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Pénale
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**International
Criminal
Court**

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No.: **ICC-02/04-01/15**
Date: **2 December 2016**

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

Prosecution's response to the Defence request for leave to appeal Decisions ICC-02/04-01/15-596-Conf and ICC-02/04-01/15-600

Source: Office of the Prosecutor

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Introduction

1. The Defence request for leave to appeal Decisions 596-Conf and 600 (“Request”)¹ should be rejected. The Request advances one issue: whether Trial Chamber IX erred in law when it decided that rule 76(3) of the Rules was not a procedural bar to the formal submission of prior recorded testimony pursuant to rule 68(2) (b) that was not translated to the Accused (“Issue”).²
2. The Issue is no more than a mere disagreement with the Decisions. It is not appealable.
3. Moreover, the Issue will have no significant impact on the fair and expeditious conduct of the proceedings or the outcome of the trial. Nor will immediate resolution by the Appeals Chamber materially advance the proceedings.

Submissions

i. The Issue is not appealable

3. Article 82(1)(d) of the Rome Statute (“Statute”) provides that a party may 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.

¹ ICC-02/04-01/15-609 (“Request”). *See also* ICC-02/04-01/15-596-Conf, para. 26 (“First Decision”) and ICC-02/04-01/15-600, para. 28 (“Second Decision”) (together “Decisions”).

² ICC-02/04-01/15-609, para. 9.

4. An “issue” is an identifiable and discrete subject or topic requiring a decision for its resolution and *not merely a matter over which there is disagreement or conflicting opinion*.³ The Request fails to identify an appealable issue arising from the Decisions.

5. Indeed, as the Chamber found, “[t]he timeframe determined [...] for the completion of the disclosure of incriminating evidence by the Prosecution three months prior to the commencement of the trial and the provision, under [r]ule 76(3) of the Rules, of Acholi translation of prior statements of prosecution witnesses [...] *was only required for the purpose of the Defence’s ability to adequately prepare for the trial and the witnesses’ oral examination*.”⁴ The Chamber *did not* find that the same time-frame applied to responses to rule 68(2)(b) applications, in which the Defence arguments were limited to raising procedural arguments.⁵ The Defence does not acknowledge this finding. Moreover, to the extent that the Defence appears to misunderstand the 7 June 2016 ruling, the Issue does not even arise from the Decisions at hand.

6. The Defence appears to disagree with the Chamber’s finding that “[t]he difference between examination of a *viva voce* witness at trial and the provision of a response to [a rule 68(2)(b) application] is so significant[...]”.⁶ It also relitigates its earlier submissions.⁷ Nor does the Defence acknowledge that, as the Chamber found, it had never argued to extend its response time-limit “until after

³ See ICC-01/04-168 OA3, para. 9; ICC-02/11-01/15-117 paras. 19-22; ICC-01/05-01/08-532, para. 17; ICC-02/05-02/09-267, para. 22; ICC-01/04-01/06-1557, para. 30; ICC-01/04-01/07-2035, para. 25; ICC-02/05-03/09-179, para. 27. (emphasis added).

⁴ First Decision, para. 26 (emphasis added), citing Decision on Disclosure Issues Arising Out of First Status Conference, 7 June 2016, ICC-02/04-01/15-457, para. 10.

⁵ First Decision, para. 26.

⁶ First Decision, para. 26; Request, para. 12-13.

⁷ Request, para. 13.

completion of disclosure by the Prosecution and provision of translation of all the prior recorded testimonies concerned.”⁸

7. A mere conflicting opinion does not render the Issue appealable. For these reasons, the Issue should be dismissed.
8. Article 82(1) (d) criteria are cumulative: a failure to fulfil one of the criteria is fatal to any application for leave to appeal. As shown below, the Request fails to meet the remaining criteria for leave to appeal.

ii. The Issue does not significantly affect the fairness of the proceedings

9. An applicant cannot speculate in the abstract that a decision causes a prejudice to the rights of the accused in order to invoke that the fairness of the proceedings are affected.⁹ It does not suffice for an issue to have a merely hypothetical impact on the fairness or expeditiousness of proceedings.¹⁰ The arguments put forward by the Defence must explain how they apply to the issue— *i.e.*, how the issue “specifically affects” the fairness of the proceedings.¹¹
10. The Defence fails to demonstrate how the Chamber’s introduction through rule 68(2) (b) of the 39 witnesses’ prior recorded testimony, prior to the provision of their Acholi translations at the time, significantly affects the fair conduct of the proceedings. More specifically, the Defence fails to articulate any concrete prejudice caused to the accused.

⁸ First Decision, para. 27.

⁹ See ICC-01/04-168 OA3, para. 10; ICC-02/04-01/05-316, p. 6; ICC-01/09-02/11-211 para. 33 and 39; ICC-01/09-02/11-88, para. 25, *see also* paras. 23-27; ICC-01/04-01/06-2109, para.22; ICC-01/05-01/08-680, para. 36; ICC-01/09-02/11-275, paras. 28-29; ICC-01/09-01/11-301, para. 30.

¹⁰ ICC-01/04-01/07-1958, para. 20. *See also*: ICC-02/04-01/05-367, para. 21-22.

¹¹ ICC-01/05-01/08-2925, para. 34.

11. There is no impact on fairness of the proceedings because responding to rule 68(2) (b) statements is different from preparing for the oral examination of a witness.¹² The arguments in a response to a rule 68(2)(b) application are procedural in nature. More so, the prior recorded statements are only being submitted at this phase of the case. As such all issues of weight are deferred to the end of the trial. Thus the Defence still has the opportunity of attacking the weight to be given to the statements later, in its closing brief. The Defence will have all Acholi translations to the prior recorded testimony well in time before then.
12. Even if the Acholi translations disclosed in the future give rise to a new procedural question to which the Defence objects, the Defence is not prevented from raising it at that time. This Chamber can consider such submissions, along with all other evidence at the end of the trial, for purposes of issuing its article 74 decision. The Defence implicitly accepted this when it sought a postponement of their response to the Prosecution's first application for the introduction, pursuant to rule 68(2) (b), of prior recorded testimony of 38 witnesses ("First Application").¹³ Their request was granted in full by the Single Judge.¹⁴ At no point did the Defence argue that the time limit for its response ought to be extended until after the completion of disclosure by the Prosecution and the provision of translations to all the prior recorded testimonies concerned.
13. There is also no impact on the fairness of the proceedings even if, as the Defence avers, the impugned decisions were wrongly decided, since as the Chamber noted that the prior recorded statements are all brief and of well-defined subject matters and the Defence had six (6) weeks for the preparation of its response to the First Application.¹⁵ The Chamber further noted that Mr Ongwen is assisted by

¹² ICC-02/04-01/15-596-Conf, para 26.

¹³ ICC-02/04-01/15-470-Corr; ICC-02/04-01/15-596-Conf, para. 27.

¹⁴ ICC-02/04-01/15-475.

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

a Defence team whose members, including the lead counsel, are fluent in both English and Acholi.¹⁶

iii. The Issue does not significantly affect the expeditious conduct of the proceedings

14. The Defence's arguments on the impact on the expeditious conduct of the proceedings are speculative.

15. The Defence avers that the proceedings will be delayed since any conviction, based on the prior recorded statements of witnesses, will be challenged on appeal.¹⁷ It is premature to predict the outcome of this trial, nor indeed, the course of any potential appeal.

16. The Defence further claims that it will have to seek adjournments of the trial in order to discuss both the *viva voce* witnesses with Mr Ongwen and to address the prior recorded testimony of the 39 witnesses submitted pursuant to rule 68(2)(b).¹⁸ Once again, these submissions are hypothetical. Moreover, the Defence does not explain how discussion of witnesses and addressing prior recorded testimony warrants an adjournment of the proceedings.

iv. Immediate resolution by the Appeals Chamber is not necessary

17. The immediate resolution by the Appeals Chamber will not advance the proceedings. An interlocutory appeal will not materially advance the proceedings

¹⁶ ICC-02/04-01/15-596-Conf, para. 28.

¹⁷ ICC-02/04-01/15-596-Conf, para. 19.

¹⁸ ICC-02/04-01/15-596-Conf, para. 20.

in the sense of ensuring that the proceedings follow the right course.¹⁹ The Defence advances no more than its mere disagreement with the Decisions. And it misunderstands the basis of the Chamber's ruling. The Appeals Chamber has repeatedly held that interlocutory appeals are not a forum to provide advisory opinions but rather are a second instance review.²⁰ Moreover, the Defence only speculates when it states that "[w]ithout such decision, the taint would permeate ever crevasse, every nook and cranny of the trial."²¹ In these circumstances, the Appeals Chamber need not intervene.

Conclusion

12. For these reasons, the Request fails to meet the article 82(1) (d) criteria for leave to appeal. The Request should therefore be rejected.



Fatou Bensouda
Prosecutor

Dated 2nd day of December 2016
At The Hague, The Netherlands

¹⁹ ICC-01/04-01/06-2404, para. 33.

²⁰ See ICC-01/04-503 OA4 OA5, para. 30 ("the role of an advisory body" is "beyond and outside the scope of [the Appeals Chamber's] authority"); ICC-01/04-01/07-3132 OA12, para. 7. See also ICC-01/04-01/06-772 OA4, para. 4 ("The Appeals Chamber recalls that it does not provide guidance on the interpretation of the law [...] to the parties").

²¹ *Contra* Request, para 24.