

**Cour  
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**International  
Criminal  
Court**

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No.: **ICC-02/04-01/15**  
Date: **22 August 2016**

**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 Document**

**Common Legal Representative's response to the "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:** Office of Public Counsel for Victims

**Document to be notified in accordance with regulation 31 of the *Regulations of the******Court to:*****The Office of the Prosecutor**

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## I. INTRODUCTION

1. The Common Legal Representative of 592 victims authorised to participate in the present case<sup>1</sup> submits that the Request filed by the Defence for leave to appeal the Decision admitting the evidence preserved under article 56 of the Rome Statute<sup>2</sup> (the “Defence Request”) fails to identify any appealable issues. The issues as framed by the Defence do not arise from the Trial Chamber’s decision and therefore, on this ground alone, the Defence Request should be dismissed in its entirety.

## II. PROCEDURAL BACKGROUND

2. On 10 August 2016, Trial Chamber IX (the “Chamber”) issued the “Decision on Request to Admit Evidence Preserved Under Article 56 of the Statute” (the “Impugned Decision”).<sup>3</sup>

3. On 16 August 2016, the Defence filed its Request, seeking leave to appeal the Impugned Decision on four issues, namely: a. Whether the admission of article 56 material is an exception permitted pursuant to article 69(2) of the Rome Statute; 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 with respect to article 56; and d. Whether the Trial Chamber can sever its assessment of the admissibility of the evidence from its assessment of the relevance of said evidence pursuant to article 69(4).<sup>4</sup>

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<sup>1</sup> See the “Decision on contested victims’ applications for participation, legal representation of victims and their procedural rights” (Pre-Trial Chamber II, Single Judge), No. ICC-02/04-01/15-350, 27 November 2015, p. 19; the “Decision on issues concerning victims’ participation” (Pre-Trial Chamber II, Single Judge), No. ICC-02/04-01/15-369, 15 December 2015, pp. 10-11; and the “Second decision on contested victims’ applications for participation and legal representation of victims” (Pre-Trial Chamber II, Single Judge), No. ICC-02/04-01/15-369, 24 December 2015, pp. 20-22.

<sup>2</sup> See the “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)” (the “Defence Request”).

<sup>3</sup> See the “Decision on Request to Admit Evidence Preserved Under Article 56 of the Statute” (Trial Chamber IX), No. ICC-02/04-01/15-520, 10 August 2016 (the “Impugned Decision”).

<sup>4</sup> See the Defence Request, *supra* note 2, para. 2.

4. On 18 August 2016, the Prosecution filed its Response to the Defence Request.<sup>5</sup>

### III. SUBMISSIONS

#### A. Legal standard for interlocutory appeals

5. Article 82(1)(d) of the Rome Statute sets out the criteria for granting a request for leave to appeal:

- a) The decision shall involve an issue that would significantly affect:
  - i. the fair and expeditious conduct of proceedings; or
  - ii. the outcome of the trial; and
- b) For which, in the opinion of the relevant Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

6. For the purposes of the first prong of this test, the Appeals Chamber defined an “issue” as “an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion”.<sup>6</sup> Moreover, the Appeals Chamber ruled that “the Pre-Trial or Trial Chamber is vested with power to state, or more accurately still, to certify the existence of an appealable issue”.<sup>7</sup>

7. Consequently, it must first be determined whether the “issues” identified in the Defence Request are “appealable issues” within the meaning of article 82(1)(d) of the Rome Statute, as interpreted by the jurisprudence of the Court. The above mentioned practice “requires the parties to articulate discrete issues for Appeals Chamber resolution and [...] it is generally insufficient to argue that the entirety of the Chamber’s

<sup>5</sup> See the “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”, No. ICC-02/04-01/15-526, 18 August 2016.

<sup>6</sup> See the “Judgement on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal” (Appeals Chamber), No. ICC-01/04-168 OA3, 13 July 2006, para. 9.

<sup>7</sup> *Idem*, para. 20.

*reasoning is erroneous when requesting leave to appeal*".<sup>8</sup> Moreover, *"while an application for leave to appeal should not contain in detail the arguments which the party intends to raise before the Appeals Chamber, it must still identify clearly the appealable issue, including by way of indicating a specific factual and/or legal error. Only in this case can the Chamber assess whether the issue, provided it was wrongly decided, may have implications on the fairness and expeditiousness of the proceedings or outcome of the trial"*.<sup>9</sup>

### **B. The "issues" raised in the Defence Request fail to properly constitute "appealable issues"**

8. The first purported "issue" as framed in the Defence Request is "[w]hether the admission of Article 56 material is an exception permitted pursuant to Article 69(2)". In particular, the Defence contends that the Impugned Decision is unclear about the interpretation that the Chamber has adopted of the relevant provisions related to the admission of evidence<sup>10</sup>.

9. The Common Legal Representative submits that the Defence takes issue with *the wording* of the various provisions governing the admission of evidence, rather than identifying a specific legal or factual finding by the Chamber which could affect the Impugned Decision in the meaning of article 82(1)(d) of the Rome Statute. The statutory provisions on which the Chamber based its reasoning are clearly and in detail explained in the Impugned Decision.<sup>11</sup> In reaching its conclusions, the Chamber did neither make nor was it under any legal obligation to provide non-essential clarifications about what the Defence considers to be an ambiguous language of the relevant provisions of the Rome Statute. The fact that the wording of

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<sup>8</sup> See the "Decision on the joint defence request for leave to appeal the decision on witness preparation" (Trial Chamber V), No. ICC-01/09-01/11-596, 11 February 2013, para. 11; the "Decision on Defence Request for Reconsideration of or Leave to Appeal/Decision on 'Defence Request for Disclosure and Judicial Assistance'" (Trial Chamber VII), No. ICC-01/05-01/13-1282, 22 September 2015, para. 10.

<sup>9</sup> See the "Decision on the Gbagbo Defence request for leave to appeal the 'Decision on Defence requests relating to the Prosecution's Pre-Trial Brief'" (Trial Chamber I), No. ICC-02/11-01/11-307, 21 October 2015, para. 70.

<sup>10</sup> See the Defence Request, *supra* note 2, paras. 12 – 15.

<sup>11</sup> See the Impugned Decision, *supra* note 3, first sentence and paras. 6 and 7.

any given statutory provision is lacking clarity in the eyes of the Defence does not in any way constitute an appealable issue. Thus, the first purported “issue” does not arise from the Impugned Decision.

10. The second purported “issue” as framed in the Defence Request is “[w]hether Articles 69(3) and (4) take precedence over the requirements of Article 69(2)”.<sup>12</sup>

11. The Common Legal Representative submits that the Defence grossly misconstrues the Chamber’s reasoning. In the Impugned Decision, the Chamber never considered the evidence preserved under article 56 of the Rome Statute as “prior recorded testimony” which is governed by a different legal regime, namely, rule 68 of the Rules of Procedure and Evidence (the “Rules”). In paragraph 6 of the Impugned Decision, the Chamber was simply skimming over various subparagraphs of article 69 and merely mentioned, in passing, the fact that “[u]nder Article 69(2), the Court may permit the recorded testimony of a witness [...]”. Thus, the Defence’s contentions that (a) “[...] the Article 56 material is a form of prior recorded testimony”<sup>13</sup> and; (b) the Chamber allegedly ruled that “[it] has discretion to admit prior recorded testimony outside the requirements of Rule 68” are totally wrong and baseless.<sup>14</sup> The evidence in question has never been presented by the Prosecution or assessed by the Chamber as “prior recorded testimony” pursuant to or, allegedly, “outside the requirements of Rule 68”.<sup>15</sup> Consequently, the second purported “issue” does not emanate from the Impugned Decision.

12. The third purported “issue” as framed in the Defence Request is “[t]he precise scope of Rule 68 of the Rules of Procedure and Evidence [...] with respects to Article 56.”<sup>16</sup>

<sup>12</sup> See the Defence Request, *supra* note 2, paras. 16 – 17 and 21.

<sup>13</sup> *Idem*, para. 18

<sup>14</sup> See the Impugned Decision, *supra* note 3, para. 6. In fact, the Trial Chamber stated exactly the opposite in footnote 20: “Notably, Rule 68 of the Rules does not apply to evidence collected under Article 56 of the Statute. See Rule 68(1) of Rules.”

<sup>15</sup> See the Defence Request, *supra* note 2, para. 17.

<sup>16</sup> *Idem*, paras. 22-28.

13. The Common Legal Representative submits that the Defence's arguments are built upon a false premise and call for a purely academic exercise. The Chamber never deemed the evidence preserved under article 56 of the Rome Statute as "*prior recorded testimony*" within the meaning of rule 68 of the Rules. Needless to repeat, the evidence whose admission was sought by the Prosecution was collected and preserved by the Pre-Trial Chamber under subparagraph 2 of article 56<sup>17</sup> and is admitted by the Trial Chamber pursuant to subparagraph 4 of article 56 and article 69 of Rome Statute<sup>18</sup>. Therefore, within the context of the Impugned Decision, the Chamber did neither make any ruling in relation to, nor has it been required to specify "[t]he precise scope of Rule 68 of the Rules of Procedure and Evidence [...] with respects to Article 56"<sup>19</sup>, as now abruptly desired by the Defence. Accordingly, the third purported "issue" does not arise from the Impugned Decision.

14. The fourth purported "issue" as framed in the Defence Request is "[w]hether the Trial Chamber can sever its assessment of admissibility from its assessment of relevance pursuant to Article 69(4)".<sup>20</sup>

15. The Common Legal Representative submits that the Defence distorts the relevant rulings made by the Chamber. In the Impugned Decision, the Chamber did indeed defer its assessment of the relevance and probative value of the evidence preserved under article 56 until rendering its judgment pursuant to article 74(2) of the Rome Statute. However, in doing so, the Chamber explicitly stated that it was following the procedure adopted in the Initial Directions on the Conduct of the Proceedings which governs admissibility of evidence submitted by all parties and

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<sup>17</sup> See the "Decision on the 'Prosecution application for the Pre-Trial Chamber to preserve evidence and take measures under article 56 of the Rome Statute'" (Pre-Trial Chamber II, The Single Judge), No. ICC-02/04-01/15-277-Conf, 27 July 2015 and the "Decision on the 'Second Prosecution application to the Pre-Trial Chamber to preserve evidence and take measures under article 56 of the Rome Statute'" (Pre-Trial Chamber II, The Single Judge), No. ICC-02/04-01/15-316-Conf, 12 October 2015.

<sup>18</sup> See the Impugned Decision, *supra* note 3, first sentence.

<sup>19</sup> See the Defence Request, *supra* note 2, paras. 2 and 22-28.

<sup>20</sup> *Idem*, paras. 29-33.

participants at trial.<sup>21</sup> Hence, this was not for the first time that the Chamber made the ruling in question.

16. Most importantly, the Defence did not request leave to appeal the decision on the Initial Directions on the Conduct of the Proceedings, which was rendered more than a month ago, containing the ruling in relation to the admissibility of evidence at trial upon its submission. The Impugned Decision simply reiterated the common procedure for admissibility of evidence previously adopted in said Initial Directions and indicated that it applies to the evidence preserved under article 56 of the Rome Statute. Therefore, the fourth purported “issue” effectively challenges another decision whose time limit for seeking leave to appeal has already expired and thus fails to arise from the Impugned Decision.

17. Lastly, since these purported “issues” do not properly constitute appealable issues, there is no need to delve into the remaining requirements of article 82(1)(d) of the Rome Statute.

**FOR THE FOREGOING REASONS**, the Common Legal Representative respectfully requests the Trial Chamber to dismiss the Defence Request.



**Paolina Massidda**  
**Principal Counsel**

Dated this 22<sup>nd</sup> day of August, 2016

At The Hague, The Netherlands

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<sup>21</sup> See the Impugned Decision, *supra* note 3, para. 7 and footnote 21. See also the “Initial Directions on the Conduct of the Proceedings” (Trial Chamber IX), No. ICC-02/04-01/15-497, 13 July 2016, paras. 24-26.