

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: **28 November 2016**

TRIAL CHAMBER IX

Before: Judge Bertram Schmitt, Single Judge
Judge Péter Kovács
Judge Raul C. Pangalangan

SITUATION IN UGANDA

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

Public

**Defence Request for Leave to Appeal Decisions ICC-02/04-01/15-596-Conf and
ICC-02/04-01/15-600**

Source: Defence for Dominic Ongwen

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

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I. INTRODUCTION

1. Pursuant to Article 82(1)(d) of the Rome Statute, the Defence for Dominic Ongwen ('Defence') hereby requests leave to appeal an issue within Decisions ICC-02/04-01/15-596-Conf and ICC-02/04-01/15-600 ('Impugned Decisions'). Specifically, the Defence requests leave to appeal the following issue:

- a. Trial Chamber IX erred in law when it decided that Rule 76(3) of the Rules of Procedure and Evidence was not a procedural bar against the formal submission of prior recorded testimony pursuant to Rule 68(2)(b) of the Rules that was not translated for the Accused ('Issue I');¹

II. BACKGROUND

2. On 14 June 2016, the Prosecution submitted a request to introduce the prior recorded testimony into evidence of 38 witnesses.²
3. On 26 July 2016, the Defence responded to the Prosecution's 14 June 2016 request.³
4. On 21 September 2016, the Prosecution submitted a second request to introduce the prior record testimony into evidence of six (6) witnesses.⁴
5. On 5 October 2016, the Defence responded to the Prosecution's 21 September 2016 request.⁵
6. On 28 October 2016, the Prosecution submitted a request to introduce the prior recorded testimony into evidence of P-0001.⁶

¹ ICC-02/04-01/15-596-Conf, paras 25-29 and ICC-02/04-01/15-600, para. 28

² ICC-02/04-01/15-465-Conf-Corr.

³ ICC-02/04-01/15-509-Conf-Corr.

⁴ ICC-02/04-01/15-538-Conf.

⁵ ICC-02/04-01/15-555-Conf.

⁶ ICC-02/04-01/15-579-Conf.

7. On 7 November 2016, the Defence responded to the Prosecution's 28 October 2016 request to introduce the prior recorded testimony of P-0001.⁷
8. On 18 November 2016 and 22 November 2016, Trial Chamber IX ('Chamber') issued the Impugned Decisions, granting 39 of the 44 Prosecution requests made pursuant to Rule 68(2)(b) of the Rules of Procedure and Evidence.⁸

III. SUBMISSIONS

a) The Law

9. Article 82(1)(d) gives discretionary power to the Chamber to allow a party to appeal "[a] decision that involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings."

b) Rule 76(3) of the Rules of Procedure and Evidence bars Trial Chamber IX from accepting the formal submission into evidence prior recorded testimony taken pursuant to Rule 68(2)(b) of the Rules of Procedure and Evidence (Issue I)

The Issue Arises from the Decision

10. The Defence argued that the Prosecution's failure to supply Mr Ongwen with Acholi translations/transcripts of the Rule 68(2)(b) submissions acted as a procedural bar to the submission of the documents because of Rule 76(3).⁹ The Chamber rejected this argument, deciding that the Defence should have asked for a stay of the response until the Prosecution finished its disclosure,¹⁰ "the difference between examination of a *viva voce* witness at trial and the provision of a response to an application under Rule 68(2)(b) is so significant that it

⁷ ICC-02/04-01/15-587-Conf.

⁸ See Impugned Decisions. The Defence notes that the introduction into evidence is dependent on the Rule 68(2)(b)(ii) and (iii) declarations.

⁹ ICC-02/04-01/15-509-Conf-Corr, paras 1(c), 44, 48 and 50; ICC-02/04-01/15-555-Conf, paras 2(c), 8 and 10-13.

¹⁰ ICC-02/04-01/15-596-Conf, para. 27.

cannot be said that they are equivalent or even comparable in terms of the time required for the Defence preparation and the accused's [sic] degree of participation therein",¹¹ and that the Defence was not prejudiced because the statements were in the possession of the Defence for four to six weeks before the responses were due and Counsel Ayena Odongo is fluent in Acholi and English.¹²

11. First, the Defence apologises for the typographical error in paragraph 46.¹³ It should have read 15 June 2016, not 15 July 2016.¹⁴ Witness P-0325's statement was disclosed to the Defence on 15 June 2016.
12. Issue I is not a mere disagreement between the Chamber and the Defence. The Defence maintains, and shall argue on appeal, that Rule 76(3) is applicable to applications pursuant to Rule 68(2)(b), and translations must be disclosed to the Defence before such applications are made.
13. The topic of translations, one topic specifically being Rule 76(3), has been an issue at the International Criminal Court for the past three (3) years. Rule 76(3), along with other rules dealing with interpretation and/or translations, have been before the Working Group on Amendments of the ICC since before the 2014 ASP meeting.¹⁵ The fact remains that Rule 76(3) has not changed. Rule 76(3) does not differentiate between *viva voce* witnesses and prior recorded testimony submitted through Rule 68(2)(b). Rule 76(3) creates a positive obligation on the Prosecution and Court to provide statements in a language which an accused can fully understand and speak. With that, it is not the

¹¹ ICC-02/04-01/15-596-Conf, para. 26 and ICC-02/04-01/15-600, para. 28 (*citing* to paragraph 26 of ICC-02/04-01/15-596-Conf).

¹² ICC-02/04-01/15-596-Conf, para. 28.

¹³ ICC-02/04-01/15-509-Conf-Corr, para. 46.

¹⁴ See metadata for UGA-OTP-0264-0242-R01 which was disclosed to the Defence on 15 June 2016, and not 15 June 2015 as stated in paragraph 26 of the Impugned Decision.

¹⁵ See ICC-ASP/15/24, para. 21. Whilst paragraph 21 talks about the history, the rest of that section is pertinent to the Defence's argument. Available at: https://asp.icc-cpi.int/iccdocs/asp_docs/ASP15/ICC-ASP-15-24-ENG.pdf.

obligation of the Defence, specifically Counsel, to spend countless days interpreting 368 pages of prior recorded testimony for Mr Ongwen.¹⁶ This is not the job of a Counsel, and would be tantamount to malpractice and an improper use of his time interpreting statements of which the Court and Prosecution are required to give translations.

14. The Chamber exceeded its discretionary powers in the Rome Statute, Rules of Procedure and Evidence and the Regulations of the Court and Registry, and as such, Issue I arises from the Impugned Decisions and is not a mere disagreement between the Chamber and Defence.

The Issue Significantly affects the Fair Conduct of the Proceedings

15. Article 67(1)(f) of the Rome Statute guarantees an accused the right to have translations of documents presented to the Court “in a language which the accused fully understands and speaks.” Rule 76(3) guarantees an accused the right to have the statements, *i.e.* all statements, of Prosecution witnesses in a language he or she fully understands and speaks. Rule 76(3) does not state that an accused only has the right to translated statements of *viva voce* witnesses before the witness’s testimony. Finally, Article 67(1)(b) grants an accused the right “[t]o have adequate time...for the preparation of the defence...”
16. Mr Ongwen has the right to a fair trial, in full equality. He has the right to have all statements from Prosecution witnesses and to help prepare his defence. Requiring lead counsel to interpret these documents detracts from his duties as counsel. Not having these documents translated detracts from Mr Ongwen’s ability to review documents during non-business hours, and

¹⁶ This number includes statements which were given by the witnesses in the three (3) filings, but for which an Acholi translation was not given to the Defence before the time of the respective applications. This number does not take into account the large volume of annexes associated with the prior recorded testimony.

severely restricts his ability to help prepare his defence with those charged with advising him.

17. Finally, Rule 76(3) contains no restrictions as to which statements must be translated. A plain reading of Rule 76(3) corroborates the Defence's position. It is against Mr Ongwen's fair trial right to submit statements into evidence when he has not been given adequate time to review the documents and advise Counsel. These statements are deemed submitted into evidence, *i.e.* as if the witnesses testified before the Court.¹⁷ It is contrary to internationally recognised human rights law, and the Rome Statute, to conduct testimony whilst an accused cannot understand the testimony against him or her.
18. For the abovementioned reasons, the Defence maintains that Issue I significantly affects Mr Ongwen's fair trial right granted pursuant to Rule 76(3), and supported by Articles 67(1)(f) and 67(1)(b).

The Issue Significantly affects the Expeditious Conduct of the Proceedings

19. Mr Ongwen has the right to an expeditious trial pursuant to Articles 64(2) and 67(1)(c) of the Rome Statute. The Defence understands that the ASP's reasoning behind the adoption of Rule 68(2)(b) was to streamline cases and make them more expeditious, but if Mr Ongwen is convicted of any charges which these witnesses discuss, the Impugned Decisions shall be challenged on appeal. The Chamber authorised the prior recorded testimony of 39 witnesses, or 32.2% of all testifying witnesses.
20. Furthermore, had the translations been given during the time of the requests, the Defence could have gone through the statements with Mr Ongwen before trial and prepared in-depth reviews of the witnesses with Mr Ongwen. Now, as the Prosecution collects the documents required under Rule 68(2)(b)(ii) and

¹⁷ See footnote 8 above.

(iii), the Defence will need to discuss not only *viva voce* witnesses with Mr Ongwen, but will need to address prior recorded testimony of the 39 witnesses submitted pursuant to Rule 68(2)(b). Since the hours of operation at the ICC-DC are limited, along with the available space to meet with detainees in a privileged setting, there is a high probability that the Defence shall need to requests adjournments of the trial to discuss properly with Mr Ongwen about these witnesses.

21. The Defence maintains that the submission of the prior recorded testimony into evidence pursuant to Rule 68(2)(b) before all statements from the witness are translated and disclosed to Mr Ongwen significantly affect the expeditious conduct of the proceeding.

An Immediately Resolution by the Appeals Chamber Will Materially Advance the Proceedings

22. The Appeals Chamber has held that this criterion will be satisfied if the relevant chamber rules that an authoritative determination on the appeal would “move forward” the proceedings and “remove doubts about the correctness of the decision or map a course of action along the right lines”.¹⁸ The issue at stake must also be “such that its immediate resolution by the Appeals Chamber will settle the matter posing for decision through its authoritative determination, ridding thereby the judicial process of possible mistakes that might taint either the fairness of the proceedings or mar the outcome of the trial”.¹⁹ The solving of the issue by the Appeals Chamber is aimed to “ensure that the proceedings follow the right course”.²⁰
23. The ability to participate in one’s own trial is a fundamental right. By not requiring translations being disclosed to Mr Ongwen before the applications

¹⁸ ICC-01-04-168, paras 14-15.

¹⁹ ICC-01-04-168, para. 14.

²⁰ ICC-01-04-168, para. 15.

for submission pursuant to Rule 68(2)(b) were submitted by the Prosecution, the Chamber has denied Mr Ongwen his fundamental right of adequate time for the preparation of his defence. The Impugned Decision almost completely disavowed his participatory rights by declaring, “the difference between examination of a *viva voce* witness at trial and the provision of a response to an application under Rule 68(2)(b) is so significant that it cannot be said that they are equivalent or even comparable in terms of the time required for the Defence preparation and the accused’s [sic] degree of participation therein”.²¹ The Defence highlights that P-0028²² and P-0047²³ were excluded from having their prior recorded testimony submitted *via* Rule 68(2)(b) because of an in-depth analysis of the *substance* of their statements.

24. An immediate decision by the Appeals Chamber will remove any doubt as to the requirements of Rule 76(3) in relation to prior recorded testimony being submitted to the Chamber pursuant to Rule 68(2)(b). If the Appeals Chamber decides the Impugned Decisions are correct, it would remove the air of taint. Without such a decision, the taint would permeate every crevasse, every nook and cranny of the trial. A decision, either way, shall ensure the integrity of the proceedings.
25. The Defence maintains that an immediately resolution by the Appeals Chamber of Issue I will materially advance the proceedings.

IV. RELIEF

26. Pursuant to Article 82(1)(d) of the Rome Statute, the Defence requests the Chamber to grant leave to appeal Issue I.

²¹ ICC-02/04-01/15-596-Conf, para. 26 and ICC-02/04-01/15-600, para. 28 (*citing* to paragraph 26 of ICC-02/04-01/15-596-Conf).

²² ICC-02/04-01/15-596-Conf, paras 214-215.

²³ ICC-02/04-01/15-596-Conf, paras 53-54.

Respectfully submitted,



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Hon. Krispus Ayena Odongo
On behalf of Dominic Ongwen

Dated this 28th day of November, 2016

At Kampala, Uganda