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**International
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Date: **19 November 2019**

TRIAL CHAMBER IX

Before: Judge Bertram Schmitt, Single Judge
Judge Péter Kovács
Judge Raul C. Pangalangan

SITUATION IN UGANDA

**IN THE CASE OF
*THE PROSECUTOR v. DOMINIC ONGWEN***

PUBLIC

**Defence Request for Leave to Appeal “Decision on Defence to Submit the Prior
Recorded Testimony of D-0036 and related documents pursuant to Rule 68(2)(a) of the
Rules”**

Source: Defence for Dominic Ongwen

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:**The Office of the Prosecutor**

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I. INTRODUCTION

1. The Defence for Dominic Ongwen ('Defence') requests from Trial Chamber IX's ('Chamber') leave to appeal its "Decision on Defence Request to submit Prior Recorded Testimony of D-0036 and related documents pursuant to Rule 68(2)(a) of the Rules" ('Impugned Decision').¹

2. The Defence requests leave to appeal the following issue arising from the Impugned Decision:

The Chamber used an improper standard by assessing the meaningfulness of the interviews conducted by the Office of the Prosecutor when determining whether the prior recorded testimony could be submitted into evidence through Rule 68(2)(a) of the Rules of Procedure and Evidence ('Issue').

3. The Defence asserts that the Chamber applied an incorrect standard by assessing the meaningfulness of the interviews by the Office of the Prosecutor ('Prosecution').² Meaningfulness is absent from Rule 68(2)(b) of the Rules of Procedure and Evidence ('RPE') and should not be taken into account when determining whether to accept prior recorded testimony pursuant to Rule 68(2)(a) of the RPE.

II. PROCEDURAL HISTORY

4. On 28 October 2019, the Defence filed its request "Defence Request to Add Eleven Items to its List of Evidence and Submission of Prior Recorded Testimony of UGA-D26-P-0036 pursuant to Rule 68(2)(a) of the Rules of Procedure and Evidence" ('Application').³ As the title denotes, the Defence requested to add 11 transcripts of prior recorded testimony to its list of evidence and to submit into evidence 19 transcripts of prior recorded testimony from UGA-D26-P-0036 ('D-0036' or 'Witness').⁴

5. On 6 November 2019, the Prosecution responded to the Defence's Application.⁵ The Prosecution requested that the Chamber reject the Defence's Application.⁶ For posterity, the

¹ ICC-02/04-01/15-1665.

² Impugned Decision, paras 8-11.

³ ICC-02/04-01/15-1650-Conf. A public redacted version was filed on 8 November 2019.

⁴ *Ibid.*

⁵ ICC-02/04-01/15-1656.

⁶ *Ibid.*

Prosecution did not oppose the inclusion of the 11 transcripts of prior recorded testimony of D-0036 onto the Defence's list of evidence.⁷

6. On 13 November 2019, the Chamber issued the Impugned Decision. The Chamber stated, "that the opportunity to examine the witness must be a meaningful one, mirroring as far as possible the parties' right to question the witness during his or her testimony during the trial proceedings."⁸ The Chamber rejected the Defence's Application.

III. APPLICABLE LAW

7. Pursuant to Article 82(1)(d) of Statute, either 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. The purpose of such procedure is to "pre-empt the repercussions of erroneous decisions on the fairness of the proceedings or the outcome of the trial".⁹ The Pre-Trial Chamber is vested with the power to certify the existence of an appealable issue,¹⁰ however when determining whether leave to appeal should be granted, the Pre-Trial Chamber must not justify or defend the correctness of its decision, but instead determine whether the issues presented significantly affect the fairness of the proceedings.¹¹

8. According to Rule 155(1) of the RPE, a party shall make a written application for leave to appeal to the Chamber that gave the decision, setting out the reasons for the request for leave to appeal. The application for leave to appeal shall state the name and number of the case or situation and shall specify the legal and/or factual reasons in support thereof, in accordance with Regulation 65(1) of the Regulations of the Court ('RoC'). It shall also specify the reasons warranting immediate resolution by the Appeals Chamber of the matter at issue.¹²

9. The Appeals Chamber has ruled that only an "issue" may form the subject-matter of an appealable decision, which it defined as "an identifiable subject or topic requiring a

⁷ *Ibid*, para. 3.

⁸ Impugned Decision, para. 8.

⁹ ICC-01/04-168, para. 19.

¹⁰ *Ibid.*, para. 20.

¹¹ See e.g. ICC-01/09-02/11-253, para. 28.

¹² Regulation 155 (2) of the RoC.

decision for its resolution, not merely a question over which there is disagreement or conflicting opinion”.¹³ Further, an issue is “a subject the resolution of which is essential for the determination of the matters arising in the judicial cause under examination” and may be “legal or factual or a mixed one”.¹⁴ The issue must be one apt to “significantly affect”, that is, in a material way, either the fair and expeditious conduct of the proceedings, or the outcome of the trial.¹⁵ In other words, the issue “must be one likely to have repercussions on either of these two elements of justice”.¹⁶

10. The Appeals Chamber has defined the term “fair” as being associated with the norms of a fair trial and corresponding human rights, as per Article 64(2) and 67(1) of the Statute.¹⁷ In particular, it noted that the “expeditious conduct of the proceedings in one form or another constitutes an attribute to a fair trial”.¹⁸ The term “proceedings” extends to proceedings prior and subsequent to the current proceedings.¹⁹

11. The Appeals Chamber also held that an issue will be appealable “where the possibility of error in an interlocutory or intermediate decision may have a bearing” on the outcome of the trial.²⁰ The Pre-Trial Chamber, when deciding on a request for leave to appeal, “must ponder the possible implications of a given issue being wrongly decided on the outcome of the case”, thereby forecasting the consequences of such an occurrence.²¹

12. Regarding the second aspect of a request for leave to appeal (the immediate resolution by the Appeals Chamber), the Appeals Chamber has held that this criterion will be satisfied if the relevant Chamber rules that an authoritative determination on the appeal would “move forward” the proceedings and “remove doubts about the correctness of the decision or map a course of action along the right lines”.²² The issue at stake must also be “such that its immediate resolution by the Appeals Chamber will settle the matter posing for decision through its authoritative determination, ridding thereby the judicial process of possible mistakes that might taint either the fairness of the proceedings or mar [*sic*] the outcome of the

¹³ ICC-01/04-168, para. 9.

¹⁴ *Ibid.*

¹⁵ *Ibid.*, para. 10.

¹⁶ *Ibid.*

¹⁷ *Ibid.*, para. 11.

¹⁸ *Ibid.*

¹⁹ *Ibid.*, para. 12.

²⁰ *Ibid.*, para. 13.

²¹ *Ibid.*, para. 13.

²² *Ibid.*, paras 14-15.

trial”.²³ The solving of the issue by the Appeals Chamber is aimed to “ensure that the proceedings follow the right course”.²⁴

IV. SUBMISSIONS

7. Pursuant to Article 82(1)(d), the Defence requests leave to appeal the following Issue:

The Chamber used an improper standard by assessing the meaningfulness of the interviews conducted by the Office of the Prosecutor when determining whether the prior recorded testimony could be submitted into evidence through Rule 68(2)(a) of the Rules of Procedure and Evidence.

a) The Issue arises from the Impugned Decision

8. The Issue arises from the Impugned Decision and is not a mere disagreement between the Chamber and Defence. The Issue hedges on whether the Prosecution’s interview of the Witness was “meaningful”.²⁵ The Defence argues that the term “meaningful” has not been applied to Prosecution requests for inclusion of prior recorded testimony, and thus, is not a requirement pursuant to Rule 68(2)(a) of the RPE.

9. There exists no requirement in Rule 68(2)(a) of the RPE that the examination be meaningful. In Rule 68 of the RPE, which subsumes approximately two pages of the RPEs, the word meaningful or any derivation thereof is not found. The Defence shall argue on appeal that meaningfulness is a subjective term and was not included in the original RPE or the 2013 amendments. Furthermore, the Defence shall demonstrate that issues related to reliability and veracity were discussed and included in the 2013 amendment, yet no such changes were made to Rule 68(2)(a) of the RPE.

10. The Defence will also argue on appeal that the Prosecution’s attempt to claim a lack of a meaningful interrogation of D-0036 falls short of problems related to reliability and veracity of the Witness. The Defence shall discuss about how the Prosecution relied upon this Witness during the Confirmation of Charges Hearing.²⁶ The Defence shall also discuss about how the examples to which the Prosecution selects are information collected long before the

²³ *Ibid.*, para. 14.

²⁴ *Ibid.*, para. 15.

²⁵ Impugned Decision, paras 10-11.

²⁶ ICC-02/04-01/15-375-Conf-AnxD, pp 17-18, items 670-684.

Prosecution interviewed the Witness in July 2015.²⁷ The Defence shall demonstrate how the Prosecution's claim of its lack of a meaningful examination of the Witness stems from its inept investigations, lack of proper organisation and/or its failure to perform a proper interview pursuant to Article 54(1) of the Rome Statute, and not from the lack of opportunity.

11. The Defence acknowledges that Article 69(4) of the Rome Statute grants the Chamber the power to "rule on the...admissibility of any evidence, taking into account...any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness..." The Defence shall argue that this is not dispositive to allowing the submission of the Witness's prior recorded testimony into evidence and that it does not require that the Prosecution's portion of the prior recorded testimony is meaningful. Coincidentally, nothing in the Rome Statute or RPE requires that parties exercise meaningful examinations; merely requires that the opportunity has been availed to both parties.

12. Finally, on appeal, the Defence shall argue how the element of "meaningful" has not been applied equally to the trial proceedings.²⁸ The Defence argued 6 July 2016 that the admission into evidence the transcripts from the Article 56 Hearings violated Mr Ongwen's rights, including his right to challenge testimony based on over 50,000 pages of material disclosed by the Prosecution since the Article 56 Hearings.²⁹ The Defence also notes that it wrote the following about being able to conduct meaningful examinations during the Article 56 Hearings:

[C]ross-examination by the Defence for the purpose of the Article 74 Judgment at a point where the charges have not been confirmed cannot be as effective as at a point where the Defence knows the charges and is able to conduct investigations to inform cross-examination. Moreover, it placed the Defence in a position where it had to take decisions in advance of the knowledge of the full-scope of the trial which placed it between a rock and a hard place: between missing an opportunity for questioning and taking positions on matters not fully informed of the scope of the charges and evidence.³⁰

13. The Issue outlined above is an issue which arises from the Impugned Decision. It is a derivation from the RPE and a derivation from the standards set by the Chamber to submit

²⁷ See ICC-02/04-01/15-1656, fn. 13. The Defence further notes that footnotes 14-16 contains citations of information available to the Prosecution during the early days of the case (2006) but chose to use different logbooks out of convenience.

²⁸ ICC-02/04-01/15-492, paras 20-27.

²⁹ *Ibid*, para. 25.

³⁰ *Ibid*, para. 23.

prior recorded testimony of Prosecution witnesses. The Defence requests leave to appeal the Issue as it arises from the Impugned Decision.

b) The Issue significantly affects the fair and expeditious conduct of the proceedings

14. The Issue significantly affects the fair and expeditious conduct of the proceedings. On appeal, the Defence shall argue that the term “fair”, as defined by the Appeals Chamber, depends heavily upon the fair trial rights of the Accused. On appeal, the Defence shall argue that “expeditious conduct” should also account for matters similar in context.

15. Firstly, the term fair, as described by the Appeals Chamber above, requires the Chamber to look at Articles 64(2) and 67(1) of the Rome Statute.³¹ The Defence shall argue that the Defence is not treated in full equality with the Prosecution. Different standards have been applied to the Issue than were applied in similar situations requested by the Prosecution, even when the Defence argued about its ability to conduct meaningful examinations.³² The Chamber categorically dismissed all challenges related to Article 67(1) rights in relation to the Article 56 Hearings in a rather quick strike of the keyboard.³³ The Chamber gave more consideration to the Prosecution’s alleged meaningful rights towards D-0036 than it did to the Defence’s Article 67(1) rights in the Article 56 Hearings.³⁴

16. This fairness is further compounded by the Chamber’s failure to delineate a well-reasoned decision in its refusal to allow the OTP Transcripts³⁵ onto the Defence’s list of evidence. The Prosecution did not oppose the addition,³⁶ and the sole reason for not allowing the addition was that the **second** request in the Defence’s motion was moot.³⁷ This reasoning cannot be any reasonable or fair foundation for a denial of this request for leave to appeal.

17. The Issue also significantly affects Mr Ongwen’s rights to present evidence pursuant to Articles 31(1)(a) and (d) of the Rome Statute. The Defence outlined contributions made by

³¹ ICC-01/04-168, para. 11.

³² See ICC-02/04-01/15-464, ICC-02/04-01/15-492 and ICC-02/04-01/15-520.

³³ ICC-02/04-01/15-520, para. 12.

³⁴ Compare Impugned Decision with ICC-02/04-01/15-520.

³⁵ UGA-OTP-0244-0007-R01, UGA-OTP-0244-0018-R01, UGA-OTP-0244-0040-R01, UGA-OTP-0244-0059-R01, UGA-OTP-0244-0075-R01, UGA-OTP-0244-0094-R01, UGA-OTP-0244-0103-R01, UGA-OTP-0244-0122-R01, UGA-OTP-0244-0142-R01, UGA-OTP-0244-0161-R01 and UGA-OTP-0244-0181-R01.

³⁶ ICC-02/04-01/15-1656, para. 3.

³⁷ *Ibid*, para. 12.

the witness, including threats of collective punishment by Joseph Kony³⁸ and Mr Ongwen's lack of mental growth from childhood to adulthood.³⁹ Failure to allow the Witness's prior recorded testimony violates Mr Ongwen's rights under the Rome Statute and Rule 79(3) of the RPE.

18. Secondly, the Issue affects the expeditiousness of the proceedings. As the Defence approaches the end of its presentation of evidence, it is imperative that Defence has its "fair shake in time" to request the inclusion of testimonial evidence pursuant to Rule 68(2)(a) of the RPE.

19. It is unfortunate that D-0036 revoked his agreement to testify at such a late stage in the proceedings. Had he given real indications of his intentions earlier, the Defence would have been arguing this at a time well before the end of its presentation of evidence. Material could have been used from his interviews during its questioning of other witnesses. As such, and because of the advanced stage of the proceedings, the Defence is left between the proverbial rock and a hard place. Because of this, the Defence is preserving this issue for any possible appeal at a later stage in the proceedings.

20. This Issue outlined in this submission shall be one which will be argued should an appeal by the Defence on an Article 74 judgment be necessary. The Defence is confident in this Issue and is confident that it affects the outcome of the trial. Failure to allow an appeal shall cause an unnecessary delay in the proceedings should Mr Ongwen be found guilty on any charge. As such, failure to allow an appeal on the Issue shall significantly affect the expeditiousness of the entire proceedings.

c) The Issue significantly affects the outcome of the trial

21. The Defence argues that the Issue would significantly affects the outcome of the trial. The information outlined in the Witness's prior recorded testimony, as argued by the Defence in the Application, offers significant insight into Mr Ongwen's alleged involvement with the

³⁸ Application, paras 24 and 26.

³⁹ See generally Application, para. 23. (Noting that within the prior recorded testimony, the Witness speaks of how Mr Ongwen fought without fear the entire time he knew him, which the Witness states is not what he observed from other persons who grew up in the LRA.)

Lukodi attack⁴⁰ and into the Defence's Article 31(1)(a) and Article 31(1)(d) affirmative defences.⁴¹

22. The Defence outlined in its submission how the Witness gave a first-hand account of his interrogation of Mr Ongwen about the Lukodi attack.⁴² As written in the Application, this information was elicited by the Prosecution and challenged by its investigators.⁴³ This is important information for the Chamber during its Article 74 deliberations. Failure to give due consideration to the Witness's interrogation of Mr Ongwen denies Mr Ongwen of the right to present evidence pursuant to Article 67(1)(e) of the Rome Statute.

23. Similarly, the failure to allow the submission of the Witness's prior recorded testimony into evidence violates Mr Ongwen's rights pursuant to Articles 31(1)(a) and (d) of the Rome Statute and Rule 79(3) of the RPE.

24. The Defence gave notification on 9 August 2016 that the Defence intended to rely upon the Witness for the purpose of its duress defence.⁴⁴ Similarly, the Defence gave notification of a mental disease or defect defence on the same day.⁴⁵ The Witness testified about both defences, and the Defence noted these admissions in its Application.⁴⁶

25. On appeal, the Defence shall demonstrate how the failure to allow the submission into evidence of the Witness's prior recorded testimony because of the application of a meaningful interview standard deprives Mr Ongwen of valuable evidence which would significantly affect the outcome of the trial.

d) An immediate resolution of the Issue will materially advance the proceedings

26. An immediately resolution of the Issue by the Appeals Chamber will materially advance the proceedings. The Defence argues that an incorrect standard for submission of prior recorded testimony pursuant to Rule 68(2)(a) of the RPE has been applied in the Impugned Decision.

⁴⁰ *Ibid*, para. 23.

⁴¹ *Ibid*, paras 24-26.

⁴² *Ibid*, paras 23.

⁴³ *Ibid*.

⁴⁴ ICC-02/04-01/15-517-Conf-AnxA, p. 2.

⁴⁵ ICC-02/04-01/15-518-Conf.

⁴⁶ Application, paras 23-26.

27. The Issue raised for appeal is a novel question. As noted by the Defence in the Application, the use of Rule 68(2)(a) has been extremely limited at the Court.⁴⁷ Other than when it was used by Trial Chamber I in *Lubanga*,⁴⁸ the use of Rule 68(2)(a) of the RPE is rather non-existent.⁴⁹

28. An immediate resolution by the Appeals Chamber will ensure that proper evidence is or is not considered during the Article 74 deliberations. This shall materially advance the proceedings by ensuring, at least on this Issue, that the Chamber does not exclude significant evidence during its Article 74 deliberations.

e) It is immaterial to this request that the OTP Transcripts were not included on the Defence's list of evidence

29. Finally, the Defence argues that it is immaterial that the OTP Transcripts were not added to the Defence's list of evidence. As the Defence wrote above, the Prosecution did not object to the inclusion of the OTP Transcripts to the Defence's list of evidence.⁵⁰ While the 30 September 2019 date had passed, this is not dispositive of inclusion of additional items onto the Defence's list of evidence.⁵¹

30. Noting that the Prosecution objected to the items added by the Chamber's "Decision on Defence Request to Add Three Items to its List of Evidence,"⁵² and the Chamber excluded one based on legal issues,⁵³ but two items were included.⁵⁴ Considering the tests outlined by the Chamber for inclusion past deadlines, the Defence avers that said OTP Transcripts would have been added to the Defence's list of evidence.

31. For the abovementioned reasons, the Defence argues that because the Chamber rendered it moot for the inclusion of the OTP Transcripts because of using the "meaningful standard" in relation to Rule 68(2)(a), it is not dispositive for the purpose of this request and granting leave to appeal.

⁴⁷ See *ibid*, paras 29-64.

⁴⁸ *Ibid*, para. 54.

⁴⁹ The Defence notes that there was an attempt to use this in the *Bemba* main case, but ultimately it was chosen to use the current Rule 68(3) of the RPE.

⁵⁰ ICC-02/04-01/15-1656, para. 3.

⁵¹ See ICC-02/04-01/15-1661.

⁵² *Ibid*, para. 4.

⁵³ *Ibid*, para. 9.

⁵⁴ *Ibid*, paras 8 and 10.

V. RELIEF

32. The Defence respectfully requests that Trial Chamber IX grant the Defence leave to appeal the following issue:

The Chamber used an improper standard by assessing the meaningfulness of the interviews conducted by the Office of the Prosecutor when determining whether the prior recorded testimony could be submitted into evidence through Rule 68(2)(a) of the Rules of Procedure and Evidence.

Respectfully submitted,



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

Dated this 19th day of November, 2019

At The Hague, Netherlands