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**International
Criminal
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PRE-TRIAL CHAMBER II

Before: Judge Cuno Tarfusser, Single Judge

SITUATION IN UGANDA

**IN THE CASE OF
*THE PROSECUTOR v. DOMINIC ONGWEN***

Confidential

Common Legal Representative's response to the "*Defence Request for Leave to Appeal 'Decision on the Defence 'Request to Postpone Confirmation of Charges Hearing'*"

Source: Office of Public Counsel for Victims

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

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I. Introduction

1. The Principal Counsel of the Office of Public Counsel for Victims, acting as Common Legal Representative of 294 victims authorised to participate in the present case,¹ submits that the "*Defence Request for Leave to Appeal 'Decision on the Defence 'Request to Postpone Confirmation of Charges Hearing'*" (the "Defence Request") fails to identify any appealable issues. The purported issues as framed by the Defence constitute mere disagreements with the findings of the Single Judge in his decision not postponing the confirmation of charges hearing. Therefore, on this ground alone, the Defence Request should be dismissed in its entirety.

II. Procedural Background

2. On 26 November 2015, the Single Judge of Pre-Trial Chamber II dismissed the Defence's "*Request to Postpone Confirmation of Charges Hearing*" which sought an order postponing the confirmation of charges hearing² (the "Impugned Decision").

3. On 2 December 2015, the Defence filed its Request.³

4. Pursuant to regulation 23*bis*(2) of the Regulations of the Court, this response is filed confidential following the classification of the Defence Request and because it refers to the Impugned Decision currently classified as confidential.

¹ See the "Decision on contested victims' applications for participation, legal representation of victims and their procedural rights" (Pre-Trial Chamber II), No. ICC-02/04-01/15-350, 27 November 2015, p. 19.

² See the "Decision on the Defence 'Request to Postpone Confirmation of Charges Hearing'" (Pre-Trial Chamber II), No. ICC-02/04-01/15-348-Conf, 26 November 2015 (the "Impugned Decision").

³ See the "Defence Request for Leave to Appeal 'Decision on the Defence 'Request to Postpone Confirmation of Charges Hearing'", No. ICC-02/04-01/15-360-Conf, 2 December 2015 (the "Defence Request").

III. Submissions

1. *Legal standard for interlocutory appeals*

5. Article 82(l)(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 expeditiousness conduct of proceedings; or
 - ii. the outcome of the trial; and
- b) For which, in the opinion of 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”.⁴ 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”.⁵

7. Consequently, it must first be determined whether the purported “issues” in the Defence Request are “appealable issues” within the meaning of article 82(l)(d) of the Rome Statute as interpreted by the jurisprudence of the Court. The above mentioned definition “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 reasoning is erroneous when requesting leave to appeal”.⁶

⁴ 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” (The Appeals Chamber), No. ICC-01/04-168 OA3, 13 July 2006, para. 9.

⁵ *Idem*, para. 20.

⁶ 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

8. In this regard, the issues for which the parties seek leave to appeal must not be “generic assertions”⁷; in other words, issues whose formulation is exceedingly broad or so general that it is essentially a challenge to the entirety of the Chamber's reasoning are not sufficiently discrete to qualify as appealable issues.⁸ 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”.⁹

2. The purported “issues” raised in the Defence Request fail to properly constitute “appealable issues”

9. The Defence contends that “the Single Judge failed to reasonably consider the factors presented by the Defence which cumulatively provide a reasonable basis to postpone the [Confirmation Hearing]. It is argued that the Single Judge erroneously considered the factors presented by the Defence in isolation, thereby ignoring the compounding issues which significantly affect the fair conduct of the proceedings”.¹⁰

10. Moreover, while stating that it seeks to raise *two* issues, the Defence seems to challenge a number of matters; including: (i) the breadth of disclosure – “the Single

Disclosure and Judicial Assistance” (Trial Chamber VII), No. ICC-01/05-01/13-1282, 22 September 2015, para. 10.

⁷ See the “Decision on Defence Request for Leave to Appeal Decision on the Request to strike two witnesses from the Prosecution’s Witness List” (Trial Chamber VII), No. ICC-01/05-01/13-1307, 28 September 2015, para. 4.

⁸ See the “Decision on the ‘Defence Application for Leave to Appeal the ‘Decision on the defence request for a temporary stay of proceedings’” (Trial Chamber IV), No. ICC-02/05-03/09-428, 13 December 2012, para. 27; 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. 17; the “Decision on the Prosecutor's and Defence requests for leave to appeal the decision adjourning the hearing on the confirmation of charges (Pre-Trial Chamber I), No. ICC-02/11-01/11-464, 31 July 2013, para. 67 and the “Decision on Babala Defence request for leave to appeal ICC-01/05-01/13-800” (Trial Chamber VII), No. ICC-01/05-01/13-877, 27 March 2015, para. 7.

⁹ 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.

¹⁰ See the Defence Request, para. 2 (Emphasis in the original).

Judge erred in finding that the abundance of disclosure received by the Defence 'is a poor indicator of the complexity of the case and the work required' [etc.]"; (ii) the alleged loss of time and resources due to article 56 proceedings – "the Single Judge unreasonably dismissed the Defence's assertion that it 'lost at least two (2) months' as a result of the Article 56 proceedings [etc.]" and (iii) the time and resources spent for processing victim applications – "[while] review of victims' applications is part of the normal course of its work. However, it is also unreasonable to view this factor in isolation. The abundance of applications compounds the issues already compounded by the magnitude of the case and the Article 56 proceedings" and finally "these matters are additionally compounded by insufficient staffing resources".¹¹

11. Not only these purported "issues" are formulated in a too general and vague manner to constitute discrete issues, but, in essence, they merely express the Defence's disagreements with the Single Judge's findings contained in the Impugned Decision. Indeed, the matters addressed by the Defence in its Request were the subject of said Decision and were assessed by the Single Judge, individually and cumulatively, in relation to the Defence's readiness to commence the confirmation hearing.¹² In fact, according to the established jurisprudence of the Court, a request for leave to appeal repeating arguments already considered in impugned decisions indicates the existence of mere disagreement with the relevant rulings¹³ and the fact that the Defence is not satisfied with the dismissal of its submissions does not establish an appealable issue.¹⁴

¹¹ *Idem*, paras. 10-17.

¹² See the Impugned Decision, paras. 2 and 5-9.

¹³ See the "Decision on the 'Request for Leave to Appeal against the 'Decision on the Request for an order for the commencement of the pre-confirmation phase by the Defence of Saif Al-Islam Gaddafi'" (Pre-Trial Chamber I), No. ICC-01/11-01/11-490, 1 December 2013, para. 31 and the "Decision on Defence requests for leave to appeal the 'Order setting the commencement date for trial'" (Trial Chamber I), No. ICC-02/11-01/15-117, 2 July 2015, para. 22.

¹⁴ See the "Decision on the Defence Request for Leave to Appeal" (Pre-Trial Chamber II), No. ICC-01/04-02/06-207, 3 January 2014, para. 33.

12. Furthermore, by reproducing the exact same arguments, which had failed previously, the Defence is contesting the entirety of the Impugned Decision. This is also at odds with the established jurisprudence of the Court, requiring the elaboration of discrete legal or factual issues in order to qualify as an “*appealable issue*”. As stressed by Pre-Trial Chamber I, a Chamber “*can exercise its power under article 82(1)(d) of the Statute only with respect to discrete legal or factual issues arising out of its decision. Leave to appeal cannot be granted if the party seeking to appeal, instead of identifying appealable issues, seeks leave to litigate ex novo before the Appeals Chamber the entire decision*”.¹⁵

13. The Common Legal Representative also notes that the issues adjudicated in the Impugned Decision (such as the amount of disclosure exchanged between the parties, and the sufficiency of the time available to the Defence for its preparation) are matters of practice and procedure left within the Chamber's discretionary powers. In accordance with the Court's jurisprudence, requests for leave to appeal decisions dealing with such kind of matters are regularly rejected.¹⁶

14. Finally, the purported “*issues*” raised by the Defence involve matters of appreciation of facts surrounding the readiness of the Defence for the confirmation of charges hearing. Yet, the Defence failed to show that the Single Judge's evaluation of said facts constitutes an “*appealable issue*”. Indeed, the mere assertion that the Single Judge should have exercised his discretion differently or must adopt the same view

¹⁵ 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’”, *supra* note 9, para. 70 (Emphasis added).

¹⁶ See the “Decision on the ‘Defence Request for Leave to Appeal the ‘Urgent Decision on the ‘Urgent Defence Application for Postponement of the Confirmation Hearing and Extension of Time to Disclose and List Evidence’ (ICC-01/09-01/11-260)’” (Pre-Trial Chamber II), No. ICC-01/09-01/11-301, 9 August 2011, para. 30; the “Decision on the ‘Defence Application for Leave to Appeal the ‘Decision on the defence request for a temporary stay of proceedings’”, *supra* note 8, para. 27; the “Decision on the Defence Request for Leave to Appeal”, *supra* note 14, para. 25; the “Decision on the Defence request for leave to appeal the ‘Decision on the Confirmation of Charges against Laurent Gbagbo’ (Pre-Trial Chamber I), No. ICC-02/11-01/11-680, 1 September 2014, para. 14; the “Decision on Defence requests for leave to appeal the ‘Order setting the commencement date for trial’”, *supra* note 13, para. 22 and the “Decision on the Gbagbo Defence request for leave to appeal the ‘Decision on Defence requests relating to the Prosecution's Pre-Trial Brief’”, *supra* note 9, para. 12.

as the Defence in assessing facts do not suffice to show the existence of an error.¹⁷ The fact that the Defence reiterates an alternative assessment of the facts does not mean that it raised an appealable issue, but merely, as stated *supra*, a disagreement with the factual findings of the Single Judge.

15. Accordingly, as held by the Appeals Chamber, since “mere disagreement” or “conflict of opinion” do not constitute an “*appealable issue*” within the meaning of article 82(1)(d) of the Rome Statute, “*there is no need to delve into the remaining requirements of article 82(1)(d) of the Statute.*”¹⁸

16. Considering that this is the first opportunity for victims to express their views and concerns in the proceedings, the Common Legal Representative wishes to indicate that victims expect an expeditious proceeding. While the Common Legal Representative was so far unable to consult with her clients due to the fact that she has been only recently appointed, by virtue of her previous appointment in the Uganda situation and the *Kony et al.* case, she is aware that victims hope that the confirmation of charges will proceed as scheduled since they are expecting justice since more than ten years.

¹⁷ See the “Decision on the Applications for Leave to Appeal the Decision on the Admission of the Evidence of Witnesses 132 and 287 and on the Leave to Appeal on the Decision on the Confirmation of Charges” (Pre-Trial Chamber I), No. ICC-01/04-01/07-727, 24 October 2008, pp. 16 – 17; the “Decision on the ‘Prosecution’s Application for Leave to Appeal the ‘Decision on the Confirmation of Charges’” (Pre-Trial Chamber I), No. ICC-02/05-02/09-267, 23 April 2010, paras. 11 – 12; the “Decision on the Defence Applications for Leave to Appeal the Decision on the Confirmation of Charges” (Pre-Trial Chamber II), ICC-01/09-02/11-406, 9 March 2012, paras. 33, 65 and 73; the “Decision on the ‘Requête de la Défense sollicitant l’autorisation d’interjeter appel de la Décision sur la confirmation des charges datée du 9 juin 2014’” (Pre-Trial Chamber II), No. ICC-01/04-02/06-322, 4 July 2014, paras. 21 and 25 and the “Decision on the Defence request for leave to appeal the ‘Decision on the Confirmation of Charges against Laurent Gbagbo’”, *supra* note 16, paras. 22 and 25.

¹⁸ See the “Decision on the Defence Request for Leave to Appeal”, *supra* note 14, para. 33 and the “Decision on the ‘Requête de la Défense sollicitant l’autorisation d’interjeter appel de la Décision sur la confirmation des charges datée du 9 juin 2014’”, *supra* note 17, para. 29.

FOR THE FOREGOING REASONS, the Common Legal Representative respectfully requests the Single Judge to dismiss the Defence Request.

A handwritten signature in black ink, appearing to read 'Paolina Massidda', with a horizontal line drawn underneath the name.

Paolina Massidda
Principal Counsel

Dated this 7th day of December 2015

At The Hague, The Netherlands