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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 Dominic Ongwen's request for leave to appeal the
"Decision on Request to Admit Evidence Preserved Under Article 56 of the
Statute"**

Source: Office of the Prosecutor

Document to be notified in accordance with regulation 31 of the Regulations of the Court to:

The Office of the Prosecutor

Ms Fatou Bensouda, Prosecutor
Mr James Stewart
Mr Benjamin Gumpert

Counsel for the Defence

Mr Krispus Ayena Odongo
Mr Charles Achaleke Taku

Legal Representatives of Victims

Mr Joseph Akwenyu Manoba
Mr Francisco Cox
Ms Paolina Massidda

Legal Representatives of Applicants

Unrepresented Victims

Unrepresented Applicants for Participation/Reparation

The Office of Public Counsel for Victims

Ms Paolina Massidda
Ms Caroline Walter

The Office of Public Counsel for the Defence

States Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Mr Nigel Verrill

Detention Section

Victims Participation and Reparations Other Section

Introduction

1. The *Ongwen* Defence's request for leave to appeal the Decision recognising the formal submission of the article 56 evidence¹ should be rejected. The Application is tangential to the Decision. Not only does the Application wrongly challenge the Decision as one where the Chamber conclusively determined that the article 56 evidence was admitted, it fails to acknowledge the Chamber's established system to determine the admissibility of evidence in the case. Moreover, although the Defence itself had requested the Chamber to defer its decision to admit the article 56 evidence,² it now—counter-intuitively—fails to recognise that the Chamber has indeed done so.

2. None of the four alleged issues³ arise from the Decision. The First, Second and Third Issues wrongly assume and variously speculate on a decision to “admit” the article 56 evidence—when none was made. The Fourth Issue challenges the Chamber's preference to defer admissibility determinations in the case—the subject matter of a previous decision. Further, none of the Issues show any significant impact on the fairness and expedition of the proceedings, or the outcome of the trial. Moreover, the Appeals Chamber's immediate resolution of the Issues would not materially advance the proceedings. The Application fails to meet the article 82(1)(d) test for leave to appeal.

¹ ICC-02/04-01/15-522 (“Application”); ICC-02/04-01/15-520 (“Decision”).

² ICC-02/04-01/15-492 (“Defence response on article 56”), para. 49.

³ Here, “Issues”.

Submissions

3. The Application must fail: none of the Issues “arise” in “the judicial cause under examination.”⁴ Rather, the Issues misstate the Decision, and identify peripheral and/or premature concerns.

i. The First, Second and Third Issues do not arise from the Decision

4. The Defence describes three Issues as:

- a. whether the admission of article 56 material is an exception permitted pursuant to article 69(2) (“First Issue”);⁵
- b. whether articles 69(3) and (4) take precedence over the requirements of article 69(2) (“Second Issue”);⁶
- c. the precise scope of rule 68 of the Rules of Procedure and Evidence (“RPE”) with respect to article 56 (“Third Issue”).⁷

All three Issues misstate the Decision. None emanate from it.

5. Although the Defence speculates on “the admission” of the article 56 evidence⁸ and challenges “[t]he way in which the Trial Chamber applied [the key evidentiary provisions] and how they relate to each other”,⁹ this conjecture is irrelevant to the Chamber’s ultimate disposition. Indeed, the Chamber did not conclusively “admit” the article 56 evidence. Rather, as the Decision’s plain text reveals, the Chamber recognised the article 56 evidence as being “formally submitted”, but deferred its assessment of the evidence’s relevance and probative value until the stage of its deliberations for the article 74 judgement.¹⁰ In the absence of a categorical decision

⁴ See ICC-01/04-168 OA3, para. 9.

⁵ Application, paras. 2(a), 12-15.

⁶ Application, paras. 2(b), 16-21.

⁷ Application, paras. 2(c), 22-28.

⁸ Application, paras. 12-33.

⁹ Application, paras. 10-11.

¹⁰ Decision, para. 7, disposition.

on the admissibility of the article 56 evidence, the Defence's arguments contesting the alleged admissibility of this evidence are premature.

6. The Defence misreads the Decision. As the Decision makes clear and "[i]n line with [the Chamber's] general rule" on deferring its final determinations on admissibility, the Chamber only addressed the Defence's objections relevant to article 69(7).¹¹ The Chamber then found that the [a]rticle 56 evidence "was not obtained by means of a violation of the Statute" and that violations of internationally recognised human rights were neither alleged nor apparent.¹² The Chamber made no determination on the admissibility of the evidence *per se*.

7. To the extent that the Defence challenges the Chamber's dismissal of its argument that "[t]here is no statutory avenue [to admit] the article 56 evidence",¹³ the Defence's claim contradicts the Statute's plain text and logic. Not only does article 56(4) explicitly provide that such evidence preserved for trial is governed at trial by article 69 and given appropriate weight at that time,¹⁴ the Chamber found that this was so.¹⁵ The Defence impermissibly revisits its earlier failed arguments, without showing appealable error.¹⁶

8. Finally, the Defence's claim questioning "the scope of rule 68"¹⁷ or whether "[a]rticles 69(3) or (4) can bypass the requirements of [a]rticle 69(2)"¹⁸ is hypothetical. The Chamber's disposition or pertinent analysis simply did not engage with these issues, and as such, they lie outside the Decision's remit. The Defence's arguments on the scope of various legal provisions and case law are not germane to the Decision. Nor do they even appear to support the Defence's position.¹⁹

¹¹ Decision, para. 7. *See also* Decision, paras. 8-15.

¹² Decision, para. 15.

¹³ Decision, para. 6. *See e.g.*, Application, paras. 12-15.

¹⁴ Article 56(4).

¹⁵ Decision, para. 6; *Contra* Application, paras. 14-15.

¹⁶ *Compare e.g.*, Application, paras. 12-28 and Defence response on article 56, paras. 5-19.

¹⁷ Application, paras. 22-28.

¹⁸ Application, paras. 16-21.

¹⁹ *Contra* Application, paras. 16-28.

9. For these reasons, the First, Second and Third Issues do not arise from the Decision. They should be dismissed.

ii. The Fourth Issue does not arise from the Decision

10. The Fourth Issue—“whether the Trial Chamber can sever its assessment of admissibility from its assessment of relevance pursuant to [a]rticle 69(4)”²⁰—does not emanate from the Decision. This Issue is no more than a veiled and untimely challenge to the Chamber’s already established preference of deferring its admissibility determinations to the end of trial—the subject of an earlier decision.²¹ Indeed, the Defence did not seek leave to appeal the Initial Directions on the Conduct of the Proceedings (issued on 13 July 2016) when it would have been appropriate to do so; it cannot do so now.

11. In contesting the deferral of the Chamber’s assessment of the evidence’s relevance,²² the Defence does no more than merely disagree with the settled practice in this case. As the Initial Directions on the Conduct of the Proceedings establishes,

“[w]hen the participants formally submit evidence during trial, *all the Chamber will generally do is recognise their formal submission*. The Chamber will consider the relevance, probative value and potential prejudice of each item of evidence submitted when deliberating the judgment[...].”²³

12. Moreover, in claiming that the Chamber ruled on “admissibility” when it reviewed the article 69(7) challenges,²⁴ the Defence offers no more than conjecture. Nor does the plain text of article 69(7)²⁵ or the Decision²⁶ support such an argument.

²⁰ Application, paras. 29-33.

²¹ See ICC-02/04-01/15-497 (“Initial Directions on the Conduct of the Proceedings”), paras. 24-26.

²² Application, paras. 32-33.

²³ Initial Directions on the Conduct of the Proceedings, para. 24 (emphasis added).

²⁴ Application, para. 29.

²⁵ Article 69(7) states “[e]vidence obtained by means of a violation of this Statute or internationally recognised human rights *shall not be admissible* [...]”(emphasis added). See also Initial Directions on the Conduct of the

Nor is the Defence's reliance on the plain text of article 69(4) and case law to claim that "[the Decision] charts a different course" apposite.²⁷

13. For these reasons, the Fourth Issue does not arise from the Decision. It should be dismissed.

iii. The remaining article 82(1)(d) criteria are not met

14. Article 82(1)(d) criteria are cumulative: a failure to fulfil any one of the criteria is fatal to any application for leave to appeal.²⁸ Since none of the Issues derive from the Decision, they should be dismissed without further consideration.

15. In addition, the Issues do not meet the remaining article 82(1)(d) criteria.

16. The Defence fails to show any impact on the fair *and* expeditious conduct of the proceedings.²⁹ Apart from claiming that "[t]he [a]rticle 56 evidence is core to the charges and even minor legal errors have the potential to impact upon the trial[...]",³⁰ the Defence advances no argument. Nor has it shown that such error exists. To the contrary—that the Chamber has not yet conclusively admitted the article 56 evidence renders any challenges to such admission premature and speculative at this stage. Moreover, that the Defence itself had requested that the decision [on the admissibility of the article 56 evidence] be deferred³¹ undermines its present allegations of unfairness. Further, the Defence fails to demonstrate the impact on the expedition of the proceedings. There is no such impact.

Proceedings, para. 26, noting "[t]he Chamber always retains the discretion to rule on admissibility related issues upfront when appropriate, particularly when procedural bars are raised which may foreclose consideration of the standard admissibility criteria."

²⁶ Decision, paras. 7-15.

²⁷ *Contra* Application, paras. 31-32.

²⁸ ICC-02/11-01/15-117, para. 26. ICC-02/11-01/15-132, para. 5. *See also* ICC-01/05-01/08-3273, para. 8, stating that the article 82(1)(d) criteria is cumulative, and "[f]ailure to fulfil one or more of these criteria is fatal to an application for leave to appeal."

²⁹ Application, paras. 34-35 (emphasis added).

³⁰ Application, para. 35.

³¹ Defence response on article 56, para. 49; Decision, para. 4.

17. Likewise, the Defence fails to argue any impact on the outcome of the trial. There can be no such impact. Merely because the article 56 evidence has been formally submitted, and is thus available to the Chamber to consider, does not yet directly affect the outcome of the trial. To claim otherwise is premature and improperly speculates on the outcome of the Chamber's consideration of the totality of the available evidence in its article 74 decision.

18. Finally, the Appeals Chamber's immediate resolution of the Issues will not materially advance the proceedings. The Issues are speculative, and as the Defence concedes, "[t]ouch upon trial issues wider than the present decision."³² To engage the Appeals Chamber's review at this juncture would require it to assume an impermissible advisory function.³³ Nor—in view of the Decision's precise ambit and analysis—is the Appeals Chamber's intervention necessary to correct the Defence's misapprehension of the Decision, or offer "clarity [on whether] evidence is admitted or not admitted".³⁴

³² Application, para. 36.

³³ ICC-01/04-01/07-1497 OA8, para. 38.

³⁴ *Contra* Application, para. 36.

Conclusion

19. For these reasons, the Application fails to meet the article 82(1)(d) criteria for leave to appeal. The Application should therefore be rejected.



Fatou Bensouda, Prosecutor

Dated 18th day of August 2016
At The Hague, The Netherlands