

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

No.: **ICC-02/04-01/15**
Date: **26 November 2019**

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 Denying the
Submission of Testimony of D-0036 Pursuant to Rule 68(2)(a) of the Rules**

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

The Office of the Prosecutor

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**The Office of Public Counsel for
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Counsel Support Section

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Detention Section

**Victims Participation and Reparations
Section**

Others

Trial Chamber IX of the International Criminal Court, in the case of *The Prosecutor v. Dominic Ongwen*, having regard to Article 82(1)(d) of the Rome Statute (the ‘Statute’) and Regulation 23 *bis*(3) of the Regulations of the Court, issues the following ‘Decision on Defence Request for Leave to Appeal the Decision Denying the Submission of Testimony of D-0036 Pursuant to Rule 68(2)(a) of the Rules’.

I. Procedural history and submissions

1. On 28 October 2019, the Defence filed a request, pursuant to Article 69(2) of the Statute and Rule 68(2)(a) of the Rules of Procedure and Evidence (the ‘Rules’), seeking to add the transcripts of interviews related to witness D-0036 to its List of Evidence and to submit these as prior recorded testimony (the ‘Initial Request’).¹
2. On 13 November 2019, the Chamber rejected the submission of the aforesaid evidence related to D-0036 (the ‘Impugned Decision’).²
3. On 19 November 2019, the Defence requested leave to appeal the Impugned Decision (the ‘Request’).³ It seeks 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 (the ‘Issue’).⁴

4. On 22 November 2019, the Office of the Prosecutor (the ‘Prosecution’) filed its response to the Request (the ‘Response’).⁵ It submits that the Request should be rejected since the Issue is not appealable.⁶ In its view, the Defence merely disagrees with the Impugned Decision.⁷

¹ Defence Requests 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, ICC-02/04-01/15-1650-Conf. A public redacted version was filed on 8 November 2019, ICC-02/04-01/15-1650-Red.

² Decision on Defence Request to Submit the Prior Recorded Testimony of D-0036 and related documents pursuant to Rule 68(2)(a) of the Rules, ICC-02/04-01/15-1665.

³ 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”, ICC-02/04-01/15-1674.

⁴ Request, ICC-02/04-01/15-1674, para. 2.

⁵ Prosecution’s Response to Defence Request for Leave to Appeal Decision ICC-02/04-01/15-1665, ICC-02/04-01/15-1676-Conf. By way of e-mail on that same date, the Prosecution requested that the Response be reclassified as ‘Public’.

⁶ Response, ICC-02/04-01/15-1676-Conf, para. 1.

⁷ Response, ICC-02/04-01/15-1676-Conf, para. 3.

II. Analysis

5. The Chamber notes that the Prosecution filed a confidential Response by mistake and requests its reclassification as ‘public’. Accordingly, the Chamber directs the Registry to reclassify the Response as ‘public’.
6. The Chamber recalls the interpretation of Article 82(1)(d) of the Statute as set out in detail previously.⁸
7. The Chamber considers that the Defence has misconstrued the Impugned Decision. Unlike prior decisions taken under Rule 68 of the Rules, particularly sub-rules 68(2)(b) and 68(3), the Initial Request sought submission pursuant to sub-rule 68(2)(a), which has distinct requirements. Furthermore, the Defence distorts the approach taken by the Chamber in prior rulings under sub-rules 68(2)(b) and 68(3), which have equally applied to both Prosecution and Defence witnesses and not, as purported,⁹ solely in favour of the Prosecution.
8. The Issue identified by the Defence considers the following finding of the Chamber out of context. In general, the Chamber found that ‘the opportunity to examine’ under Rule 68(2)(a) of the Rules ‘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’.¹⁰
9. However, the Chamber did not, as averred by the Defence,¹¹ make a determination on the basis of a new or additional requirement not foreseen in Rule 68(2)(a) of the Rules. The Chamber’s decision was based on the main criterion of this provision, namely the parties’ ‘opportunity to examine the witness during the recording’ applied to the specific evidence of D-0036. The Chamber never assessed the ‘meaningfulness of the

⁸ 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 Prosecution Request to Introduce Evidence of Defence Witnesses via Rule 68(2)(b), 5 September 2018, ICC-02/04-01/15-1331, para. 8.

⁹ Request, ICC-02/04-01/15-1674, para. 8.

¹⁰ Impugned Decision, ICC-02/04-01/15-1665, para. 8.

¹¹ Request, ICC-02/04-01/15-1674, para. 9.

interviews conducted by the [Prosecution]’;¹² it was the *opportunity* to examine that was deemed insufficiently meaningful.

10. In the Impugned Decision the Chamber decided that mere presence is clearly insufficient’.¹³ Specifically as regards the interviews with D-0036, the Chamber determined that ‘both parties questioning the witness in consecutive interviews is not in itself sufficient to fulfil the requirements’ under Rule 68(2)(a) of the Rules.¹⁴ It also determined that the ‘opportunity to examine’ criterion was not met. First, only in one of the interviews were representatives of both parties present. Second, even in that one interview in which both parties were present, the applicable protocol prevented the Prosecution from asking questions to the witness.¹⁵
11. Accordingly, the Chamber finds that the Issue is not appealable because it did not arise from the Impugned Decision.

¹² *Contra* Request, ICC-02/04-01/15-1674, para. 2.

¹³ Impugned Decision, ICC-02/04-01/15-1665, para. 10.

¹⁴ Impugned Decision, ICC-02/04-01/15-1665, para. 11.

¹⁵ Impugned Decision, ICC-02/04-01/15-1665, para. 10.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

REJECTS the Request; and

DIRECTS the Registry to re-classify filing ICC-02/04-01/15-1676-Conf as ‘public’.

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



Judge Bertram Schmitt, Presiding Judge



Judge Péter Kovács



Judge Raul C. Pangalangan

Dated 26 November 2019

At The Hague, The Netherlands