

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

**Decision on Defence Request for Leave to Appeal the Decision on Prosecution
Request to Introduce Evidence of Defence Witnesses via Rule 68(2)(b)**

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

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Counsel Support Section

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Detention Section

**Victims Participation and Reparations
Section**

Others

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 the Decision on Prosecution Request to Introduce Evidence of Defence Witnesses via Rule 68(2)(b)'.

I. Procedural history and submissions

1. On 19 July 2018, the Office of the Prosecutor ('Prosecution') filed a motion requesting, pursuant to Rule 68(2)(b) of the Rules of Procedure and Evidence ('Rules'), that the prior recorded testimony of seven witnesses for the defence of Mr Ongwen ('Defence') be introduced into evidence in lieu of oral testimony ('Prosecution's Request').¹ On 30 July 2018, the Defence responded that the Prosecution's Request should be rejected.²
2. On 16 August 2018, the Chamber issued a decision rejecting the Prosecution Request with respect to six of the seven Defence witnesses, but concluding that the evidence of D-132 must be introduced in written form pursuant to Rule 68(2)(b) of the Rules ('Impugned Decision').³
3. On 21 August 2018, the Defence filed a request for leave to appeal the Impugned Decision ('Request for Leave to Appeal').⁴ The Defence seeks leave to appeal on one issue:

¹ Prosecution's request to introduce prior recorded testimony of seven Defence witnesses under rule 68(2)(b), ICC-02/04-01/15-1310-Conf. A public redacted version was filed on 20 July 2018, ICC-02/04-01/15-1310-Red.

² Defence Response to "Prosecution's request to introduce prior recorded testimony of seven Defence witnesses under rule 68(2)(b)", ICC-02/04-01/15-1316-Conf, with a confidential annex, ICC-02/04-01/15-1316-Conf-AnxA. A public redacted version of the Response was filed on 31 July 2018, ICC-02/04-01/15-1316-Red.

³ Decision on Prosecution Request to Introduce Evidence of Defence Witnesses via Rule 68(2)(b), ICC-02/04-01/15-1322-Conf, paras 15-21, page 12. A public redacted version was filed the same day, ICC-02/04-01/15-1322-Red.

⁴ Defence Request for Leave to Appeal "Decision on Prosecution Request to Introduce Evidence of Defence Witnesses via Rule 68(2)(b)", ICC-02/04-01/15-1324.

Whether 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.⁵

4. The Defence submits that the Impugned Decision erred in stating that ‘nothing in the wording or structure of Rule 68 of the Rules suggests’ that a request under this rule cannot be made when ‘the prior recorded testimony stems from a witness who is being called by another party or participant’.⁶ The Defence asserts that, in support of its conclusion, the Chamber cites but one source which it misinterprets.⁷
5. The Defence does not dispute that a Chamber may make a *proprio motu* ruling under Rule 68(2)(b) of the Rules, but argues that there is no indication that the Chamber would have made that ruling in the absence of the Prosecution’s Request.⁸ The Defence argues that the Chamber’s ‘veiled threat’ that it may make *proprio motu* Rule 68(2)(b) rulings should the appearance of Defence witnesses not go smoothly ‘puts an immense pressure on the Defence’ and amounts to a violation of Mr Ongwen’s fair trial rights.⁹
6. The Defence asserts that the Chamber’s interpretation of Rule 68(2)(b) of the Rules will lead to lengthier proceedings and additional litigation, and that by depriving ‘Mr Ongwen of his right to have adequate time to examine Witness D-0132 live, the Trial Chamber violated’ his right to have adequate time for the preparation of his defence.¹⁰ It is further argued that resolution of the issue

⁵ Request for Leave to Appeal, ICC-02/04-01/15-1324, paras 12, 18, 29.

⁶ Request for Leave to Appeal, ICC-02/04-01/15-1324, para. 13, *citing* Impugned Decision, ICC-02/04-01/15-1322-Red, para. 6.

⁷ Request for Leave to Appeal, ICC-02/04-01/15-1324, paras 14-17, 23, *referring to* Trial Chamber II, *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on Defence Request to Admit into Evidence Entirety of Document DRC-OTP-1017-0572, 25 May 2011, ICC-01/04-01/07-2954.

⁸ Request for Leave to Appeal, ICC-02/04-01/15-1324, paras 2, 18, 21-22.

⁹ Request for Leave to Appeal, ICC-02/04-01/15-1324, para. 4.

¹⁰ Request for Leave to Appeal, ICC-02/04-01/15-1324, paras 23, 25.

would significantly affect the outcome of the trial and an immediate and urgent resolution by the Appeals Chamber will materially advance the proceedings.¹¹

7. On 27 August 2018, the Prosecution responded that the Request for Leave to Appeal should be rejected ('Response').¹² The Prosecution argues that the question of 'whether a non-calling party can request the application of Rule 68(2)(b) was not essential to the Trial Chamber's decision' and is therefore not an appealable issue.¹³ The Prosecution further submits that remaining criteria for leave to appeal are not met.¹⁴

II. Applicable law and analysis

8. The Chamber is required under Article 82(1)(d) of the Statute to assess: (i) whether the matter is an appealable issue; (ii) whether the issue would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial; and (iii) whether, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings. Due to the cumulative nature of the leave to appeal criteria set out in Article 82(1)(d) of the Statute, the failure to satisfy any one of the criteria stipulated must result in the rejection of a request for leave to appeal. The Chamber recalls the interpretation of Article 82(1)(d) of the Statute as set out in detail in previous decisions.¹⁵
9. The Chamber considers the issue presented by the Defence to be an appealable issue under Article 82(1)(d) of the Statute. Whether a non-calling party may make a request under Rule 68(2)(b) of the Rules is an identifiable subject

¹¹ Request for Leave to Appeal, ICC-02/04-01/15-1324, paras 27-28.

¹² Prosecution's Response to Defence Request for Leave to Appeal Decision ICC-02/04-01/15-1322, ICC-02/04-01/15-1325, para. 1.

¹³ Response, ICC-02/04-01/15-1325, paras 3-4, 8.

¹⁴ Response, ICC-02/04-01/15-1325, paras 8-12.

¹⁵ 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. *See also* Decision on the Defence Request for Leave to Appeal the Decision on the Confirmation of Charges, 29 April 2016, ICC-02/04-01/15-428, paras 5-9.

requiring a decision for its resolution. This issue was essential for the determination of the matter at hand, namely whether the prior testimony of seven Defence witnesses could be admitted pursuant to Rule 68(2)(b) of the Rules, at the instigation of the Prosecution, and over the objections of the Defence.¹⁶

10. The Chamber is of the view, however, that the issue presented by the Defence does not significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial. The prejudice alleged by the Defence is unsubstantiated. The Impugned Decision does not reject the evidence of D-132. The Chamber has simply requested that evidence be presented in writing rather than orally. This method of introducing evidence, contrary to the assertions of the Defence,¹⁷ streamlines the presentation of evidence and expedites proceedings.
11. The Chamber indeed took its decision regarding D-132 as a result of the Prosecution's Request, and over the objections of the Defence. This fact alone does not significantly affect the fairness of proceedings. As the Chamber noted in the Impugned Decision, the mere fact the Defence does not agree to the introduction of evidence pursuant to Rule 68(2)(b) of the Rules 'does not necessarily create any inconsistency with the rights of the accused'.¹⁸ The Chamber reiterates that, while its order that D-132's prior recorded statement be introduced into evidence affects the manner in which this evidence is presented, it does not affect the overall time Mr Ongwen has for the preparation of his

¹⁶ The Defence correctly points out that the *Katanga* decision cited at paragraph 6 of the Impugned Decision involves a Defence witness rather than a Prosecution witness. Nevertheless, the Chamber's reading of the wording and structure of Rule 68 of the Rules stands separate and apart from its analysis of the *Katanga* decision, which both the Chamber and the Defence agree related to the introduction of a prior recorded statement pursuant to (what is now known as) Rule 68(3) of Rules, rather than Rule 68(2)(b) of the Rules.

¹⁷ Request for Leave to Appeal, ICC-02/04-01/15-1324, para. 23.

¹⁸ Impugned Decision, ICC-02/04-01/15-1322-Red, para. 7.

defence and therefore does not implicate his rights under Article 67(1)(b) of the Statute.¹⁹

12. The Chamber also fails to see how this issue significantly affects the outcome of the trial. D-132's evidence, which constitutes background information and does not go to central issues of the charges or the alleged crimes, will be included on the case record whether provided orally or in written form.²⁰ The evidence will therefore be available for the parties and participants to comment upon throughout the remainder of the trial and for the Chamber to consider in its judgment deliberations. The form in which the evidence comes before the Chamber does not change this.
13. Furthermore, the Chamber fails to see how immediate resolution by the Appeals Chamber would materially advance the proceedings. Even if the Appeals Chamber were to agree with the Defence that a non-calling party may not make a request pursuant to Rule 68(2)(b) of the Rules, the Defence accepts that the Chamber may apply the rule *proprio motu*. The nature of D-132's evidence is such that the Chamber found that its introduction in written form would not be prejudicial or inconsistent with the rights of the accused.²¹ This analysis does not change no matter the source of the initial request, and the Defence has made no attempt to challenge the Chamber's reasoning in relation to whether the requirements of Rule 68(2)(b) of the Rules has been met with respect to the evidence of D-132.
14. Finally, the Chamber notes with dismay that the Defence has characterised its statement regarding the possibility of *proprio motu* rulings under Rule 68(2)(b) of

¹⁹ Impugned Decision, ICC-02/04-01/15-1322-Red, para. 12.

²⁰ Impugned Decision, ICC-02/04-01/15-1322-Red, para. 21.

²¹ Impugned Decision, ICC-02/04-01/15-1322-Red, para. 21.

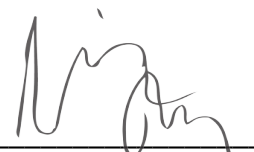
the Rules as a 'veiled threat'.²² The Chamber does not make threats, veiled or otherwise, to the parties or participants. It is, however, always obligated to ensure that the proceedings are fair and expeditious.²³ The Chamber has a number of tools at its disposal to guide and direct the conduct of proceedings. Rule 68(2)(b) of the Rules is one such tool that seeks to facilitate the efficient processing of evidence. Potential recourse to this procedure for introducing evidence in written form should be taken simply as a method to streamline the evidence and move the proceedings forward. The Chamber has always been forthcoming with the parties and participants regarding possible steps that can be taken to facilitate the efficiency of the proceedings. The Chamber considers continued dialogue on this front to be beneficial for all involved.

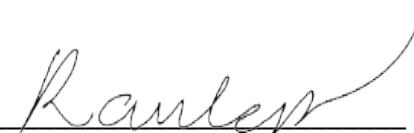
FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

REJECTS the Request for Leave to Appeal.

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 September 2018

At The Hague, The Netherlands

²² Request for Leave to Appeal, ICC-02/04-01/15-1324, para. 4, *referring to* Impugned Decision, ICC-02/04-01/15-1322-Red, para. 25.

²³ Article 64(2) of the Statute.