

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

No.: ICC-02/04-01/15  
Date: 19 September 2016

**TRIAL CHAMBER IX**

**Before:** Judge Bertram Schmitt, Presiding Judge  
Judge Peter Kovacs  
Judge Raul C. Pangalangan

**SITUATION IN UGANDA**

**IN THE CASE OF *THE PROSECUTOR v. DOMINIC ONGWEN***

**Public**

**Decision on Prosecution Request for Leave to Appeal the  
Decision on Witness Preparation**

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

**The Office of the Prosecutor**

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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**

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**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 Article 82(1)(d) of the Rome Statute ('Statute'), issues the following 'Decision on Prosecution Request for Leave to Appeal the Decision on Witness Preparation'.

#### **A. Background and Submissions**

1. On 22 July 2016, the Chamber issued a decision adopting several protocols for the trial ('Impugned Decision').<sup>1</sup> Therein, it rejected the Office of the Prosecutor's ('Prosecution') request for a witness preparation protocol.
2. On 1 August 2016, the Prosecution filed a request for leave to appeal the Impugned Decision ('Request').<sup>2</sup> Particularly, it requests leave to appeal two issues: (i) whether the Chamber erred in equating the witness preparation requested by the Prosecution to conduct which could lead to a 'rehearsal' of witness evidence and, in doing so, abused its discretion ('First Issue') and (ii) whether the Chamber erred in failing to recognise/properly recognise the Prosecution's right to prepare and present evidence in a manner best suited to establish the truth and, in doing so, abused its discretion by rejecting the Prosecution's proposal for witness preparation ('Second Issue', together with the First Issue, 'Issues').<sup>3</sup>
3. In respect of the First Issue, the Prosecution submits that the Chamber mischaracterised the model of witness preparation requested by describing it as a practice potentially leading to a 'distortion of the truth' and carrying the risks of 'constituting a rehearsal of in-court testimony'.<sup>4</sup> It argues that a proper consideration of the Prosecution's proposal, which consists of five specific

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<sup>1</sup> Decisions on Protocols to be Adopted at Trial, ICC-02/04-01/15-504.

<sup>2</sup> Prosecution's request for leave to appeal the 'Decision on Protocols to be Adopted at Trial', ICC-02/04-01/15-511.

<sup>3</sup> Request, ICC-02/04-01/15-511, para. 3.

<sup>4</sup> Request, ICC-02/04-01/15-511, para. 9.

measures, would have shown that it is distinct from ‘witness proofing’<sup>5</sup> and that the Impugned Decision repeatedly fails to properly assess the specific measures proposed by the Prosecution.<sup>6</sup>

4. With regard to the Second Issue, the Prosecution submits that the Impugned Decision did not properly evaluate its submissions on witness preparation and failed to give weight or even recognise the Prosecution’s right to prepare and present evidence in a manner it deems best suited to establish the truth.<sup>7</sup>
5. On 4 August 2016, the defence for Mr Ongwen (‘Defence’) filed its response, submitting that the Request should be rejected (‘Response’).<sup>8</sup> It argues that the Issues do not arise from the Impugned Decision<sup>9</sup>, that they are mere disagreements<sup>10</sup> and fail to meet the other criteria of Article 82(1)(d) of the Statute.<sup>11</sup>

## **B. Analysis**

6. The Chamber recalls the applicable law governing requests for leave to appeal, as set out in previous decisions.<sup>12</sup>
7. The Chamber will analyse both Issues together, as the First Issue is essentially centred on the rejection of the Prosecution’s specific proposal for witness preparation and the Second Issue argues for the Prosecution’s general prerogative to conduct witness preparation.

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<sup>5</sup> Request, ICC-02/04-01/15-511, para. 11.

<sup>6</sup> Request, ICC-02/04-01/15-511, paras 12-15.

<sup>7</sup> Request, ICC-02/04-01/15-511, paras 19-23.

<sup>8</sup> Defence Response to ‘Prosecution’s request for leave to appeal the “Decision on Protocols to be Adopted at Trial”’ (ICC-02/04-01/15-511), ICC-02/04-01/15-514.

<sup>9</sup> Response, ICC-02/04-01/15-514, paras 3-22.

<sup>10</sup> Response, ICC-02/04-01/15-514, paras 23-25.

<sup>11</sup> Response, ICC-02/04-01/15-514, paras 26-34.

<sup>12</sup> See, Decision on Defence Request for Leave to Appeal Decision ICC-02/04-01/15-521, 2 September 2016, ICC-02/04-01/15-529, paras 4-8; Decision on Defence Request for Leave to Appeal the Decision on Article 56 Evidence, 9 September 2016, ICC-02/04-01/15-535, para. 8.

8. It is doubtful that the two Issues qualify as appealable issues – witness preparation was rejected for multiple independent reasons and any errors on the two points identified by the Prosecution would not have been essential for the determination of the Impugned Decision. Even if these issues were understood as appealable issues, the Chamber fails to see how not allowing witness preparation affects the fairness of the proceedings. The Impugned Decision only concerned the participants’ ability to contact their witnesses during the period shortly before the witness’s testimony. For the time before the familiarisation process commences and after the testimony concludes, the Impugned Decision did not specifically regulate the participants’ witness contacts in any way. Further, and as indicated in the Impugned Decision, much of what the Prosecution sought to accomplish with witness preparation can be addressed without permitting the practice.<sup>13</sup> The argument that an incorrect decision regarding an effective trial practice ‘tarnishes the fairness of the proceedings’<sup>14</sup> is too unspecific and unpersuasive in view of the limited scope of the Impugned Decision.
9. In respect of the Second Issue, the Chamber notes that the Appeals Chamber jurisprudence referred to by the Prosecution<sup>15</sup> concerns a dissenting opinion on the Prosecution’s right to submit relevant evidence. This is unrelated to the issue of witness preparation since the Prosecution is in no way hindered from calling certain witnesses or examining them. Further, the Prosecution’s assertion that without witness preparation it cannot properly question its witnesses and that the Impugned Decision therefore impedes the Prosecution’s role to establish the

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<sup>13</sup> Impugned Decision, ICC-02/04-01/15-504, para. 16.

<sup>14</sup> Request, ICC-02/04-01/15-511, para. 26.

<sup>15</sup> Request, ICC-02/04-01/15-511, para. 21, *referencing* Appeals Chamber, *The Prosecutor v. Mathieu Ngudjolo Chui*, Joint Dissenting Opinion of Judge Ekaterina Trendafilova and Judge Cuno Tarfusser to ‘Judgment on the Prosecutor’s appeal against the decision of Trial Chamber II entitled “Judgment pursuant to article 74 of the Statute”’, ICC-01/04-02/12-271-Anx.

truth<sup>16</sup> is not convincing. The Impugned Decision does not pose any condition or impediment on the questioning of witnesses. The Prosecution is still in position to fully examine its witnesses and to resolve any imprecision, confusion or incompleteness during the testimony.

10. The claim that the fairness is affected since the Chamber has the obligation to ensure a fair trial for both the Prosecution and the Defence<sup>17</sup> is also not convincing as the Defence is equally barred from using the form of witness preparation proposed by the Prosecution. The Prosecution fails to present arguments why it is specifically disadvantaged by the absence of witness preparation. The references to the burden of proof – which is imposed on the Prosecution by the Statute – and the complexity of the case<sup>18</sup> do not support an argument of a substantial disadvantage of the Prosecution.
11. Accordingly, the Chamber does not find that the Issues affect the fairness of the proceedings.
12. For the same reasons the Chamber finds that the outcome of the trial is not significantly affected. The Prosecution's contention that without its proposed form of witness preparation 'the article 74 decision will not reflect all the evidence available'<sup>19</sup> is not convincing. The Chamber stresses again that the fact that there is no witness preparation is unrelated to elicitation of evidence and does in no way hamper the parties' rights to question witnesses in court. Any alleged distortion of the evidentiary record is therefore merely speculative at best.

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<sup>16</sup> Request, ICC-02/04-01/15-511, paras 32.

<sup>17</sup> Request, ICC-02/04-01/15-511, para. 27.

<sup>18</sup> Request, ICC-02/04-01/15-511, paras 28-30.

<sup>19</sup> Request, ICC-02/04-01/15-511, para. 28.

13. Since the criteria of Article 82(1)(d) of the Statute are cumulative,<sup>20</sup> the failure to fulfil one of the criteria is fatal to the request. Therefore, both Issues do not fulfil the criteria of Article 82(1)(d) of the Statute and accordingly, the Chamber dismisses the Request.

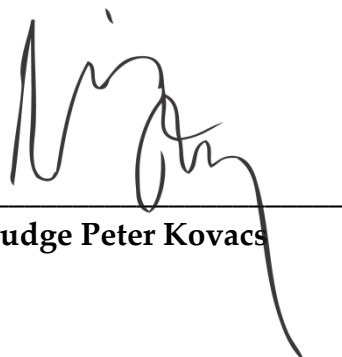
**FOR THE FOREGOING REASONS, THE CHAMBER HEREBY**

**REJECTS** the Request.

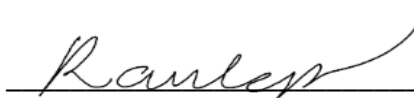
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Judge Bertram Schmitt, Presiding Judge



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Judge Peter Kovacs



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Judge Raul C. Pangalangan

Dated 19 September 2016

At The Hague, The Netherlands

<sup>20</sup> See, Decision on Defence Request for Leave to Appeal Decision ICC-02/04-01/15-521, 2 September 2016, ICC-02/04-01/15-529, para. 9.