

**Cour
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**International
Criminal
Court**

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No.: **ICC-02/04-01/15**

Date: **21 August 2018**

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

**Defence Request for Leave to Appeal “Decision on Prosecution Request to Introduce
Evidence of Defence Witnesses via Rule 68(2)(b)”**

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. Pursuant to Article 82(1)(d) of the Rome Statute ('Statute'), the Defence for Dominic Ongwen ('Defence') seeks leave to appeal the Trial Chamber IX's ('Trial Chamber') "Decision on Prosecution Request to Introduce Evidence of Defence Witnesses via Rule 68(2)(b)" ('Rule 68(2)(b) Decision').¹
2. The Defence avers that the Trial Chamber's decision to allow for a non-calling party (the Prosecution) to request for the introduction of prior recorded testimony of Defence witness D-0132² under Rule 68(2)(b) of the Rules of Procedure and Evidence ('RPE') is erroneous as a matter of law and fact. It is the Defence position that the Trial Chamber's misinterpretation of the facts leading to the *Katanga* decision³ and the ultimate outcome of Rule 68(2)(b) Decision sets a concerning precedent that allows for the Prosecution to dictate the way in which the Defence must present its evidence. Further, there is no indication that if it were not for the Prosecution request, the Defence Witness D-0132 would not be testifying *viva voce*.
3. The three requirements for granting an interlocutory appeal pursuant to Article 82(1)(d) of the Statute are satisfied in respect to one issue hereinafter identified: i) the issue for which appellate resolution is sought arise out of Rule 68(2)(b) Decision and is essential for the correct determination of Rule 68(2)(b) Decision; ii) the issue significantly affects the fair and expeditious conduct of the proceedings against Mr Ongwen, or the outcome of the *Ongwen* trial; and iii) an immediate resolution of the issue by the Appeals Chamber may materially advance the proceedings by setting the correct application of Rule 68(2)(b) of the RPE and ensuring that the Defence preparation of the *viva voce* testimony of D-0132 is not impeded.
4. Finally, the Trial Chamber held that it assumes the appearance of Defence witnesses to go *smoothly*, or it will take appropriate action to further the fair and expeditious conduct, including further *proprio motu* Rule 68(2)(b) rulings.⁴ The Defence considers this veiled threat, framed within the meaning of fair and expeditious conduct of the proceedings, to put an immense pressure on the Defence. This is also presumptuous without a supporting factual basis and amounts to a violation of Mr Ongwen's right to adequate time for the preparation of the

¹ ICC-02/04-01/15-1322-Red.

² UGA-D26-0025-0021.

³ Rule 68(2)(b) Decision, para. 6, and footnote 14; *See also*, ICC-01/04-01/07-2954.

⁴ Rule 68(2)(b) Decision, para. 25.

defence under Article 67(1)(b) of the Statute and also his right to obtain attendance and examination of witnesses on his behalf under Article 67(1)(e) of the Statute.

II. APPLICABLE LAW

5. Pursuant to Article 82(1)(d) of the 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 Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.” The purpose of such a procedure is to “pre-empt the repercussions of erroneous decisions on the fairness of the proceedings or the outcome of the trial.”⁵ The Chamber is vested with the power to certify the existence of an appealable issue.⁶ However, when determining whether leave to appeal should be granted, the Chamber must not justify or defend the correctness of its decision, but instead determine whether the issue presented significantly affects the fairness of the proceedings.⁷
6. 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.”⁸ This application must also “specify the reasons warranting immediate resolution by the Appeals Chamber of the matter at issue.”⁹
7. 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.”¹⁰ 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.”¹¹ The issue must be one apt to “significantly affect” the fair and expeditious conduct of the proceedings or the outcome of the trial.¹² In other words, the issue

⁵ ICC-01/04-168, para. 19.

⁶ ICC-01/04-168, para. 20.

⁷ See e.g. ICC-01/09-02/11-253, para. 28.

⁸ Regulation 65(1) of the Regulations of the Court (‘RoC’)

⁹ Rule 155(1) of the RPE.

¹⁰ ICC-01/04-168, para. 9.

¹¹ ICC-01/04-168, para. 9.

¹² ICC-01/04-168, para. 10.

“must be one likely to have repercussions on either of these two elements of justice.”¹³

8. The Appeals Chamber has defined the term “fair” as being associated with the norms of a fair trial and corresponding human rights, as per Articles 64(2) and Article 67(1) of the Statute.¹⁴ In particular, the Appeals Chamber noted that the “expeditious conduct of the proceedings in one form or another constitutes an attribute to a fair trial.”¹⁵ The term “proceedings” extends to proceedings prior and subsequent to the current proceedings.¹⁶
9. When determining whether a request for leave to appeal should be granted, the Trial Chamber must not justify or defend the correctness of its decision, but instead focus on determining whether the issue presented significantly affects the fairness of the proceedings.¹⁷ Mr Ongwen has the right to a reasoned statement¹⁸ and “reasoned statement of the Trial Chamber’s findings on the evidence and conclusions” must be provided.¹⁹ A reasoned statement includes a “holistic evaluation and weighing of all the evidence taken together in relation to the fact at issue.”²⁰
10. The Appeals Chamber also held 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.²¹ The 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.²²
11. Regarding the third aspect of a request for leave to appeal (the immediate resolution by the Appeals Chamber), the Appeals Chamber held 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.”²³ 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

¹³ ICC-01/04-168, para. 10.

¹⁴ ICC-01/04-168, para. 11.

¹⁵ ICC-01/04-168, para. 11.

¹⁶ ICC-01/04-168, para. 12.

¹⁷ *See e.g.*, ICC-02/09-02/11-253, para. 28.

¹⁸ ICC-01/05-01/13-2275-Red, para. 1540.

¹⁹ Article 74(5) of the Statute.

²⁰ ICC-01/04-01/06-3121-Red, para. 22.

²¹ ICC-01/04-168, para. 13.

²² ICC-01/04-168, para. 13.

²³ ICC-01/04-168, paras 14-15.

taint either the fairness of the proceedings or the outcome of the trial.”²⁴ By resolving the issue, the Appeals Chamber ensures “that the proceedings follow the right course.”²⁵

III. SUBMISSIONS

12. The Defence seeks leave to appeal the following issue arising from Rule 68(2)(b) Decision:

Issue: Whether the Trial Chamber erred in law and fact by holding that Rule 68 of the RPE enables a non-calling party to make a Rule 68 request for a witness called by the other party

The issue is an appealable issue that arises from Rule 68(2)(b) Decision

13. This issue arises from the holding of the Trial Chamber that Rule 68 of the RPE enables a non-calling party to make an application *via* Rule 68 of the RPE on behalf of a witness called by the calling party. In particular, the Trial Chamber held that

Nothing in the wording or structure of Rule 68 of the Rules suggests that a party cannot make a Rule 68 request solely because the prior recorded testimony stems from a witness who is being called by another party or participant.²⁶

14. To support the above cited holding, the Trial Chamber relies on a single decision, stating the following

In fact, a decision relied upon by the Defence in its Response (Trial Chamber II, *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on Defence Request to Admit into Evidence Entirety of Document DRC-OTP-1017-0572, 25 May 2011, ICC-01/04-01/07-2954) concerned a situation where a defence team made a Rule 68(b) request (what is now Rule 68(3) of the Rules) in respect of a witness who was called by the Prosecution.²⁷

15. Firstly, it is important to point out that in the abovementioned *Katanga* decision, the witness concerned was not called by the Prosecution, but by the Defence.²⁸ Briefly, regarding the facts that form the basis of the *Katanga* decision, during the cross-examination of Defence witness

²⁴ ICC-01/06-168, para. 14.

²⁵ ICC-01/04-168, para. 15.

²⁶ Rule 68(2)(b) Decision, para. 6.

²⁷ Rule 68(2)(b) Decision, page 5, para. 6, footnote 14; *See also*, ICC-01/04-01/07-2954.

²⁸ The witness concerned in the *Katanga* Decision is witness P-236; see ICC-01/04-01/07-2954, para. 1, The transcripts cited within this Decision refers to the witness as DRC-D02-P-0236/DRC-D03-P-0011, see for example ICC-01/04-01/07-T-248-ENG ET WT. For more clarity, see also ICC-01/04-01/07-T-248-ENG ET WT, page 47, lines 1 to 2 where Mr Macdonald is quoted saying “The witness is being called by Mr. Hooper and the Kilenda team”. *See also*, ICC-01/04-01/07-T-243-Red-ENG WT, page 6, lines 1 to 4.

D02-P-0236, the Prosecution requested the witness to read a portion of a prior recorded statement, previously given to the Prosecution; this was done in silence.²⁹

16. Secondly, the Defence team for Mr Katanga did not mention any request pursuant to Rule 68(3) of the RPE in their filing to the Trial Chamber II.³⁰ After this portion was read in silence by the witness, Trial Chamber II submitted the portion into evidence for the completeness of the trial record.³¹ The Defence firstly made an oral request to include the entire document instead of just the portion read³² and then made a request in writing³³; neither of the publicly available requests made by the Defence mention Rule 68 of the RPE.³⁴
17. Thirdly, as pointed out by this Trial Chamber, the *Katanga* decision concerned Rule 68(3) of the RPE and not Rule 68(2)(b) of the RPE.³⁵ The considerations for submitting a witness *via* Rule 68(3) and 68(2)(b) of the RPE clearly differ. Rule 68(3) of the RPE gives the opportunity for the Prosecution, Defence and the Chamber to examine the witness orally, whereas Rule 68(2)(b) of the RPE strips away the chance of oral examination. The Trial Chamber did not cite any other case law to support its finding that a non-calling party can request that a witness called by the other party be submitted *via* Rule 68(2)(b) of the RPE.
18. The Defence does not dispute that the Trial Chamber can introduce its witnesses *proprio motu* *via* Rule 68(2)(b) of the RPE.³⁶ However, what it does dispute is the legal interpretation that Rule 68(2)(b) of the RPE enables a non-calling party, on its own accord, to request the introduction of a witness called by the other party *via* Rule 68(2)(b) of the RPE.³⁷
19. The error in law and the lack of legal authority cited by the Trial Chamber to support its finding that Rule 68(2)(b) of the RPE allows for a non-calling party to make a request for a witness

²⁹ ICC-01/04-01/07-2954, para. 1. See also ICC-01/04-01/07-T-247-ENG-ET WT, p. 27 to 28.

³⁰ ICC-01/04-01/07-2839-Corr.

³¹ ICC-01/04-01/07-2954, para. 6, (“The Chamber emphasises, [...] that the excerpt of the prior recorded statement of P-236 was only allowed into evidence because it was not read aloud. The normal practice before this Chamber is for the parties to read quotes from previous statements into the trial record. In this particular instance, witness P-236 was asked to read one page of his prior recorded statement in silence and was subsequently asked to comment. The Chamber therefore had no alternative but to admit the relevant excerpt into evidence, as otherwise it would not have been part of the trial record. The excerpt was therefore admitted as if it had been read out loud by the witness.”).

³² ICC-01/04-01/07-T-248-ENG ET WT, p. 46-50.

³³ ICC-01/04-01/07-2839-Corr.

³⁴ It was mentioned by the Prosecution, see ICC-01/04-01/07-2850, para. 6 to 9.

³⁵ Rule 68(2)(b) Decision, page 5, para. 6, footnote 14.

³⁶ Rule 68(2)(b) Decision, para. 7.

³⁷ Rule 68(2)(b) Decision, para. 6 and 11.

called by the other party creates unclear jurisprudence. This precedent is an appealable issue because the intervention from the Appeals Chamber will determine whether the non-calling party can seek to introduce the other party's witness through Rule 68(2)(b) of the RPE, or not. Thus avoiding unnecessary litigation and streamlining the proceedings at this Court.

20. Therefore Rule 68(2)(b) Decision amounts to an error of law and fact, causes prejudice to Mr Ongwen and warrants the review of the Appeals Chamber.

The issue affects the fair and expeditious conduct of the proceedings against Mr Ongwen, or, the outcome of the Ongwen trial

21. The prejudice of submitting D-0132's prior recorded testimony into evidence *via* Rule 68(2)(b) of the RPE is founded in the Trial Chamber's consideration of the Prosecution's request and a subsequent incorrect application of Rule 68(2)(b) of the RPE. This is especially so given that the Trial Chamber ordered the submission of D-0132's prior recorded testimony into evidence only after the Prosecution requested for it. This is in stark contrast with the Trial Chamber's holding that "[t]he opposing party cannot dictate the way in which evidence must be presented."³⁸
22. The Trial Chamber presents its order to submit D-0132 into evidence as a *proprio motu* Rule 68(2)(b) ruling. However, there is no indication that the Trial Chamber would have made such ruling without the Prosecution's request. In fact, on 4 June 2018, the Defence notified the Trial Chamber and the Prosecution that it intends to call D-0132 as a *viva voce* witness. On the same day, the Defence disclosed to the Trial Chamber and the Prosecution D-0132's prior recorded testimony.³⁹ The Trial Chamber had access to D-0132's prior recorded testimony for one month and a half and it never ordered *proprio motu* to introduce this statement into evidence. The order came only after the Prosecution's request.
23. The fact that Rule 68(2)(b) Decision was taken only after the Prosecution's request and that the Trial Chamber misinterpreted the facts leading to the *Katanga* decision to support its ruling jeopardises the fairness of the *Ongwen* case proceedings. An erroneous application of a legal provision with respect to material related to the Defence witness prejudices the Defence preparation, and thus violates Mr Ongwen's rights under Article 67(1)(b) and (e) of the Statute.

³⁸ Rule 68(2)(b) Decision, para. 5.

³⁹ UGA-D26-0025-0021.

Further, an erroneous legal interpretation by the Trial Chamber will lead to lengthier proceedings, harm the expeditiousness of proceedings and lead to additional litigation.

24. The Defence also notes the Trial Chamber's finding that it "fails to see how the question of whether prior recorded testimony is introduced via Rule 68 of the Rules or not affects" Mr Ongwen's right to have adequate time for the preparation of the defence under Article 67(1)(b) of the Statute.⁴⁰
25. Contrary to the Trial Chamber, the Defence avers that the Prosecution's request and the Trial Chamber's order violate this right. The Prosecution based its request on the Trial Chamber's holding that "the entire purpose of Rule 68(2)(b) of the Rules is to identify certain situations where it is not necessary to examine witnesses while preserving the fair and expeditious conduct of the proceedings."⁴¹ The Trial Chamber's aim to run the proceedings expeditiously is well-intended; however, it is necessary that this intention is balanced in light of Mr Ongwen's right to adequate time for the preparation of the defence. This is not the case here. By depriving Mr Ongwen of his right to have adequate time to examine Witness D-0132 live, the Trial Chamber violated this right.
26. Therefore, the Defence is of the view that the abovementioned issue significantly affects the fair and expeditious conduct of the proceedings against Mr Ongwen, specifically his right to obtain the attendance and examination of witnesses on his behalf⁴² and his right to adequate time for the preparation of the defence.⁴³

An immediate resolution of the issue may materially advance the Ongwen case proceedings

27. As held by the Appeals Chamber, the purpose of interlocutory appeal is "[to remove] doubts about the correctness of a decision or [to map] a course of actions along the rights lines", which "provides a safety net for the integrity of the proceedings."⁴⁴ In the present case, there is no such safety net since Rule 68(2)(b) Decision contains an error that allows – following the Prosecution request – for the introduction of D-0132's prior recorded testimony into evidence.

⁴⁰ Rule 68(2)(b) Decision, para. 12.

⁴¹ ICC-02/04-01/15-1310-Red, para. 8; *See also*, ICC-02/04-01/15-596, para. 7, citing in part also to Trial Chamber VII, Bemba *et al.*, Decision on Prosecution Rule 68(2) and (3) Requests, ICC-01/05-01/13-1478-red-Corr, para. 106.

⁴² Article 67(1)(e) of the Statute.

⁴³ Article 67(1)(b) of the Statute.

⁴⁴ ICC-01/04-168, para. 15.

This prejudices Mr Ongwen, because the Prosecution request dictates the way in which the Defence must present its evidence and the Trial Chamber accepts it.


28. This legal error ought to be immediately resolved by the Appeals Chamber. Immediate resolution will allow the Defence to call its Witness D-0132 as a *viva voce* witness, as it originally intended to. The immediate resolution will also allow the Defence to arrange all the necessary logistics and prepare the live testimony of D-0132 on time, which will further the fair and expeditious conduct of the proceedings. Finally, immediate resolution will also allow for the Defence to properly prepare for the presentation of its defence commencing 18 September 2018.⁴⁵ The Appeals Chamber's resolution of this issue will therefore materially advance the *Ongwen* case proceedings.

IV. RELIEF SOUGHT

29. For the reasons stated above, the Defence respectfully requests that leave is granted by the Trial Chamber to appeal the following issue:

Issue: Whether the Trial Chamber erred in law and fact by holding that Rule 68 of the RPE enables a non-calling party to make a Rule 68 request for a witness called by the other party.

Respectfully submitted,



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

Dated this 21th day of August, 2018

At Gulu, Uganda

⁴⁵ ICC-02/04-01/15-1275, p. 4.