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**International
Criminal
Court**

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Date: 16 August 2016

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 Request to Admit Evidence
Preserved Under Article 56 of the Statute” (ICC-02/04-01/15-520)**

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. On 10 August 2016, Trial Chamber IX ('Trial Chamber') issued its decision¹ on the Prosecution request to admit the transcripts, recordings, and other associated material collected by the Single Judge of Pre-Trial Chamber II pursuant to Article 56 ('Impugned Decision').
2. The Defence hereby seeks leave to appeal this decision pursuant to Article 82(1)(d) of the statute on four issues, namely:
 - a. Whether the admission of Article 56 material is an exception permitted pursuant to Article 69(2);
 - b. Whether Articles 69(3) and (4) take precedence over the requirements of Article 69(2);
 - c. The precise scope of Rule 68 of the Rules of Procedure and Evidence ('RPE') with respects to Article 56; and
 - d. Whether the Trial Chamber can sever its assessment of admissibility from its assessment of relevance pursuant to Article 69(4).
3. These related but separate issues have the potential to impact upon outcome of trial, and in doing so, will impact upon its fairness and expeditiousness. Immediate Appeals Chamber attention is merited at this stage as it will materially advance the proceedings.

II. APPLICABLE LAW

4. 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

¹ ICC-02/04-01/15-520.

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”.² The Pre-Trial Chamber is vested with the power to certify the existence of an appealable issue,³ 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.⁴

5. According to Rule 155(1) of the Rules of Procedure and Evidence (‘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.⁵
6. 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 decision for its resolution, not merely a question over which there is disagreement or conflicting opinion”.⁶ 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

² ICC-01/04-168, para. 19.

³ *Ibid.*, para. 20.

⁴ *See e.g.* ICC-01/09-02/11-253, para. 28.

⁵ Regulation 155 (2) of the RoC.

⁶ ICC-01/04-168, para. 9.

one”.⁷ 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.⁸ In other words, the issue “must be one likely to have repercussions on either of these two elements of justice”.⁹

7. 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.¹⁰ In particular, it noted that the “expeditious conduct of the proceedings in one form or another constitutes an attribute to a fair trial”.¹¹ The term “proceedings” extends to proceedings prior and subsequent to the current proceedings.¹²
8. 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.¹³ 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.¹⁴
9. 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”.¹⁵ The issue at stake must also be “such that its immediate

⁷ *Ibid.*

⁸ *Ibid.*, para. 10.

⁹ *Ibid.*

¹⁰ *Ibid.*, para. 11.

¹¹ *Ibid.*

¹² *Ibid.*, para. 12.

¹³ *Ibid.*, para. 13.

¹⁴ *Ibid.*, para. 13.

¹⁵ *Ibid.*, paras 14-15.

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 trial”.¹⁶ The solving of the issue by the Appeals Chamber is aimed to “ensure that the proceedings follow the right course”.¹⁷

III. SUBMISSIONS

10. The Trial Chamber summarily dismissed the Defence arguments concerning the lack of an avenue for the admission of the Article 56 material.¹⁸ It outlined the most essential evidential provisions, but without discussing the priority of their application concluded that these provisions made clear that the material is admissible.

11. This terse reasoning leads to the emergence of a cluster of issues related to the order and priority of application of these key evidentiary provisions and how they relate to each other. Different applications of the provisions lead to different legal outcomes. This makes the way in which the Trial Chamber applied them essential to the particular disposition of the Defence arguments.

A. The issues arise from the Impugned Decision

1. *Whether the admission of Article 56 material is an exception permitted pursuant to Article 69(2)*

12. Article 56(4) states that “[t]he admissibility of evidence preserved or collected for trial pursuant to this article, or the record thereof, shall be governed at trial by article 69” which the Trial Chamber noted.¹⁹ Similarly, the Trial Chamber

¹⁶ *Ibid.*, para. 14.

¹⁷ *Ibid.*, para. 15.

¹⁸ Impugned Decision, para. 6.

¹⁹ *Ibid.*

noted that Article 69(2) “may permit the recorded testimony of a witness, as well as the introduction of transcripts, subject to the Statute and Rules”.²⁰

13. Article 69(2) opens with the requirement that “The testimony of a witness *at trial* shall be given in person, except to the extent provided by the measures set forth in article 68 or in the Rules of Procedure and Evidence” (emphasis added). Article 56(4) does not provide an indication that it is an exception to this requirement, but rather material collected under it is “governed” by Article 69(2). Article 56(4) also makes no distinction as to which part of Article 69 is relevant.
14. There is thus an issue as to whether Article 56(3) is (a) a clarification as to the applicable rules – in other words, in case of doubt, the evidence can be, or must be, evaluated under Article 69(2), but still subject to the controls of Article 69(2), or alternatively (b) material collected under Article 56 is a special kind of evidence that is an example of the exceptions specified in the “Statute and Rules” in the second sentence of Article 69(2). In other words the material collected under Article 56 – whether documentary, prior recorded testimony, or other – is simply evaluated under Article 69(4).
15. Although an interpretation of the Impugned Decision suggests the Trial Chamber adopted the latter understanding, it is not clear from the decision itself. This issue thus arises out of the decision.

2. *Whether Article 69(3) and (4) takes precedence over the requirements of Article 69(2)*

16. The Trial Chamber stated that:

Under Article 69(2), the Court may permit the recorded testimony of a witness, as well as the introduction of transcripts, subject to the Statute and Rules. Article 69(3) permits the parties to submit

²⁰ *Ibid.*

relevant evidence, while Article 69(4) provides that the Court may rule on the admissibility of any evidence.²¹

17. This passage suggests that (a) the Trial Chamber has discretion to admit prior recorded testimony outside the requirements of Rule 68, (b) the parties can submit this material, and (c) the Trial Chamber can rule upon the admissibility and relevance under Article 69(4). No mention is made by the Trial Chamber of the requirement that the default rule is that testimony must be at trial unless authorised by the Statute and RPE.
18. In its recent *Ruto and Sang case* decision on the retroactivity of Rule 68, the Appeals Chamber rejected the Prosecution's argument that material that was not admissible under the prior Rule 68 could have been admitted through Article 69(2) and (4).²² It thus discussed the possibility of admitting prior recorded testimony simply through Article 69. It noted that:

If those requirements [of Rule 68] are not met, recourse to article 69 (2) and (4) of the Statute is not permissible given that such a course of action would render rule 68 of the Rules meaningless and would enable the party seeking the introduction of the evidence to avoid the stringency of the latter provision.²³

As the Article 56 material is a form of prior recorded testimony, this jurisprudence appears relevant and decisive to the Article 69(4) limb of the Trial Chamber's reasoning.

19. As regards, the *Ruto and Sang* Prosecution's argument that the material could have been admitted through Article 69(3), the Appeals Chamber refused to address the issue as it had not been addressed by the Trial Chamber in the decision that it was reviewing.²⁴ While the Appeals Chamber appears to have been willing to consider the issue under the correct circumstances, it refused to

²¹ *Ibid.*

²² ICC-01/09-01/11-2024, paras 82-86.

²³ *Ibid.*, para. 86.

²⁴ *Ibid.*, para. 89.

do so in that judgement because it had not been considered in the decision it was reviewing.

20. In considering that the material could be submitted through Article 69(3), bypassing Rule 68, the Impugned Decision appears – though not explicitly – to have taken a position on this issue was brought before the Appeals Chamber. It may also have taken a position contrary to that of the Appeals Chamber on the Article 69(4) avenue.

21. Thus, the question of whether Article 69(3) or (4) can bypass the requirements of Article 69(2) as regard prior recorded testimony arises from the Impugned Decision.

3. *The precise scope and nature of Rule 68(1) of the Rules of Procedure and Evidence ('RPE') with respects to Article 56*

22. In the context of discussing the exceptions to the principle of orality as enshrined in Article 69(2), in footnote 20, the Impugned Decision states: “Notably, Rule 68 of the Rules does not apply to evidence collected under Article 56 of the Statute. See Rule 68(1) of Rules.”

23. Rule 68(1) states:

When the Pre-Trial Chamber has not taken measures under article 56, the Trial Chamber may, in accordance with article 69, paragraphs 2 and 4, and after hearing the parties, allow the introduction of previously recorded audio or video testimony of a witness, or the transcript.

24. Rule 68 either exhaustively regulates the exception to orality through prior recorded testimony or it does not. The Appeals Chamber hints that there may be other ways to admit prior recorded testimony, but never fully articulates

how.²⁵ Footnote 20 of the Impugned Decision also indicates the Trial Chamber's view that Rule 68 is not exhaustive.

25. The plain reading of the opening sentence of Rule 68(1) is not that prior recorded testimony under Article 56 material is not subject to the requirements of Rule 68, but rather that Article 56 prior recorded testimony is not permitted through Rule 68.
 26. Other than Rule 68, there is no other rule that explicitly enables the introduction of prior recorded testimony. However, the Impugned Decision implies that there is another rule for bypassing the principle of orality in Article 69(2), but does not state it.
 27. If Rule 68 comprehensively covers the subject matter of prior recorded testimony, then the Article 56 material cannot be admitted by the terms of Rule 68. If Rule 68 is not exhaustive, then a legal basis has not been fully articulated that enables the submission of that which seems prohibited by the plain text of Article 69(2).
 28. In either eventuality, the issue of the scope of Rule 68 arises from the decision because either the evidence is improperly admitted through Rule 68 or an unclear legal basis has been applied to admit prior recorded testimony.
4. *Whether the Trial Chamber can sever its assessment of admissibility from its assessment of relevance pursuant to Article 69(4)*
29. The Impugned Decision ruled upon the admissibility of the evidence pursuant to Article 69(4). This is implicit in the discussion of the application of Article 56,²⁶ but clear when the Trial Chamber examines the challenges to legality raised by the Defence under Article 69(7).²⁷ The opening of Article 69(7) states

²⁵ ICC-01/05-01/08-1386 (OA6), para. 77 (“[t]he most relevant provision [in respect of “the introduction of documents or written transcripts”] in the Rules of Procedure and Evidence is rule 68”).

²⁶ Impugned Decision, para. 6.

²⁷ *Ibid.*, paras 7-13.

that “Evidence obtained by means of a violation of this Statute or internationally recognized human rights shall not be admissible”. Thus, if the Trial Chamber reviewed the Article 69(7) challenges then it was ruling upon its admissibility.

30. This conclusion is further strengthened by the fact that admissibility is not mentioned where the Trial Chamber indicated in its dispositive section that “the assessment of the relevance and probative value”²⁸ is to be deferred to the judgement. The Trial Chamber also considered the material “submitted”.²⁹

31. The Appeals Chamber in the Rule 68 Bemba judgement stated that:

As borne out by the use of the word "may" in article 69 (4), the Trial Chamber has the power to rule or not on relevance or admissibility when evidence is submitted to the Chamber. Consequently, the Trial Chamber may rule on the relevance and/or admissibility of each item of evidence when it is submitted, and then determine the weight to be attached to the evidence at the end of the trial.³⁰

32. Both the text of Article 69(4) and the Appeals Chamber jurisprudence appear to consider the discretion to rule upon the admissibility and relevance as a single exercise. In deferring its assessment of the relevance to the judgement, the Trial Chamber has taken a decision that charts a different course.

33. The Impugned Decision thus gives rise to the issue of whether the Article 69(4) assessment can be severed or whether the discretion only extends to concurrently assessing one or both.

B. The issues impact upon the fairness, expeditiousness, and outcome of the trial

34. The four issues concern the interpretation of the Court’s core evidential provisions. Legal certainty and correctness in this area is an essential aspect of

²⁸ *Ibid*, pg. 7.

²⁹ *Ibid*.

³⁰ ICC-01/05-01/08-1386 (OA6), para. 37

a fair trial and uncertainty in this regard has the potential to cause delays and pre-emptive litigation.

35. As the Defence noted in its response to the Prosecution Article 56 request, the Article 56 evidence is core to the charges and even minor legal errors have the potential to impact upon the trial since it forms much of the core evidence for an entire category of charges.

C. Appellate consideration of the issues at this stage will materially advance the proceedings

36. The issues in the present request for leave have the potential to send the proceedings into confused an uncharted territory. While this is true for the present Article 56 material, particularly as regards to issues 2 and 3, the issues touch upon trial issues wider than the present decision. Finally, as the Defence continues to prepare for the various defences it may raise, clarity as regards to these issues – whether knowing that the evidence is admitted or not admitted - will assist the Defence to focus its arguments and energies towards live issues rather than those that may be subsequently overturned or subject to change.

IV. CONCLUSION

37. The Defence respectfully requests Trial Chamber IX to grant it leave to appeal the four issues described above.

Respectfully submitted,



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Hon. Krispus Ayena Odongo
On behalf of Dominic Ongwen

Dated this 15th day of August, 2016

At Den Haag, Netherlands