



Original: English

No.: ICC-02/04-01/15  
Date: 9 September 2016

**TRIAL CHAMBER IX**

**Before:** Judge Bertram Schmitt, Presiding Judge  
Judge Peter Kovacs  
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 Article 56  
Evidence**

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

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Participation/Reparation**

**The Office of Public Counsel for  
Victims**

**The Office of Public Counsel for the  
Defence**

**States Representatives**

**Amicus Curiae**

**REGISTRY**

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**Detention Section**

**Victims Participation and Reparations  
Section**

**Other**

**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 Article 56 Evidence.

### **A. Background and Submissions**

1. In September and November 2015, the Single Judge of Pre-Trial Chamber II, pursuant to Article 56 of the Statute, heard witnesses P-99, P-101, P-214, P-226, P-227, P-235 and P-236 ('Witnesses') via video-link.<sup>1</sup>
2. On 13 June 2016, the Office of the Prosecutor ('Prosecution') requested that the Chamber admit the transcripts and audio-visual recordings of the Witnesses' testimonies, as well as related items used during their examinations ('Article 56 Evidence').<sup>2</sup>
3. On 10 August 2016, the Chamber issued the 'Decision on Request to Admit Evidence Preserved under Article 56 of the Statute' ('Impugned Decision'),<sup>3</sup> in which it recognised the Article 56 Evidence as formally submitted.<sup>4</sup>
4. On 16 August 2016, the defence for Dominic Ongwen ('Defence') filed its request for leave to appeal the Impugned Decision ('Request').<sup>5</sup> The Defence raises four

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<sup>1</sup> P226 and P227 testified between 15 and 19 September 2015. See ICC-02/04-01/15-T-8-Conf; ICC-02/04-01/15-T-9-Conf; ICC-02/04-01/15-T-10-Conf; ICC-02/04-01/15-T-11-Conf. Between 9 and 17 November 2015, P-99, P-101, P-214, P-235 and P-236 testified. See ICC-02/04-01/15-T-13-Conf; ICC-02/04-01/15-T-14-Conf; ICC-02/04-01/15-T-15-Conf; ICC-02/04-01/15-T-16-Conf; ICC-02/04-01/15-T-17-Conf. For the audio-visual recordings of these hearings, see ICC-02/04-01/15-351-Conf-Anx1; ICC-02/04-01/15-351-Conf-Anx2; ICC-02/04-01/15-354-Conf-Anx1; ICC-02/04-01/15-354-Conf-Anx2; ICC-02/04-01/15-355-Conf-Anx1; ICC-02/04-01/15-358-Conf-Anx1; ICC-02/04-01/15-358-Conf-Anx2; ICC-02/04-01/15-356-Conf-Anx1; ICC-02/04-01/15-357-Conf-Anx1; ICC-02/04-01/15-352-Conf-Anx1.

<sup>2</sup> Prosecution's request to admit evidence preserved under Article 56 of the Statute, 13 June 2016, ICC-02/04-01/15-464, with two public annexes.

<sup>3</sup> Decision on Request to Admit Evidence Preserved Under Article 56 of the Statute, 10 August 2016, ICC-02/04-01/15-520.

<sup>4</sup> Impugned Decision, ICC-02/04-01/15-520, page 9.

issues ('Issues'): (i) 'whether the admission of Article 56 material is an exception permitted pursuant to Article 69(2)' of the Statute ('First Issue');<sup>6</sup> (ii) whether Article 69(3) and (4) of the Statute take precedence over the requirements of Article 69(2)' of the Statute ('Second Issue');<sup>7</sup> (iii) 'the precise scope and nature of Rule 68(1) of the Rules with respect to Article 56' of the Statute ('Third Issue');<sup>8</sup> and (iv) 'whether the Trial Chamber can sever its assessment of admissibility from its assessment of relevance pursuant to Article 69(4)' of the Statute ('Fourth Issue').<sup>9</sup> The Defence submits that the Issues are appealable pursuant to Article 82(1)(d) of the Statute.<sup>10</sup> The Defence also argues that the Issues 'have the potential to impact upon the outcome of the trial, and in doing so, will impact upon its fairness and expeditiousness.<sup>11</sup> The Defence further submits that immediate Appeals Chamber attention is merited at this stage as it will advance the proceedings.<sup>12</sup>

5. On 18 August 2016, the Prosecution submitted its response to the Request ('Prosecution Response'),<sup>13</sup> in which it argues that the Request fails to meet the criteria under Article 82(1)(d) of the Statute and should therefore be rejected.<sup>14</sup>
6. On 22 August 2016, the Common Legal Representative of Victims submitted its response to the Request,<sup>15</sup> where it asks that the Chamber dismiss the Request.<sup>16</sup>

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<sup>5</sup> 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), 16 August 2016, ICC-02/04-01/15-522.

<sup>6</sup> Request, ICC-02/04-01/15-522, para. 2.

<sup>7</sup> Request, ICC-02/04-01/15-522, para. 2.

<sup>8</sup> Request, ICC-02/04-01/15-522, para. 2.

<sup>9</sup> Request, ICC-02/04-01/15-522, para. 2.

<sup>10</sup> Request, ICC-02/04-01/15-522, paras 2 and 12-33.

<sup>11</sup> Request, ICC-02/04-01/15-522, paras 2-3 and 34-35.

<sup>12</sup> Request, ICC-02/04-01/15-522, paras 3 and 36.

<sup>13</sup> 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', 18 August 2016, ICC-02/04-01/15-526.

<sup>14</sup> Prosecution Response, ICC-02/04-01/15-526, para. 19.

## B. Analysis

7. The Chamber recalls the applicable law relating to Article 82(1)(d) of the Statute, set out in a previous decision.<sup>17</sup>
8. At the outset, the Chamber recalls its ruling in its Initial Directions on the Conduct of the Proceedings ('Initial Directions'), where it stated that:<sup>18</sup>

[a]s a general rule, this Chamber will defer its assessment of the admissibility of the evidence until deliberating its judgment pursuant to Article 74(2) of the Statute. When 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 [...].

9. Accordingly, the Chamber did not rule on the relevance or probative value of the Article 56 Evidence in the Impugned Decision. Rather, it recognised the Article 56 Evidence as formally submitted and, pursuant to its Initial Directions, the standard evidentiary criteria will be considered when deliberating the judgment pursuant to Article 74(2) of the Statute.

### *First Issue*

10. With respect to the First Issue, the Defence submits that the Impugned Decision is unclear as to the interpretation that the Chamber adopted of the relevant provisions related to the admission of evidence.<sup>19</sup> The Chamber finds that the Defence fails to advance an argument as to how the purported ambiguity constitutes an appealable issue. The Defence does not articulate how the resolution of the First Issue alleged is 'essential for the determination of matters

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<sup>15</sup> Common Legal Representative's response to the 'Defence Request for Leave to Appeal the 'Decision on Request to Admit Evidence Preserved Under Article 56 of the Statute (ICC-02/04-01/15-520)' 22 August 2016, ICC-02/04-01/15-527.

<sup>16</sup> OPCV Response, ICC-02/04-01/15-527, page 8.

<sup>17</sup> See 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.

<sup>18</sup> Initial Directions on the Conduct of the Proceedings, 13 July 2016, ICC-02/04-01/15-497, para. 24.

<sup>19</sup> Request, ICC-02/04-01/15-522, paras 12-15.

arising in the judicial cause under examination'.<sup>20</sup> Accordingly, the Chamber finds that the First Issue is insufficiently substantiated to qualify as an appealable issue.

### *Second Issue*

11. As to the Second Issue, the Defence argues that by allowing the submission of the Article 56 Evidence through Article 69(3) of the Statute, the Impugned Decision either 'bypasses' Rule 68 of the Rules or applies an unclear legal basis.<sup>21</sup> It submits that the question of whether Article 69(3) or (4) can bypass the requirements of Article 69(2) of the Statute as regard prior recorded testimony arises from the Impugned Decision.<sup>22</sup>
12. First, the Chamber repeats that in the Impugned Decision, in accordance with its outlined approach to the admission of evidence,<sup>23</sup> it only addressed the arguments raised by the Defence which invoked procedural bars against the admission of the Article 56 Evidence.<sup>24</sup> No decision on the precedence of the sub-parts of Article 69 of the Statute was made in the Impugned Decision. Consequently, the Second Issue does not arise from the Impugned Decision and thus, does not constitute an appealable issue.

### *Third Issue*

13. In its arguments as to the Third Issue, the Defence avers that Rule 68 of the Rules is the provision regulating the introduction of prior recorded testimony and that, by admitting the Article 56 Evidence, the Impugned Decision raises the issue of

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<sup>20</sup> See Appeals Chamber, *Situation in the Democratic Republic of the Congo*, Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006, ICC-01/04-168, para. 9.

<sup>21</sup> Request, ICC-02/04-01/15-522, paras 16-21.

<sup>22</sup> Request, ICC-02/04-01/15-522, para. 21.

<sup>23</sup> Initial Directions, 13 June 2016, ICC-01/05-01/13-497, paras 24-26.

<sup>24</sup> In accordance with the outlined approach, see Initial Directions, ICC-01/05-01/13-497, para. 26.

the 'the scope of Rule 68'.<sup>25</sup> The Defence also claims that the Third Issue 'touch[es] upon trial issues wider than the present decision'.<sup>26</sup>

14. The Third Issue seeks clarification of a legal basis, Rule 68 of the Rules, other than the one actually used in the Impugned Decision, i.e. Article 56 of the Statute. As the Prosecution Response correctly notes, '[t]o engage the Appeals Chamber's review at this juncture would require it to assume an impermissible advisory function'.<sup>27</sup> The Third Issue may be of general interest or may arise in future trial proceedings; however, this is not sufficient for the purposes of granting leave to appeal. In light of the above, the Chamber finds that resolution by the Appeals Chamber of the Third Issue does not materially advance the proceedings.

#### *Fourth Issue*

15. Finally, regarding the Fourth Issue, the Defence submits that in the Impugned Decision the Chamber ruled on the admissibility of the Article 56 Evidence while explicitly deferring the assessment of relevance and probative value until the deliberation of the judgment. This, in view of the Defence, gives rise to the appealable issue.
16. As noted above, the Chamber's decision that it would rule on procedural bars upfront and defer the standard evidentiary criteria was made in the Initial Directions and not the Impugned Decision. Having elected not to request leave to appeal the Initial Directions, the Defence cannot seek leave to appeal it now. In light of the above, the Chamber concludes that the Fourth Issue alleged by the Defence does not arise from the Impugned Decision, and accordingly, does not constitute an appealable issue.

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<sup>25</sup> Request, ICC-02/04-01/15-522, para. 22-28.

<sup>26</sup> Request, ICC-02/04-01/15-522, para. 36.

<sup>27</sup> Prosecution Response, ICC-02/04-01/15-526, para. 18.

**FOR THE FOREGOING REASONS, THE CHAMBER HEREBY  
REJECTS** the Request.

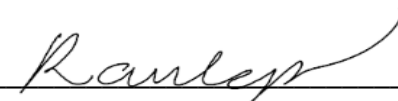
Done in both English and French, the English version being authoritative.



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**Judge Bertram Schmitt, Presiding Judge**



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**Judge Peter Kovacs**



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**Judge Raul C. Pangalangan**

Dated 9 September 2016

At The Hague, The Netherlands