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**International
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Date: **19 January 2017**

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

**Defence Request for Re-Consideration of
‘Decision on the Prosecution’s Applications for Introduction of Prior Recorded
Testimony under Rule 68(2)(b) of the Rules’ with Regards to Four Individuals**

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. The Defence hereby requests re-consideration of the decision in respect of submission of the statements of P-0337, P-0384, P-0404, and P-0029 *in lieu* of testimony previously decided in *Decision on the Prosecution's Applications for Introduction of Prior Recorded Testimony under Rule 68(2)(b) of the Rules*¹ ('Rule 68 Decision').

II. BACKGROUND

2. On 26 July 2016, the Defence filed its response² to a Prosecution request³ to admit various statements pursuant to Rule 68(2)(b) of the Rules of Procedure and Evidence ('RPE'). On 27 July 2016, a corrigendum was filed.⁴
3. On 18 November 2016, Trial Chamber IX ('Trial Chamber') took its decision upon the Rule 68 Request.

III. Applicable Law

4. Pursuant to Article 64(2) of the Statute, the Trial Chamber is obliged to "ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused".

IV. SUBMISSIONS

A. Re-consideration

5. Trial chambers of the ICC have found that they have the power⁵ to reconsider interlocutory decisions⁶ when prompted by the parties or *proprio motu*.⁷ Prior trial-

¹ ICC-02/04-01/15-596-Conf.

² ICC-02/04-01/15-509-Conf-Exp.

³ ICC-02/04-01/15-465-Conf-Corr ('Rule 68 Request').

⁴ ICC-02/04-01/15-509-Conf-Corr.

⁵ ICC-01/04-01/06-2705, para. 13 ("The starting point for considering an application of this kind is the duty on the part of a Trial Chamber to ensure the trial is fair and expeditious, pursuant to Article 64(2) of the Statute").

⁶ ICC-01/04-01/06-2705, para. 18, ICC-01/09-01/11-511, and ICC-01/09-02/11-863.

⁷ ICC-01/09-02/11-863, para. 11.

chambers have also been willing to consider material that was not formally admitted as relevant to whether reconsideration is merited.⁸

6. “Reconsideration should only be done in exceptional circumstances.”⁹ That is where a decision is “manifestly unsound and their consequences are manifestly unsatisfactory”.¹⁰ This covers “circumstances [that] can include ‘new facts or new arguments’”.¹¹ Trial Chamber VII has considered this law and added that reconsideration “should only be done if a clear error of reasoning has been demonstrated or if it is necessary to do so to prevent an injustice.”¹²

B. The miss-interpretation of the Defence position on the Direction Finding Witnesses

7. The Defence submits that re-consideration of the Rule 68 Decision concerning witnesses P-0337, P-0384, P-0404, and P-0029 is merited because the Trial Chamber misapprehended the Defence position and this misapprehension was a primary basis of its decision to accept as submitted the statements of these four witnesses *in lieu* of their testimony. The relevant position is whether the Defence intends to rely upon the direction-finding evidence as reliable.
8. As part of its interpretation of Rule 68, the Trial Chamber interpreted the factor described in Rule 68(2)(b)(i)¹³ that testimony that “relates to issues that are not materially in dispute” is relevant to whether that testimony can be submitted under Rule 68. The Trial Chamber noted that:

For the purposes of the present decision, which is taken before the opening of the trial, the Chamber considers that the Defence responses to the Applications are the primary point of reference in the identification of the matters which the Defence disputes in the present case.¹⁴

⁸ ICC-01/05-01/13-1948, para. 21.

⁹ ICC-01/09-02/11-863, para. 11.

¹⁰ ICC-01/04-01/06-2705, para. 18.

¹¹ ICC-01/09-02/11-863, para. 11.

¹² ICC-01/05-01/13-1085-Conf, para. 4.

¹³ Rule 68 Decision, para. 15.

¹⁴ Rule 68 Decision, footnote 30.

10. Upon considering the Defence arguments,¹⁵ as one of the three key reasons the Trial Chamber rejected the need for witness P-0029 to testify, the Trial Chamber stated:

The unreliability of the UPDF direction-finding evidence is [...] not disputed between the parties, neither of which intends to rely on this material in the present trial, and there is no reason why witnesses who participated in direction-finding operations need appear to testify live at trial about such operations.¹⁶

11. The Trial Chamber rejected witness P-0337 at paragraph 183, witness P-0384 at paragraph 191, and witness P-0404 at paragraph 204 making reference to its reasoning on witness P-0029 regarding the lack of a dispute as to the direction-finding evidence.
12. The basis of these findings stems from paragraph 17 of the Defence response to the Prosecution Rule 68 application where the Defence stated:

[...] Explaining the processes in which the UPDF “located” alleged persons communicating on radios is an important aspect of the Prosecution’s and Defence’s cases. The Defence intends to challenge the processes in which the UPDF “located” persons on the radio, and explain the deficiencies in the UPDF techniques. Similarly, P-0029 discusses the direction finding operation of the UPDF. [...] ¹⁷

13. The Defence did not forcefully state its position in the above excerpt; however, it did not indicate that it would not rely upon the direction-finding evidence as reliable. The excerpt above does not provide a basis for drawing this conclusion and other observations made in the Defence Rule 68 filings show that Defence did not take that position. The Defence made submissions approvingly of P-0384’s knowledge of direction-finding.¹⁸ The Defence also mentioned the relevance of P-0337’s and P-0029’s knowledge of direction-finding and forcefully indicated the importance of his testimony to the Defence.¹⁹ Moreover, during the confirmation hearings, the Defence referred to this material in support of the dismissal of the charges²⁰ having provided an analysis of it to Pre-Trial Chamber II and parties.²¹ However, the Trial Chamber has erroneously understood the Defence position to be that it will not rely upon the direction-finding evidence.

¹⁵ Rule 68 Decision, para. 160.

¹⁶ Rule 68 Decision, para. 160.

¹⁷ ICC-02/04-01/15-555-Red.

¹⁸ ICC-02/04-01/15-509-Conf-Corr, para. 119.

¹⁹ ICC-02/04-01/15-555-Conf, paras 17-18.

²⁰ ICC-02/04-01/15-T-23-CONF-ENG, p. 35, line 24 to p. 36, line 8.

²¹ Email from Defence to PTC II Legal Officers and Prosecution, 31 January 2016 at 20h37 CET, subject: “Citations from the last Defence Presentation on 26 Jan 2016”.

14. The first two sentences of the above Defence response excerpt refer to the process by which the UPDF indicated in its log-books the location of Mr Ongwen and other LRA individuals. The method of creating this part of the log-book material appears to have been based upon the intercepted radio communications through the interpretations of proverbs, breaking coded messages,²² and the mentioning of landmarks and inductive reasoning from prior known locations.²³ This was clearly an interpretive process²⁴ and one witness explicitly acknowledges that sometimes reported locations differed between the ISO and UPDF.²⁵ The process involved information from other UPDF sources²⁶ and even involved consulting the direction finding teams to break codes.²⁷ That consultation of the direction-finding staff also means that the reliability of the intercept based location identification which the Prosecution considers reliable also depended to some manner on the reliability of the direction finding units with which the Prosecution is “not satisfied”.²⁸
15. Although perhaps a cause of confusion, the quotation marks used around ‘located’ in the excerpt of the Defence response indicated doubts, distance from, or scepticism as to the term therein.²⁹ Those marks were used because in contrast to the intercept operation, at important times, the direction-finding evidence places Mr Ongwen away from his alleged locations and crime-sites and is thus exculpatory evidence. This is not fully indicated by the third sentence of the excerpt; however, that sentence nonetheless affirmingly indicates the significance of the witness’s knowledge of direction-finding in relation to the prior scepticism as regards the methods whereby the UPDF located individuals from radio intercepts. It is submitted that any ambiguity understood by the Trial Chamber should also be seen in its context of a section arguing for the *viva voce* testimony of witnesses.
16. It is clear that the miss-apprehension of the Defence position impacted upon the Trial Chamber’s reasoning. In fact, it is the primary basis given for accepting that the

²² See for example P-0003: UGA-OTP-0027-0214, paras 16-17; UGA-OTP-0069-0803, para. 14; P-0339: UGA-OTP-0258-0732, para. 82; and P-291: UGA-OTP-0246-0061-R01, paras 28 and 51.

²³ E.g. a commander was known to be at a location, mentions crossing and river, and could only move a certain distance per day. See P-0003 for example: UGA-OTP-0027-0214, para. 61.

²⁴ P-0003: UGA-OTP-0069-0803, paras 16-17.

²⁵ P-291: UGA-OTP-0246-0061-R01, para. 55.

²⁶ P-0032: UGA-OTP-0796-R01, para. 26

²⁷ P-0291: UGA-OTP-0246-0061-R01, para. 55.

²⁸ ICC-02/04-01/15-533, para. 78.

²⁹ See for reference for example: https://en.wikipedia.org/wiki/Scare_quotes referring to *inter alia* to <http://www.sussex.ac.uk/informatics/punctuation/quotes/scare>, both accessed 26 November 2016.

statements can be submitted. A failure to elicit exculpatory testimony regarding the reliability of the direction-finding evidence impacts heavily upon the fairness of the case and thus potentially its outcome. The Defence did not seek leave to appeal, because it did not consider that procedural mechanism as the appropriate basis. What is required is not the Appeals Chamber oversight, but rather a decision informed by a clear statement of the Defence's position.

17. *For absolute clarity of the Defence position on this matter*, the Defence hereby indicates that it provisionally considers the direction-finding material reliable and hopes to be able establish through questioning that the material was collected correctly.
18. The Defence therefore submits that the interests of justice merit re-consideration.
19. Though re-consideration has been granted upon the basis of the interests of justice, as an alternative basis, the present clarification is analogous to a new fact. Though a clarification of a not-fully-articulated-position is not in itself a new fact understood conventionally, the jurisprudence of the ICC illustrates that the concept of a 'new fact' can be applied with some flexibility. A previous trial chamber has considered a decision of the ICC Appeals Chamber as a relevant new legal fact for the purposes of re-consideration.³⁰ In the present situation, where the Defence has previously given indications of its position and now provided a re-stated and-complete articulation of its position, the present clarification could, it is submitted, form a separate basis for re-consideration.
20. Should the Trial Chamber consider that in these circumstances, the clarification constitutes a new fact, then that new fact makes the decision on the four Direction Finding witnesses unsound as the new fact under-cuts the reasoning. It is submitted that if the Trial Chamber's prior reasoning is removed, the principle of orality and the interests of justice point towards rejecting the submission of the Rule 68 statements for P-0337, P-0384, P-0404, and P-0029. If the Prosecution wishes to rely upon these witnesses, they should be called to testify *viva voce*.

³⁰ ICC-01/09-02/11-863, para. 12.

C. The disputed nature of the Direction-Finding material

21. Should the Trial Chamber reject the present request, the Defence emphasises that in no way has it waived its rights to rely upon the direction-finding material, raise questions in cross-examination with interception-related witnesses, and present expert-testimony or expert-reports in the Defence case or prior to any ruling upon the reliability of the direction-finding evidence.
22. The Prosecution has not given a developed argument as to why the direction-finding material is unreliable and the Defence has not given any indication that it agrees with the Prosecution's assessment or shares the same position.
23. The Defence seeks to rely upon this material for two principles reasons. Firstly, it comprises a part of the process of UPDF communication intercepts.³¹ It is thus relevant to the reliability of that material. Secondly, the Defence has conducted an analysis of the direction-finding materials and found that they are exculpatory or raises reasonable doubts.
24. The Defence took the coordinates provided in the intelligence reports and plotted them on maps. Some these locations were provided to the Pre-Trial Chamber and other parties in the confirmation phase. The intelligence reports, based upon the direction-finding material, place Mr Ongwen, as the crow flies, 22.52 kilometres from Abok at the time of the charged attack. The Prosecution alleges that Mr Ongwen took responsibility for the attack the following evening. Because traveling during the day invited attack by the UPDF, for Mr Ongwen's soldiers to reach him to report the attack, they would have had to travel through jungle at night, on the basis of some evidence – in the rain, and allegedly with civilians and looted goods. If demonstrated reliable, the direction finding material places Mr Ongwen far enough away from crime-sites to raise significant doubts as to whether certain accounts of witnesses and the Prosecution theory of certain crimes are accurate since the accounts and theory cannot be reconciled with a time-line where the Abok attackers travel such long distances under such difficult conditions. The direction finding is thus potentially *highly* exculpatory.

³¹ See for example, UGA-OTP-0267-0445-R01, para. 17 ("In addition to my command over the UPDF direction finding (DF) team, in 2003 I took control of the static interception team in Gulu. This was to streamline administrative issues. *It made sense because the interception and the DF teams were doing the same work, and both were UPDF.*" – emphasis added)

25. Furthermore, if the direction-finding material is demonstrated sufficiently reliable through testimony, it will lend credibility to certain witnesses whom the Defence has considered calling.
26. Particularly in light of Mr Ongwen's not-guilty plea on 6 December 2016,³² the presentation of exculpatory information, while ever important, takes on a further and new urgency.

V. RELIEF

27. For the reasons stated above, the Defence requests re-consideration of the Rule 68 Decision concerning witnesses P-0337, P-0384, P-0404, and P-0029.

Respectfully submitted,



.....
Hon. Krispus Ayena Odongo
On behalf of Dominic Ongwen

Dated this 19th day of January, 2017
At The Hague, Netherlands

³² ICC-02/04-01/15-T-26-ENG, p. 21, lines 2-3.