

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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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 Response to 'Prosecution's request for leave to appeal the "Decision on
Protocols to be Adopted at Trial"' (ICC-02/04-01/15-511)**

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. SUBMISSIONS

1. On 1 August 2016, the Prosecution filed a request for leave to appeal¹ ('Leave Request') Trial Chamber IX's ('Trial Chamber') decision² that rejected the prior Prosecution request to be authorised to conduct witness preparation sessions prior to witness testimony. In simple terms, the Prosecution sought leave on two grounds: (1) that the decision was taken on a wrong basis because the Trial Chamber did not understand the Prosecution's original request and (2) that the Prosecution's assessment as to whether witness preparation is required that should carry more or the most weight. The Defence requests that the Trial Chamber dismiss the Leave Request as it:

- a. Misunderstands the Impugned Decision;
- b. Miss-apprehends the rules of the court; and in fact
- c. Merely comprises disagreements with the Trial Chamber.

2. Flaws (a) and (b) go to the question of whether the purported issues arise from the decision and flaw (c) impacts each criteria of assessment under Article 82(1)(d). Even assuming the Prosecution makes out its purported issues, the remaining criteria of Article 82(1)(d) – impact upon the fairness, expeditiousness, and outcome of the proceedings requiring Appeals Chamber consideration – are not met.

A. The first issue does not arise from the Impugned Decision

3. The first issue does not arise from the decision because it is a mere disagreement. In the Prosecution's view the Trial Chamber, *inter alia*, did not

¹ ICC-02/04-01/15-511.

² ICC-02/04-01/15-504 ('Impugned Decision').

“properly [consider] the circumscribed procedure sought by the Prosecution”,³ “focused on the entirely different practice of “witness proofing””⁴ and “effectively disregarded the Prosecution’s caveat that it was advancing a different, and restricted, interpretation of the procedure”.⁵

4. Paragraph 10 of the Impugned Decision addresses the Prosecution’s first purported issue head-on. There, the Trial Chamber stated:

This Chamber shares [the concerns of the *Lubanga* Trial Chamber]. Witness preparation *has an inherent risk* of approaching a rehearsal of the witness’s testimony. This risk is caused by the calling party who, *irrespective of his/her intentions*, can unwittingly transmit expectations to the witness. *No matter how narrowly tailored the Prosecution frames the practice, witness preparation still involves extended meetings with adversarial parties imminently before testimony is given.* This *inherent risk* could certainly be addressed by a witness preparation regime with ample safeguards and heavily circumscribed roles for the parties. However, the Chamber considers that the resulting regime would need to be so limited in character that it would reduce the calling party’s role to little more than what the VWU can do in the witness familiarisation process. (emphasis added)

5. In other words, the Trial Chamber did not misunderstand the Prosecution’s arguments or new proposal, it merely disagreed with the Prosecution’s optimistic assessment of its proposed measures.
6. The emphasis in the quoted paragraph above makes clear that the Trial Chamber considered the Prosecution’s arguments and reached a different conclusion about the proposal. It was not simply responding to the *Lubanga* definition as claimed by the Prosecution. In particular, the Trial Chamber considered that the measures were not sufficiently different to escape the *inherent risk* of meeting and discussing statements, potential exhibits, and themes of the upcoming testimony. Despite the Prosecution’s caveat, the Trial

³ Impugned Decision, para. 8.

⁴ Leave Request, para. 9.

⁵ Leave Request, para. 11.

Chamber disagreed with the Prosecution's assessment that the *Lubanga* proposal and the *Ongwen* proposal were sufficiently distinct to ease its own concerns.

7. In conclusion, the Prosecution's first issue should be rejected as a mere disagreement with the Trial Chamber.

B. The second issue does not arise from the Impugned Decision

8. With its second issue, the Prosecution effectively contends three points, that: (a) it has a right to *prepare* evidence as it sees fit which is inextricably connected to its right to *present* it,⁶ (b) that the Trial Chamber denied the Prosecution the right to present evidence,⁷ and (c) that the Trial Chamber *should* defer to the Prosecution, and in some circumstances, *it might have* to defer to the Prosecution's assessment of fairness in the search for the truth.⁸
9. No parts of the purported issue have a clear legal basis which could form "an identifiable subject or topic requiring a decision for its resolution".⁹ Point (a) lacks a clear legal basis and is a mere disagreement, point (b) is premised upon a misunderstanding of the decision, and point (c) is based upon a reading of the statute that ignores that, on matters such as witness preparation, the Trial Chamber has the last say.

⁶ Leave Request, para. 20 (the Chamber rejected "in principle [...] the Prosecution's right to prepare and present evidence in a manner it deems best suited to establish the truth").

⁷ Leave Request, para. 20.

⁸ Leave Request, para. 22.

⁹ ICC-01/04-168 (OA3), para. 9.

1. *The Prosecution disagrees with the Trial Chamber's application of the statute*

10. While the Statute does address preparation¹⁰ – particularly for the Accused – consideration of Article 70 and the myriad references to fairness to the Accused make it clear that this must be done within the law and in a manner to protect the rights of the Accused. In other words, the ways of preparing a case are circumscribed by the Statute.
11. The Trial Chamber's duty to preserve fairness under Article 64(2) places it as the arbiter of the scope of permissible preparation. The Prosecution's original request did not explain why the Prosecution's assessment takes legal precedence on this issue.
12. It thus could not form the basis of an issue that was essential to the determination of request before the Trial Chamber and the Leave Request on this point is merely a disagreement with the Trial Chamber's decision.

2. *The Impugned Decision does not reject the Prosecution's right to present evidence as it sees fit*

13. The Prosecution's original request and Leave Request conflates a right to *prepare* evidence with a right to *present* evidence. If strictly construed, preparation and presentation are clearly two different acts. It does not follow that a right to present evidence creates a completely open-ended right to prepare it.
14. The Impugned Decision does not interfere with the presentation of evidence – strictly construed – and the Prosecution does not explain how the decision curtails: what, who, how, when, or why the Prosecution presents particular

¹⁰ Article 69(3) states that "[t]he parties may submit evidence relevant to the case, in accordance with article 64" which permits the parties to present their case. Additionally Article 54(3)(a) and (b) roughly speaking enables the Prosecution to collect and present evidence and the Accused has a right under Article 67(1)(e) to present admissible evidence and witnesses and prepare a Defence under Article 67(1)(b).

evidence. Nothing in the decision impacts upon the *manner* of presentation. The only plausible restriction that the decision imposes is one on “distortive effects”¹¹ on the truth. Despite this, the Prosecution states unequivocally in two places that the Trial Chamber denied the Prosecution’s “right”.¹²

15. This misunderstanding of the decision, or miss-characterisation of it or the Statute, should lead the Trial Chamber to reject this issue for appeal. This Prosecution’s disagreement or incorrect claim is a pre-condition for its argument that the Trial Chamber should have shown more deference to it.

3. *The Leave Request miss-apprehends Article 64 and Rule 140 of the Rules of Procedure and Evidence (‘RPE’)*

16. The Prosecution argues that the Trial Chamber should have balanced its rights against the obligation to search for the truth of the Trial Chamber,¹³ and moreover, it states that “the Chamber appeared to consider that any such right, in all instances, must necessarily be subordinated to its own discretion and duty to establish the truth”.¹⁴ In other words, in some cases, the Prosecution’s assertion takes priority over the assessment of the Trial Chamber.
17. Putting aside that the Article 64(2) phrase “[t]he Trial Chamber shall ensure that a trial is fair” makes clear that ultimate responsibility lies with the Trial Chamber, both the original Prosecution request and the Leave Request fail to explain the legal authority that places the Prosecution’s assessment of the requirements of a fair trial over that of the Trial Chamber.

¹¹ Impugned Decision, para. 9.

¹² Impugned Decision, para. 21 (“summarily dismissing the existence of the Prosecution’s right”); and para. 23 (“the Chamber wrongly evaluated the Defence submissions, when it denied the Prosecution’s right.”).

¹³ Leave Request, para. 22.

¹⁴ Leave Request, para. 22.

18. The Trial Chamber took its decision with reference to “Article 64(2) and 3(a) of the Rome Statute and Rule 140” of the RPE, and Rule 140(1) cross-references Article 64(8)(b). The Prosecution does not seem to dispute that these are the correct legal bases. While there is overlap between the scope of the rules, all three legal bases make clear that the final determination is to be made by the Trial Chamber.
19. Firstly, Article 64(3)(a) requires the Trial Chamber to “confer” with the parties upon assignment of the case. The Trial Chamber is obliged to adopt those “procedures” which are “necessary” for the fair and expeditious conduct of proceedings. This creates a right of consultation for the parties, but even if the Prosecution and Defence agree on the necessity of a procedure, this does not oblige the Trial Chamber to accept the procedure as “necessary” and, moreover, where the parties disagree – as on the issue of Witness Preparation – only the Trial Chamber can break the procedural impasse.
20. Secondly, Rule 140(1) makes reference to Article 64(8)(b), which states that the Trial Chamber “may give directions for the conduct of proceedings” at trial. This power is discretionary and permissive. Nothing in that provision appears to oblige the Trial Chamber to follow the Prosecution’s determination.
21. Thirdly, Rule 140(1)’s text suggests that Article 64(8)’s application is not only after the start of trial. Sub-rule (1) contemplates a situation where firstly the Presiding Judge has not given directions under Article 64(8)(b) on the presentation of evidence and secondly the parties have sought, but failed, to agree on a manner of presentation of evidence. The slim likelihood that a trial would progress to after the opening statements without any schedule or conduct guidance suggests that both Rule 140(1) and Article 64(8)(b) were not conceived of as relevant only after the start of trial. This is confirmed by the

practice of the court.¹⁵ Under Rule 140(1), the Trial Chamber is empowered to issue directions where the parties do not agree. In other words, the Trial Chamber's view takes precedence.

22. Given that there is not a legal basis for the Prosecution to overrule the Trial Chamber on trial conduct issues, and given that the Prosecution has not advanced arguments to this issue, this aspect of the second issue does not have merit and should be rejected.

C. The Leave Request is a disguised disagreement with the Impugned Decision and fails to satisfy the Article 82(1)(d) criteria

23. While the Defence does not disagree with the claims that “[a]n article 82(1)(d) decision is merely procedural, limited to an impartial and objective assessment of whether the proposed issues meet the criteria”¹⁶, the first issue falls clearly into those arguments that should be rejected for the reason characterised by the Appeals Chamber as “merely a question over which there is disagreement or conflicting opinion”¹⁷ and the second issue is founded on a series of misconceptions and disagreements.
24. The Prosecution tries to present discrete issues, but in fact seeking to appeal the thrust of the entire decision with which it is dissatisfied. The language of the Leave Request betrays its contentious objective: the Trial Chamber did not “properly” consider the Prosecution arguments;¹⁸ the decision “clearly

¹⁵ See *inter alia* ICC-01/04-01/07-1665, ICC-01/05-01/08-1023, ICC-01/09-01/11-847-Corr, and ICC-01/05-01/13-1209.

¹⁶ Leave Request, para. 2.

¹⁷ ICC-01/04-168 (OA3), para. 9.

¹⁸ Leave Request, para. 2(a).

demonstrate[s] [...] the Chamber's error";¹⁹ and "the Chamber wrongly evaluated the Defence submissions".²⁰

25. While it is submitted that the request fails on the specification of issues, the issues – even if accepted – do not surpass the other criteria of Article 82(1)(d).

1. *The two purported issues do not impact upon trial fairness and expeditiousness*

26. The Prosecution is not any more uniquely "prejudiced" by the denial of witness preparation than it is always "prejudiced" by the burden of proof and that is simply a structural feature of a modern criminal trial which is, *inter alia*, aimed at avoiding wrongful convictions.
27. Should the Defence call witnesses, many of their recollections will obviously come from the same time-frame. The Defence would thus have the same challenges with recollection and focus as the Prosecution and, at any rate, whatever the complexity of the case, it also hinders the Defence of someone who must be presumed innocent.
28. With regards to complexity, it is also worth recalling that the Trial Chamber also did not "[reject] as irrelevant several factors that other Chambers considered highly relevant to allowing witness preparation."²¹ Instead, the Trial Chamber found that the "*alleged* complexity of this case also does not justify witness preparation".²² This was because the Trial Chamber "already emphasised that the number of charges in this case does not predominantly reflect its magnitude".²³ Simply put, in the context of the case at hand, the Trial

¹⁹ Leave Request, para. 10.

²⁰ Leave Request, para. 23.

²¹ Leave Request, para. 6.

²² Impugned Decision, para. 14 (emphasis added).

²³ Impugned Decision, para. 14.

Chamber found that the complexity was not a factor that could justify preparation. It did not dismiss the legal necessity of considering the factor.

29. The Prosecution also seems to suggest that without Witness Preparation, it will not be able to elicit evidence.²⁴ While some witnesses are more difficult than others, the Prosecution has to be assumed to be competent enough to be able to formulate questions and present them to witnesses such that a witness is largely capable of understanding them and responding and it has to be assumed that the Trial Chamber can sort through relevant and irrelevant testimony.²⁵
30. Moreover, in discussing the issues, the Prosecution completely disregards the Trial Chamber's dictum that "the parties may request Rule 88 special measures which diverge from the measures recommended by the VWU".²⁶ This addresses the Prosecution's concerns over fairness to victims.²⁷ In the case of other particular complications, the parties are also always able to refer to the Trial Chamber for *ad-hoc* assistance.
31. The criteria under Article 82(1)(d) are cumulative. The impact must be upon the "fairness and expeditiousness", but it can be added that the benefit to expeditiousness by Witness Preparation put forward by the Prosecution is merely speculative. It is equally possible that the process could lead to extensive litigation as the Defence reviews the preparation sessions and identifies problematic aspects.

2. *The two purported issues do not impact upon the outcome of the trial*

²⁴ Leave Request, para. 38 ("witness preparation (or its absence) has a direct bearing on what evidence may be elicited from the witnesses")

²⁵ Leave Request, para. 38 ("irrelevant evidence elicited from unprepared witnesses could cloud the case record, unfairly influencing the assessment of witness credibility").

²⁶ Impugned Decision, para. 28.

²⁷ Leave Request, para. 31.

32. The outcome of the trial would not necessarily be impacted by the issues were they approached differently by the Trial Chamber. The Prosecution seems confident that (a) had the Trial Chamber *really* understood its proposal, the Chamber would have authorised preparation and (b) had the Trial Chamber undertaken an in-text balancing of obligations to pursue the truth, that it would necessarily have concluded that the Prosecution's view was determinative, but this should be recognised as pure speculation.

3. *The issues do not need resolution by the Appeals Chamber*

33. The Prosecution seeks to re-cast the meaning of the Impugned Decision so as to elevate its significance. That decision does not determine "if witness preparation is allowed" *per se*,²⁸ it merely finds that it is not appropriate in the present case.²⁹ Furthermore, it is alarmist to state that the proceedings will be nullified for lack of witness preparation. This has evidently not occurred for the prior cases of *Lubanga* and *Katanga*.

34. It is also inaccurate to state that the issues "concern a trial practice on which judicial opinion at this Court remains divided".³⁰ Rather, it seems that no preparation is the rule and special features in the case or a particular approach of a Chamber leads to preparation as the exception. This is evidence by the fact that Trial Chambers I (twice), II, III, IV, VII and IX have rejected witness preparation,³¹ whilst only Trial Chambers V(A) and VI have allowed it.³² With

²⁸ Leave Request, para. 6.

²⁹ See ICC-02/04-01/15-504, para. 16: "To conclude, the Chamber considers that the five measures identified by the Prosecution as the core of a witness preparation framework do not justify a witness preparation protocol *in this case*." (emphasis added)

³⁰ Leave Request, para. 2.

³¹ See ICC-01/05-01/13-1252 (Bemba et al.), ICC-02/11-01/15-355 (Gbagbo and Blé Goudé), ICC-01/05-01/081016 (Bemba), ICC-01/04-01/07-1134, para. 18 (Katanga and Ngudjolo), ICC-01/04-01/06-1049, para. 57 (Lubanga), and ICC-02/05-03/09-158, para. 15 (stating, "In accordance with the consistent practice of the Trial Chambers, however, the parties are not authorised to "proof" witnesses prior to their in-Court testimony. Trial Chamber I has described "witness proofing" as the "rehearsal of in-court testimony" with a witness prior to his appearance before the Court.") (Banda and Jerbo)).

³² See ICC-01/09-01/11-524 (Ruto and Sang) and ICC-01/04-02/06-652 (Ntaganda).

this in mind, the arguments concerning legal certainty and administrative chaos – through which the court seems to be persevering – are over-stated.³³

II. RELIEF

35. For the reasons above, the Defence respectfully requests Trial Chamber IX to reject the Prosecution's Leave Request.

Respectfully submitted,



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Hon. Krispus Ayena Odongo
On behalf of Dominic Ongwen

Dated this 4th day of August, 2016

At Gulu, Uganda

³³ Leave Request, para. 41.