

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-02/04-01/15
Date: 27 August 2018

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 Defence Request for Leave to Appeal Decision
ICC-02/04-01/15-1322**

Source: The Office of the Prosecutor

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Introduction

1. The Defence Request for Leave to Appeal¹ (“the Request”) the “Decision on Prosecution Request to Introduce Evidence of Defence Witnesses via Rule 68(2)(b)”,² (“the Decision”) should be rejected. The issue, as framed by the Defence, does not constitute an appealable issue. The Request also fails to satisfy the remaining criteria of article 82(1)(d) of the Rome Statute (“Statute”).

Submissions

2. Article 82(1)(d) of the Statute specifies that only decisions involving an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial are subject to leave to appeal. Furthermore, even if those two criteria are satisfied, the applicant must show that an immediate resolution by the Appeals Chamber may materially advance the proceedings. This wording “reflects the intention of the drafters of the Statute to limit the scope of interlocutory appeals to issues of crucial importance to the fairness and expeditiousness of the proceedings or to the outcome of the trial”.³ The criteria set out in article 82(1)(d) are cumulative and the absence of any one will result in rejection.

The issue is not an appealable issue

3. The Defence frames the issue for the interlocutory appeal as “[w]hether the Trial Chamber erred in law and fact by holding that Rule 68 of the RPE enables a non-calling party to make a Rule 68 request for a witness called by the other party”.⁴

¹ ICC-02/04-01/15-1324.

² ICC-02/04-01/15-1322.

³ ICC-02/04-01/15-64, para. 19.

⁴ Request, para. 12.

This issue is not “a subject the resolution of which is *essential* for the determination of matters arising in the judicial cause under examination [emphasis added]”.⁵ The judicial cause under examination in the Decision was the application of rule 68(2)(b) to the evidence of seven witnesses called by the Defence. The Prosecution had argued that the evidence of the seven witnesses could and should be introduced pursuant to the rule. The Defence disagreed. After hearing the Parties, the Trial Chamber concluded that only D-0132's prior recorded testimony should be introduced pursuant to rule 68(2)(b). The Trial Chamber noted that the application of rule 68(2)(b) —and the introduction of prior recorded testimonies into evidence *in lieu* of oral testimony—can be triggered by a party (not necessarily the calling party) and *proprio motu*.⁶ Hence, whether a non-calling party can request the application of rule 68(2)(b) was not essential to the Trial Chamber's decision.

4. In fact, the Defence explicitly accepts that the Trial Chamber has the power to introduce witnesses' statements *proprio motu* via rule 68(2)(b).⁷ This entails that the Trial Chamber has the power to introduce evidence pursuant to the rule even when the calling party objects, as the Defence did in this case. Notably, the Defence does not challenge the Trial Chamber's application and assessment of various factors in reaching the Decision. The Defence only disagrees with the Chamber's finding that “a non-calling party [may] make a Rule 68 request for a witness called by the other party”.⁸ However, as pointed out by the Appeals Chamber, “[t]here may be disagreement or conflict of views on the law applicable for the resolution of a matter arising for determination in the judicial process. This conflict of opinion does not define an appealable subject”.⁹

⁵ Ibid.

⁶ Decision, para. 6.

⁷ Request, para. 18.

⁸ Request, para. 12.

⁹ Appeals Chamber, *Situation in the DRC*, Judgment on Extraordinary Review, ICC-01/04-168 OA3, 13 July 2006, para. 9. See also Appeals Chamber, *Prosecutor v. Lubanga*, Dissenting Opinion of Judge Song in the

5. Further, the Defence's arguments do not support its Request. The Defence argues that the Trial Chamber presented the Decision as a *proprio motu* ruling when it only acted upon the Prosecution's request.¹⁰ However, this argument disregards the fact that, regardless of the trigger mechanism, the Trial Chamber's authority is the same: to assess and decide whether a witness's prior recorded testimony can be introduced under rule 68(2)(b). This was the judicial issue at stake in the Decision which the Defence does not dispute.
6. The Defence also misrepresents the Decision when it says that the Prosecution's request "dictates the way in which the Defence must present its evidence and the Trial Chamber accepts it".¹¹ In fact, the Trial Chamber rejected the Prosecution's proposal in respect of six (out of seven) witnesses. Furthermore, the Trial Chamber considered the Defence's objection to introduce the witnesses' evidence under rule 68(2)(b) "an important factor" in deciding whether to apply the rule.¹²
7. Similarly, the Defence's assertion that the Trial Chamber's interpretation of rule 68(2)(b) "creates unclear jurisprudence"¹³ is also misplaced. Whilst the Defence may disagree with the Trial Chamber's interpretation of the rule, there is nothing unclear about it and it does not contradict any other jurisprudence.

Other article 82(1)(d) criteria are also not met

8. Since the issue is not an appealable issue, as demonstrated above, the Request should be rejected on this basis alone. Alternatively, if the Trial Chamber finds that there is an appealable issue arising from the Decision, the Request should

Judgment on Appeal against Oral Disclosure, ICC-01/04-01/06-1433 OA11, 11 July 2008, para. 4. Diss. Op. ("A decision 'involves' an issue if the question of law or fact constituting the issue was essential for the determination or ruling that was made.").

¹⁰ Request, para. 22.

¹¹ Request, para. 27.

¹² Decision, para. 14.

¹³ Request, para. 19.

still be rejected because the Defence fails to demonstrate that the remaining article 82(1)(d) criteria are met.

9. *First*, the Defence fails to demonstrate how the issue would significantly affect the fair and expeditious conduct of the proceedings¹⁴ or the outcome of the trial. The Decision does not reject the evidence of D-0132; the Trial Chamber merely disagreed with the Defence on the manner of its presentation. This does not significantly affect the outcome of the trial, especially when the evidence is just background information.¹⁵ D-0132's testimony will be on the record, the Defence will be able to rely on it and the Trial Chamber will be able to consider it just the same as if the witness testified orally. In addition, even if, *arguendo*, the Chamber agreed with the Defence's interpretation (i.e. that a non-calling party cannot make an application under rule 68(2)(b)), this would not necessarily result in D-0132's live testimony, since the Defence accepts that the Trial Chamber can apply rule 68(2)(b) *proprio motu* and does not attempt to challenge the Trial Chamber's application of the rule to D-0132 as such.¹⁶
10. The Defence has also failed to substantiate any of its arguments on how appellate intervention would expedite the proceedings. The Defence's assertion that the Chamber's legal interpretation will lead "to lengthier proceedings, harm the expeditiousness of proceedings and lead to additional litigation"¹⁷ is unfounded. The opposite is true. The Decision streamlines the presentation of evidence and saves time, whilst causing no prejudice to the Accused.

¹⁴ The Prosecution notes that the first limb of the requirement is two-fold and that, accordingly, leave to appeal can be granted only if the issue on which appeal is sought would significantly affect the proceedings both in terms of fairness and in terms of expeditiousness. See also ICC-02/04-01/15-64, para. 23.

¹⁵ Decision, para. 21. See also ICC-02/04-01/15-1316-Red, para. 35.

¹⁶ See above, para. 4.

¹⁷ Request, para. 23.

11. Insofar as the Defence claims a violation of article 67(1)(b) of the Statute, the Prosecution, like the Trial Chamber,¹⁸ fails to see how introducing evidence under rule 68(2)(b) has any bearing on the time accorded to the Accused for the preparation of his defence.
12. *Second*, the Defence fails to articulate how the immediate resolution of the issue would materially advance the proceedings. Leave to appeal cannot be granted because the issue for which the appeal is sought is of general interest or it may arise again in future proceedings and the Appeals Chamber could provide its interpretation of the provision.¹⁹ If that were the standard, all decisions would meet this criterion and be suitable to trigger an interlocutory appeal, thus nullifying the restrictive nature of the remedy.²⁰

Conclusion

13. For the reasons set out above, the Defence Request should be rejected.



Fatou Bensouda,
Prosecutor

Dated 27th day of August 2018

At The Hague, The Netherlands

¹⁸ Decision, para. 12.

¹⁹ See Trial Chamber III, *Prosecutor v. Bemba*, ICC-01/05-01/08-2487-red, 16 January 2013, Para. 16.

²⁰ Trial Chamber VII, *Prosecutor v Bemba et al*, ICC-01/05-01/13-801, 23 January 2015, paras. 17-18.