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No.: ICC-02/04-01/15
Date: 5 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

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

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

The Office of the Prosecutor

Fatou Bensouda
James Stewart
Benjamin Gumpert

Counsel for the Defence

Krispus Ayena Odongo

Legal Representatives of the Victims

Joseph Akwenyu Manoba
Francisco Cox
Paolina Massidda

Legal Representatives of the 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

Registrar

Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

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

I. Background and Submissions

1. On 18 November 2016, the Chamber issued a decision allowing, *inter alia*, the introduction of the prior recorded testimony of 38 Prosecution witnesses under Rule 68(2)(b) of the Rules of Procedure and Evidence ('Rules'), ('First Impugned Decision').¹

2. On 22 November 2016, the Chamber issued a decision allowing, *inter alia*, the introduction of the prior recorded testimony of one further Prosecution witness under Rule 68(2)(b) of the Rules ('Second Impugned Decision', together with the First Impugned Decision, 'Impugned Decisions').²

3. On 28 November 2016, the defence team for Mr Ongwen ('Defence') filed a request for leave to appeal the Impugned Decisions ('Request') on the following issue:

whether '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').³

¹ Decision on the Prosecution's Applications for Introduction of Prior Recorded Testimony under Rule 68(2)(b) of the Rules, ICC-02/04-01/15-596-Red.

² Decision on Prosecution Request to Add Items to its List of Evidence, to include a Witness on its List of Witnesses and to Submit Two Prior Recorded Testimonies under Rule 68(2)(b) and (c), ICC-02/04-01/15-600.

³ Defence Request for Leave to Appeal Decisions ICC-02/04-01/15-596-Conf and ICC-02/04-01/15-600, ICC-02/04-01/15-609.

4. On 2 December 2016, the Prosecution and the Common Legal Representative of Victims responded to the Request, opposing it.⁴

II. Analysis

5. The Chamber recalls the applicable law relating to Article 82(1)(d) of the Statute as set out in previous decisions.⁵

6. Nowhere in the Impugned Decisions did the Chamber find that the accused was not entitled to translation in Acholi of statements submitted by way of Rule 68(2)(b) of the Rules. On the contrary, the Chamber found that the accused was entitled to an Acholi translation of Rule 68(2)(b) statements, as demonstrated by the Second Impugned Decision, in which the Chamber granted the Prosecution's request for introduction of P-1's statement, 'subject to the prompt provision of an Acholi translation of the prior recorded testimony'.⁶ The situation with respect to the First Impugned Decision was fundamentally different since all prior recorded testimonies concerned had in the meantime been translated into Acholi. Indeed, the First Impugned Decision only address those 'prior recorded testimonies that had not *yet* been translated into Acholi at the time of the Defence Response',⁷ and those for which translations into Acholi were disclosed to the Defence less than three months prior to its responses to the Prosecution's application under Rule 68(2)(b) of the Rules.⁸ Accordingly, the issue at stake is whether the Chamber erred in deciding to allow the introduction of statements under Rule 68(2)(b)

⁴ Response to the "Defence Request for Leave to Appeal Decisions ICC-02/04-01/15-596-Conf and ICC-02/04-01/15-600", ICC-02/04-01/15-616; 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, ICC-02/04-01/15-618.

⁵ 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. 7.

⁶ Second Impugned Decision, ICC-02/04-01/15-600, para. 28 and disposition.

⁷ First Impugned Decision, ICC-02/04-01/15-596-Red, para. 28 (emphasis added).

⁸ First Impugned Decision, ICC-02/04-01/15-596-Red, paras 25-28.

prior to the provision of a translation thereof to the accused. The Chamber finds that this Issue is an appealable issue.

7. However, the Chamber does not find that the Issue affects the fair or expeditious conduct of the proceedings. The Chamber first notes that to demonstrate that it affects the fairness of the proceedings, the Defence only argues that the accused is entitled to provision of translation of statements, even if introduced under Rule 68(2)(b).⁹ The Defence's argument is misconceived. As stated above, the Chamber agrees with the Defence that the Prosecution must provide the relevant Acholi translations. The Defence does not provide any arguments demonstrating that the provision of the translation *after* allowing the introduction of the statements under Rule 68(2) significantly affects the fairness of the proceedings.

8. Further, in relation to the expeditiousness of the proceedings, the Defence only argues that, had the statements been provided at the time of the requests, *i.e.* prior to the start of trial, it would have had more time to review them in-depth with Mr Ongwen, a task that will now be complicated by the fact that the trial will start, thus limiting the time available to conduct such review. Therefore, the Defence indicates that adjournments of the trial will probably be necessary to provide it with a sufficient amount of time to discuss the Rule 68(2)(b) statements with the accused.¹⁰

9. The Chamber recalls that the presentation of evidence will only start on 16 January 2017, over a month from now and that once the evidence presentation starts it will sit for a few weeks in blocks, followed by breaks.¹¹ This will provide the Defence with sufficient time to discuss in-depth any matters it deems appropriate with the accused. Thus, the Chamber finds the Defence's argument

⁹ Request, ICC-02/04-01/15-609, paras 15-18.

¹⁰ Request, ICC-02/04-01/15-609, paras 19-21.

¹¹ Email from Chamber to parties and participants on 10 October 2016 at 16:53.

that adjournments will likely be necessary to be purely speculative. Accordingly, the Chamber considers that the Defence fails to demonstrate that the Issue affects the expeditious conduct of the trial.

10. Further, the Defence does not offer any arguments demonstrating that the Issue affects the outcome of the trial.

11. Finally, the Chamber considers that the immediate resolution of the Issue by the Appeals Chamber would not materially advance the proceedings, noting in particular that, even if the absence of translation would prevent the introduction of the statements under Rule 68(2)(b), all of them have now been provided to the Defence.

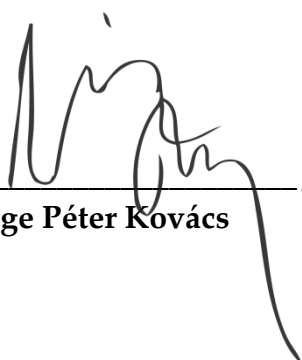
FOR THE FOREGOING REASONS, THE CHAMBER HEREBY:

REJECTS the Request.

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



Judge Bertram Schmitt
Presiding Judge



Judge Péter Kovács



Judge Raul C. Pangalangan

Dated 5 December 2016

At The Hague, The Netherlands