of Evidence’, ICC-02/04-01/15-1272-Red2. The List of Witnesses is contained in confidential Annex A, ICC-02/04-01/15-1272-Conf-AnxA. D-0036 appears in Annex A, p. 2. The List of Evidence is contained in confidential Annex B, ICC-02/04-01/15-1272-Conf-AnxB.

² Transcript of hearing, ICC-02/04-01/15-T-180-Red-ENG.

³ Order Setting a Deadline for Evidence Related Requests, ICC-02/04-01/15-1570. *See also* Clarification on Order Setting a Deadline for Evidence Related Requests, ICC-02/04-01/15-1572.

⁴ E-mail from the Defence to Trial Chamber IX Communications on 16 October 2019 at 12:58.

⁵ 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, ICC-02/04-01/15-1650-Conf. A public redacted version was filed on 8 November 2019, ICC-02/04-01/15-1650-Red.

⁶ Request, ICC-02/04-01/15-1650-Red, paras 2, 21.

⁷ Request, ICC-02/04-01/15-1650-Red, para. 3.

informs that D-0036 no longer wishes to testify, but has no objection to the submission of his prior recorded testimony as evidence in trial.⁸

6. On 6 November 2019, the Prosecution filed its response, partly opposing the Request (the ‘Response’).⁹ The Prosecution does not oppose inclusion of the transcripts of D-0036 to the Defence’s List of Evidence.¹⁰ However, it contends that they are inadmissible under Rule 68(2)(a) of the Rules. In its view, there is a procedural bar to introducing the said transcripts, as the conditions of the provision are not met.¹¹ Specifically, the Prosecution argues that the criterion that the parties ‘had the opportunity to examine the witness during the recording’ is not met.¹² The Prosecution also submits that introduction of the said transcripts under Rule 68(2)(a) of the Rules would undermine the fair trial, as the parties and the Chamber did not have an opportunity to test and assess the credibility of D-0036’s evidence.¹³

II. Analysis

7. The Chamber notes the submission of the Prosecution with regard to the confidential classification of its Response.¹⁴ Accordingly, it directs the Registry to reclassify the Response as ‘public’.
8. Turning to the merits of the Request, the Chamber observes that the central requirement under Rule 68(2)(a) of the Rules is that the parties ‘had the opportunity to examine the witness during the recording’. In the analysis of this requirement, the Chamber must also bear in mind its general obligation under Article 64(2) of the Statute, to ensure a fair and expeditious trial. Accordingly, the Chamber finds that the opportunity to examine the witness must be a meaningful one, mirroring as far as possible the parties’ right to question the witness during his or her testimony during the trial proceedings. Generally, consecutive interviews by the parties do not meet that requirement.

⁸ Request, ICC-02/04-01/15-1650-Red, para. 13.

⁹ 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”, ICC-02/04-01/15-1656-Conf.

¹⁰ Response, ICC-02/04-01/15-1656-Conf, para. 3.

¹¹ Response, ICC-02/04-01/15-1656-Conf, paras 4-6.

¹² Response, ICC-02/04-01/15-1656-Conf, paras 7-11.

¹³ Response, ICC-02/04-01/15-1656-Conf, paras 12-16.

¹⁴ Response, ICC-02/04-01/15-1656-Conf, para. 2.

9. The prior recorded statements of D-0036 are comprised of transcripts that reproduce the three occasions in which the witness was interviewed in the context of this case. The Prosecution first interviewed the witness in July 2015. On this occasion, no representative of the Defence was present.¹⁵ The Defence later interviewed D-0036 in March 2016 and December 2017.¹⁶ While two representatives from the Defence, one representative from the Prosecution and an interpreter from the Registry were present during the 2016 interview, there was no representative from the Prosecution during the 2017 interview.¹⁷
10. Although both parties interviewed D-0036 at various points, only during certain interviews were both parties present. Even when the Prosecution was permitted a representative during the 2016 Defence interviews, the applicable contact protocol prevented it from being able to ask any questions.¹⁸ Under Rule 68(2)(a) of the Rules, mere presence is clearly insufficient, as explained above, the opportunity to question the witness must be a meaningful one. In the present case, there was no possibility to test the statements by the other party, as it would have been done in the courtroom.
11. Contrary to the Defence's argument, during this series of interviews, the parties did not meet with the witness 'just as it would have been in Court'.¹⁹ The Prosecution explains with specificity its concerns about D-0036's veracity and reliability,²⁰ and the Chamber is satisfied that this explanation shows why the Prosecution's previous opportunity to examine D-0036 was insufficient under Rule 68(2)(a) of the Rules. In the specific circumstances of this case, and as explained above, the Chamber finds that both parties questioning the witness in consecutive interviews is not in itself sufficient to fulfill the requirements under this provision. Accordingly, the Chamber finds that none of the transcripts of the prior recorded statements can be admitted under Rule 68(2)(a) of the Rules.

¹⁵ Request, ICC-02/04-01/15-1650-Red, paras 17-18, 38, *referring to transcripts* UGA-OTP-0244-0007-R01, UGA-OTP-0244-0018-R01 and UGA-OTP-0244-0184-R01.

¹⁶ Request, ICC-02/04-01/15-1650-Red, para.18, *referring to transcripts* UGA-D26-0022-0153 and UGA-D26-0022-0165.

¹⁷ Request, ICC-02/04-01/15-1650-Red, para. 39; Response, ICC-02/04-01/15-1656-Conf, paras 8-9.

¹⁸ Response, ICC-02/04-01/15-1656-Conf, para. 9, *referring to* Annex to the Order concerning the modalities for the handling of confidential information during investigations and contact between a party or participant and witnesses of the opposing party or of a participant, 11 November 2015, ICC-02/04-01/15-339-Anx, para. 36.

¹⁹ Request, ICC-02/04-01/15-1650-Red, para. 45.

²⁰ Response, ICC-02/04-01/15-1656-Conf, paras 13-15.

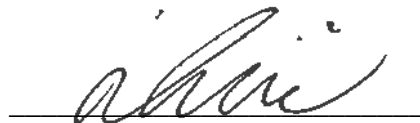
12. Although the Prosecution does not oppose the addition of the relevant transcripts of interviews of D-0036 to the Defence's List of Evidence, the Chamber rejects this part of the Request, since the addition is clearly linked to the submission of the transcripts via Rule 68(2)(a) of the Rules.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

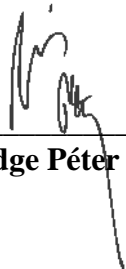
REJECTS the Request; and

ORDERS the Registry to reclassify ICC-02/04-01/15-1656-Conf as 'public'.

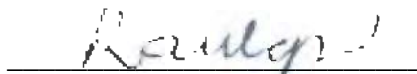
Done in both English and French, the English version being authoritative.



Judge Bertram Schmitt, Presiding Judge



Judge Péter Kovács



Judge Raul C. Pangalangan

Dated 13 November 2019

At The Hague, The Netherlands