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No.: ICC-02/04-01/15
Date: 23 February 2017

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

**Decision on the Defence Request for Partial Reconsideration of the Decision
under Rule 68(2)(b) of the Rules of Procedure and Evidence**

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

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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 64(2) of the Rome Statute ('Statute') and Rule 68(1) and (2)(b) of the Rules of Procedure and Evidence ('Rules'), issues the following 'Decision on the Defence Request for Partial Reconsideration of the Decision under Rule 68(2)(b) of the Rules of Procedure and Evidence'.

1. On 18 November 2016, the Chamber issued the 'Decision on the Prosecution's Applications for Introduction of Prior Recorded Testimony under Rule 68(2)(b) of the Rules', whereby it, *inter alia*, granted the request by the Office of the Prosecutor ('Prosecution') to introduce the prior recorded testimonies of Witnesses P-29, P-337, P-384 and P-404 under Rule 68(2)(b) of the Rules ('Decision').¹
2. On 19 January 2017, the Defence filed a request for reconsideration of the Decision on the ground that the Chamber 'misapprehended' the Defence position with respect to the 'direction-finding' evidence ('Request').²
3. On 30 January 2017, the Prosecution responded to the Request arguing that it should be rejected for several reasons ('Response').³
4. At the outset, the Chamber observes that the legal instruments of the Court provide for a clear remedy for decisions considered erroneous by the parties, namely, when the relevant conditions under Article 82(1)(d) of the Statute are met, to seek leave to appeal such decisions. The Defence did not avail itself of this procedural remedy with respect to the matter it now raises in its Request,

¹ ICC-02/04-01/15-596-Conf. A public redacted version is also available: ICC-02/04-01/15-596-Red.

² Defence Request for Re-Consideration of 'Decision on the Prosecution's Applications for Introduction of Prior Recorded Testimony under Rule 68(2)(b) of the Rules' with Regards to Four Individuals, ICC-02/04-01/15-659.

³ Prosecution's Response to Defence Request for Re-consideration of ICC-02/04-01/15-596-Conf, ICC-02/04-01/15-683.

while it did so on an unrelated matter.⁴ Although the Request may accordingly be dismissed on this ground, the Chamber, consistent with the established practice of Trial Chambers of the Court, is prepared to consider the Request. In this regard, it must be emphasised that the power of a chamber to reconsider its interlocutory decisions is exceptional and should only be exercised if a clear error of reasoning has been demonstrated or if this is necessary to prevent an injustice, in particular in light of new facts that may have arisen since the decision was rendered.⁵

5. Witnesses P-29, P-337, P-384 and P-404 were involved in the interception of LRA radio communications conducted by the Uganda People's Defence Force ('UPDF')⁶ or by the Internal Security Organisation ('ISO').⁷ They are witnesses relied upon by the Prosecution with respect to the process of interception and recording of LRA radio communications by their respective agencies, the reporting requirements of the staff involved in interception operations and the procedure for the storage of the relevant records.⁸
6. In the Decision, the Chamber granted the Prosecution's request to introduce the prior recorded testimony of these witnesses under Rule 68(2)(b) of the Rules on the grounds that the information concerning the interception operations related to aspects different from Dominic Ongwen's acts and conduct, was not, in and of

⁴ Defence Request for Leave to Appeal Decisions ICC-02/04-01/15-596-Conf and ICC-02/04-01/15-600, 28 November 2016, ICC-02/04-01/15-609.

⁵ See, e.g., Decision on Request for Reconsideration of the Order to Disclosure Requests for Assistance, 15 June 2016, ICC-02/04-01/15-468, para. 4.

⁶ Witnesses P-29 (see UGA-OTP-0027-0231-R01 and UGA-OTP-0267-0455), P-337 (see UGA-OTP-0256-0201-R01 and UGA-OTP-0267-0445-R01) and P-404 (see UGA-OTP-0267-0470-R01).

⁷ Witness P-384 (see UGA-OTP-0260-0491-R01).

⁸ See Prosecution's Pre-Trial Brief, 6 September 2016, ICC-02/04-01/15-533, paras 62-82; Corrected version of 'Prosecution's request for introduction of previously recorded testimony pursuant to rule 68(2)(b) of the Rules, 16 June 2016, ICC-02/04-01/15-465-Corr-Red2, paras 124-131 and 147; Prosecution's second request for introduction of prior recorded testimony pursuant to rule 68(2)(b) of the Rules, 20 September 2016, ICC-02/04-01/15-538-Red, paras 22-29.

itself, materially in dispute and was planned to be addressed by other witnesses who would orally testify before the Chamber.⁹

7. The Chamber also considered that the fact that the four witnesses provide certain information also on the ‘direction-finding’ operations of the UPDF (*i.e.* the process by which the UPDF attempted to determine, by intercepting the radio signal, the location of an LRA radio transmission¹⁰) did not constitute an obstacle to the introduction of their prior recorded testimony given that the Prosecution did not intend to rely on information obtained as part of the direction-finding operations and the Defence ‘intend[ed] to challenge the UPDF direction-finding processes and explain the deficiencies in the UPDF techniques’.¹¹ The Defence had indeed submitted, in its response to the Prosecution’s request to introduce the prior recorded testimony of Witnesses P-29, P-337 and P-404, that ‘[it] intends to challenge the processes in which the UPDF “located” persons on the radio, and explain the deficiencies in the UPDF techniques’.¹² The Defence now argues that with this statement, while ‘[it] did not forcefully state its position’, ‘it did not indicate that it would not rely upon the direction-finding evidence as reliable’.¹³
8. The Chamber considers this new interpretation by the Defence of its previous submissions to be untenable. If the Defence intention was to object to the introduction of the prior recorded testimony of the four witnesses on the ground that it wished to rely on the evidence produced as part of the UPDF direction-finding operations it would have stated so clearly, rather than, quite the contrary, declaring its intention to challenge these processes and explain their deficiencies. Also, the fact that the Defence waited two months before

⁹ Decision, ICC-02/04-01/15-596-Red, paras 159-162, 182-185, 190-192 and 203-205.

¹⁰ See, for example, the prior recorded testimony of Witness P-337, UGA-OTP-0256-0201 at 0207.

¹¹ Decision, ICC-02/04-01/15-596-Red, para. 160. See also paras 183, 191 and 204.

¹² Defence Response to Prosecution’s second Request pursuant to Rule 68(2)(b), ICC-02/04-01/15-555-Conf, para. 17.

¹³ Request, ICC-02/04-01/15-659, para. 13.

raising the matter militates against the Defence's present submission that there occurred 'misapprehension' of its position, rather than a legitimate change of strategy on its part.¹⁴

9. The Chamber also observes that, contrary to the Defence argument, the Defence position as to the reliability of the direction-finding evidence was not 'a primary basis of [the Chamber's] decision to accept as submitted the statements of these four witnesses *in lieu* of their testimony'.¹⁵ Indeed, regardless of whether the Defence was misinterpreted in the Decision or whether it changed its position as concerns the direction-finding evidence, the introduction under Rule 68(2)(b) of the Rules of the prior recorded testimony of the four concerned witnesses is not prejudicial to or inconsistent with Dominic Ongwen's rights and did not (and does not) depend on whether the Defence would rely on the direction-finding evidence as part of its own case.
10. As explained in the Decision, 'the purpose of a determination under Rule 68(2)(b) of the Rules is not whether a person shall testify at trial, but whether the information provided by a witness in a prior recorded testimony can be introduced without the need that the witness appears live at trial and be subject to questioning by the participants'.¹⁶ The four concerned individuals are witnesses for the Prosecution. The Prosecution has indicated that the information in their prior recorded testimony on which it intends to rely is that concerning the interception operations of LRA radio communications by the UPDF or the ISO.¹⁷ As stated in the Decision, these are matters which are not

¹⁴ The Chamber notes the Defence submission in the Request that it chose not to seek leave to appeal under Article 82(1)(d) of the Statute on this issue 'because it did not consider that procedural mechanism as the appropriate basis' (Request, ICC-02/04-01/15-659, para. 16). No reasonable explanation is however provided by the Defence as to the reasons why the alleged 'misapprehension' of its position in the Decision has only been raised two months after the issuance of the Decision.

¹⁵ Request, ICC-02/04-01/15-659, para. 7.

¹⁶ Decision, ICC-02/04-01/15-596-Red, para. 47. See also para. 7 and corresponding footnote 18.

¹⁷ See. *e.g.*, Corrected version of 'Prosecution's request for introduction of previously recorded testimony pursuant to rule 68(2)(b) of the Rules, 16 June 2016, ICC-02/04-01/15-465-Corr-Red2, paras 124-131 and 147;

materially in dispute and which would be addressed live by other witnesses whom the Defence could examine at trial.¹⁸ The conclusion in the Decision that the information on these matters in the concerned witnesses' prior recorded testimony is not required to be 'tested' through *viva voce* examination still stands.

11. With respect to the information concerning the direction-finding operations (on which the Prosecution does not intend to rely¹⁹), the Chamber observes that the material related to such operations has been disclosed to the Defence.²⁰ As this body of material is already in its possession, the Defence may rely on it in the present case if it so wishes without the need for the four witnesses to testify live at trial. Moreover, as noted, the prior recorded testimonies of Witnesses P-29, P-337 and P-404 include information about the direction-finding operations.²¹ The Defence has at no point – neither at the time of its responses to the Prosecution's requests under Rule 68(2)(b) of the Rules nor presently – indicated what information could be obtained through the examination of these witnesses at trial other than that already contained in their prior recorded testimonies which have been introduced in their entirety. In addition, the Chamber recalls, as stated repeatedly in the Decision, that there exists a procedure in place enabling the Defence to seek to question prosecution witnesses as part of its investigation and that the introduction of a witness's prior recorded testimony under Rule 68(2)(b) of the Rules does not, in and of itself, prevent that a supplementary statement is obtained from the witness.²² The Defence may also wish to call its own witnesses with respect to these issues, without the need that

Prosecution's second request for introduction of prior recorded testimony pursuant to rule 68(2)(b) of the Rules, 20 September 2016, ICC-02/04-01/15-538-Red, paras 22-29.

¹⁸ Decision, ICC-02/04-01/15-596-Red, paras 161, 184, 191 and 204. See also paras 157, 165, 173, 176, 179, 194, 198 and 201.

¹⁹ Prosecution's Pre-Trial Brief, 6 September 2016, ICC-02/04-01/15-533, para. 78; Prosecution's second request for introduction of prior recorded testimony pursuant to rule 68(2)(b) of the Rules, 20 September 2016, ICC-02/04-01/15-538-Red, para. 29.

²⁰ Prosecution's Pre-Trial Brief, 6 September 2016, ICC-02/04-01/15-533, para. 78.

²¹ Witness P-29: UGA-OTP-0267-0455 at 0463-0467; Witness P-337: UGA-OTP-0256-0201-R01 at 0204-0211; Witness P-404: UGA-OTP-0267-0470-R01 at 0474.

²² See, for example, paras 48, 65 and 152 of the Decision, ICC-02/04-01/15-596-Red.

prosecution witnesses appear at trial so that they could testify on matters on which the Prosecution does not rely.

12. In conclusion, and considering that the introduction of the prior recorded testimony of Witnesses P-29, P-337, P-384 and P-404 does not cause any injustice to the Defence, the Chamber concludes that there exist no circumstances warranting reconsideration of the Decision.

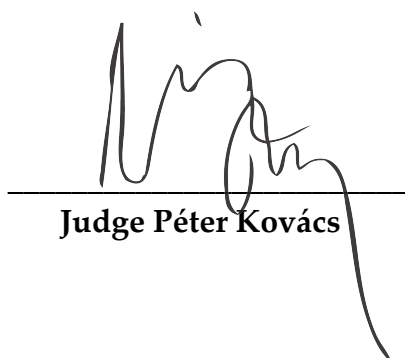
FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

REJECTS the Request.

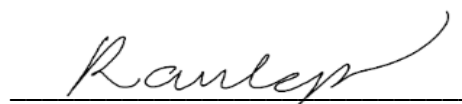
Done in both English and French, the English version being authoritative.



Judge Bertram Schmitt
Presiding Judge



Judge Péter Kovács



Judge Raul C. Pangalangan

Dated 23 February 2017

At The Hague, The Netherlands