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Internationale**

**International
Criminal
Court**



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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 Prosecution's formal submission
of intercept evidence via the "bar table"**

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 Common Legal Representative¹ submits that the Prosecution's application requesting the Chamber to recognise as formally submitted 2,507 items of evidence (the "intercept evidence") related to the interception of LRA radio communications by the Ugandan Government (the "Application")² should be granted.

2. Indeed, the Common Legal Representative contends that the material in question complies with the criteria established by the practice of the Court for the admission of evidence via the bar table, namely it is *prima facie* relevant to the trial, possesses probative value and its admission will not have any prejudicial effect on the rights of the Accused.

II. PROCEDURAL HISTORY

3. On 13 July 2016, the Single Judge of the Trial Chamber (the "Chamber") issued the Initial Directions on the Conduct of the Proceedings, addressing, *inter alia*, the possibility for the participants to submit evidence through a "bar table" motion.³

4. On 28 October 2016, the Prosecution filed the Application seeking the admission of six categories of intercept evidence, namely, (i) short-hand rough notes

¹ 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; the "Second decision on contested victims' applications for participation and legal representation of victims" (Pre-Trial Chamber II, Single Judge), No. ICC-02/04-01/15-384, 24 December 2015, pp. 20-22, "Decision concerning 300 Victim Applications and the Deadline for Submitting Further Applications", (Trial Chamber IX, Single Judge), No. ICC-02/04-01/15-543, 26 September 2016, para. 8 and p. 5, and the "Decision Concerning 610 Victim Applications (Registry Report ICC-02/04-01/15-544) and 1183 Victim Applications (Registry Report ICC-02/04-01/15-556)" (Trial Chamber IX, Single Judge), No. ICC-02/04-01/15-586, 04 November 2016, p. 8, paras. 9, 15 and 16.

² See the "Prosecution's formal submission of intercept evidence via the 'bar table'", with Confidential Annexes A to G, No. ICC-02/04-01/15-580, 28 October 2016 (the "Application").

³ See the "Initial Directions on the Conduct of the Proceedings" (Trial Chamber IX, Single Judge), No. ICC-02/04-01/15-497, para. 27.

of LRA radio communications; (ii) logbooks containing summaries of LRA radio communications; (iii) faxed copies of logbook entries; (iv) intelligence reports; (v) sound recordings of LRA radio communications; and (vi) miscellaneous intercept evidence.

III. SUBMISSIONS

5. Article 69(4) of the Rome Statute provides that “[t]he Court may rule on the relevance or admissibility of any evidence, taking into account, inter alia, the probative value of the evidence and any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness, in accordance with the Rules of Procedure and Evidence.”

6. In interpreting and applying said provision, Trial Chambers have established “a three stage approach” for the admission of evidence which is to be applied on a case-by-case basis. In particular, the Chamber shall assess the relevance, probative value, and any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness.⁴ In this regard, in examining the evidence, the Chamber “must [firstly] ensure that the evidence is *prima facie* relevant to the trial, in that it relates to the matters that are properly to be considered by the Chamber in its investigation of the charges against the accused and its consideration of the views and concerns of participating victims. [...] Second, the Chamber must assess whether the evidence has, on a *prima facie* basis, probative value. [...] Third, the Chamber must, where relevant, weigh the probative value of the evidence against its prejudicial effect. Whilst it is trite to observe that all evidence that tends to incriminate the accused is also ‘prejudicial’ to him, the Chamber must be careful to ensure that it is not unfair to admit the disputed material, for instance

⁴ See the “Corrigendum to Decision on the legal representative’s application for leave to tender into evidence material from the ‘bar table’ and on the Prosecution’s Application for Admission of three documents from the Bar Table Pursuant to Article 64 (9)” (Trial Chamber I), No. ICC-01/04-01/06-2694-Corr, 9 March 2011, para. 12.

*because evidence of slight or minimal probative value has the capacity to prejudice the Chamber's fair assessment of the issues in the case."*⁵

7. Having assessed the material which the Prosecution intends to submit through the Application, the Common Legal Representative contends that the intercept evidence is *prima facie* relevant to the trial, possesses probative value and its admission will not have any prejudicial effect on the rights of the Accused.

8. Firstly, the Common Legal Representative submits that the intercept evidence is relevant to the matters that are properly to be considered by the Chamber in its assessment of the charges against the Accused since said material addresses: (i) the contextual elements of the war crimes and crimes against humanity; (ii) the LRA's goals, policies, tactics and movements during the period covered by the charges; its system of discipline, chain of command and leadership structure; and the system of coordination and communication amongst the commanders; (iii) Mr Ongwen's position of authority in the LRA hierarchy and his particular acts and conducts during the period relevant to the charges in relation to the four attacks at the IDP camps, the conscription and use of child soldiers and the sexual and gender-based crimes.

9. Secondly, the Common Legal Representative notes that the intercept evidence has probative value since the material in question: (i) is professionally recorded and meticulously registered, extremely detailed and comprehensive, voluminous in number, but consistent in its content, and therefore appears to be authentic and reliable; and (ii) is mutually corroborative and corroborative of other Prosecution's evidence, while being independently collected and compiled.

⁵ See the "Decision on the admissibility of four documents" (Trial Chamber I), No. ICC-01/04-01/06-1399, 13 June 2008, paras. 27-31.

10. Thirdly, the Common Legal Representative contends that the probative value of the intercept evidence outweighs any prejudicial effect because: (i) the Defence has been on notice of the content of said evidence since a certain period of time, as well as of the fact that the Prosecution will be relying on this material at trial. Indeed, as noted in the Application⁶, the majority of the intercept evidence has been disclosed to the Defence long ago; and (ii) the Defence will have the opportunity to examine witnesses P-0003, P-0059, P-0125 and P-0339 (out of eighteen individuals who were personally involved in the collection of the intercept evidence) and P-0016 and P-0019, who will testify in court about any matters related to the intercept evidence.

11. Moreover, the Common Legal Representative submits that granting the Application ensures the expeditiousness of the proceedings. Indeed, the admission of the material will allow the Prosecution to better streamline its presentation of evidence which will, as a result, obviate the need to call more witnesses to attest the authenticity of the intercept evidence and thus save precious resources and time. This approach will also be in line with the Chamber's duty to ensure that the trial is fair and expeditious pursuant to article 64(2) of the Rome Statute.

12. In this regard, the Common Legal Representative wishes to reiterate that the victims participating in the case expect speedy proceedings. Since her appointment, the Common Legal Representative was able to meet, including recently in preparation for trial, many of her clients, who indicated that they hope that the trial will be conducted as expeditiously as possible since they have been waiting for justice for more than ten years.

⁶ See the "Application", *supra* note 2, para. 56.

III. CONCLUSION

For the foregoing reasons, the Common Legal Representative respectfully requests the Chamber to grant the Application.

A handwritten signature in black ink, reading "Paolina Massidda", with a horizontal line underneath the name.

Paolina Massidda
Principal Counsel

Dated this 21st day of November 2016

At The Hague, The Netherlands