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**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

Response to the "Defence Request for Leave to Appeal Decisions ICC-02/04-01/15-596-Conf and ICC-02/04-01/15-600"

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 “Defence Request for Leave to Appeal Decisions ICC-02/04-01/15-596-Conf and ICC-02/04-01/15-600” (the “Request”)² fails to identify any appealable issue. Therefore, on this ground alone, the Request should be dismissed in its entirety.

2. Assuming *arguendo* that the Chamber considers that the issue raised in the Request properly constitutes an appealable issue, the Common Legal Representative contends that the remaining requirements of article 82(1)(d) of the Rome Statute are not fulfilled and therefore the Request should be rejected.

II. PROCEDURAL BACKGROUND

3. On 07 June 2016, Trial Chamber IX (the “Chamber”) issued the “Decision on Disclosure Issues Arising Out of First Status Conference” (the “Disclosure Decision”), instructing the Prosecution to provide Acholi translations falling under rule 76(3) of the Rules of the Procedure and Evidence (the “Rules”) to the Defence, no later than three months prior to the testimony of the witness concerned.³

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 “Defence Request for Leave to Appeal Decisions ICC-02/04-01/15-596-Conf and ICC-02/04-01/15-600”, No. ICC-02/04-01/15-609, 28 November 2016 (the “Request”).

³ See the “Decision on Disclosure Issues Arising Out of First Status Conference” (Trial Chamber IX), No. ICC-02/04-01/15-457, 07 June 2016, paras. 8-10 and p. 9 (the “Disclosure Decision”).

4. 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” (the “First Impugned Decision”).⁴ On 22 November 2016, the Chamber issued the “Decision on Prosecution Request to Add Items to its List of Evidence, to include a Witness on its List of Witnesses and to Submit Two Prior Recorded Testimonies under Rule 68(2)(b) and (c)” (the “Second Impugned Decision”; together referred to as the “Impugned Decisions”).⁵

5. On 28 November 2016, the Defence filed its Request seeking leave to appeal the Impugned Decisions.⁶

III. SUBMISSIONS

A. Legal standard for interlocutory appeals

6. 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 relevant Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

⁴ See the “Decision on the Prosecution’s Applications for Introduction of Prior Recorded Testimony under Rule 68(2)(b) of the Rules” (Trial Chamber IX), No. ICC-02/04-01/15-596-Red, 18 November 2016 (the “First Impugned Decision”).

⁵ See the “Decision on Prosecution Request to Add Items to its List of Evidence, to include a Witness on its List of Witnesses and to Submit Two Prior Recorded Testimonies under Rule 68(2)(b) and (c)” (Trial Chamber IX), No. ICC-02/04-01/15-600, 22 November 2016 (the “Second Impugned Decision”).

⁶ See the Request, *supra* note 2.

7. 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”.⁷ 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”.⁸

8. Consequently, it must first be determined whether the purported “issue” in the Request is an “appealable issue” within the meaning of article 82(1)(d) of the Rome Statute as interpreted by the jurisprudence of the Court. Indeed, “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

B. The Request fails to identify an “appealable issue” and does not meet all the criteria for granting an interlocutory appeal

9. The purported “issue” as framed by the Defence in its Request is:

“[whether] Trial Chamber IX erred in law when it decided that Rule 76(3) of the Rules of Procedure and Evidence was not a procedural bar against the formal submission of prior recorded testimony pursuant to Rule 68(2)(b) of the Rules that was not translated for the Accused”.¹⁰

⁷ 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.

⁸ *Idem*, para. 20.

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 Request, *supra* note 2, para. 1(a).

10. The Common Legal Representative submits that this purported issue does not arise from the Impugned Decisions. Indeed, the Defence clearly misconstrues the relevant rulings.

11. In fact, the Chamber explicitly recognized the fact that the Accused has a right to receive the prior recorded testimonies in question in a language that he understands and speaks. For this reason, the Chamber, in its Disclosure Decision, specifically instructed the Prosecution to provide Acholi translations falling under rule 76(3) of the Rules to the Defence by no later than three months prior to the testimony of the witness concerned.¹¹ In the Impugned Decisions, the Chamber did not deviate from or modify this initial ruling. In fact, in the First Impugned Decision, the Chamber emphasised the fact that it set the above mentioned timeframe, for the completion of the disclosure of incriminating evidence by the Prosecution, in order for the Defence to be able to adequately prepare for the trial and for the questioning of the witnesses.¹²

12. The terms of the Second Impugned Decision are even clearer. The Chamber held that “[it] agrees with the Defence that the Prosecution is obliged to provide a translation in Acholi pursuant to Rule 76(3) of the Rules [...]”; and instructed the Prosecution to provide the Defence with a translation of the prior recorded testimony of Witness P-0001 in Acholi.¹³ Most importantly, the Chamber’s ruling, allowing the Prosecution to introduce the prior recorded testimony under rule 68(2)(b) of the Rules, was expressly made subject to “the prompt provision of an Acholi translation”.¹⁴

13. Consequently, the Common Legal Representative submits that the purported issue identified in the Request does not arise from the Impugned Decisions. Therefore, on this ground alone, the Request should be dismissed in its entirety.

¹¹ See the Disclosure Decision, *supra* note 3, paras. 8-10 and p. 9.

¹² See the First Impugned Decision, *supra* note 4, para. 25.

¹³ See the Second Impugned Decision, *supra* note 5, para. 28.

¹⁴ *Idem*, para. 29 and p. 14.

14. Even if the Chamber considers that the issue raised in the Request properly constitutes an appealable issue, the Common Legal Representative contends that the remaining requirements of article 82(1)(d) of the Rome Statute are not fulfilled.

15. The issue for which the Defence seeks leave to appeal would not significantly affect the fair and expeditious conduct of proceedings or the outcome of the trial. Indeed, the execution of the Prosecution's obligation, namely the provision of Acholi translations of prior statements of witnesses, has already been set in motion by virtue of the Disclosure Decision and the Impugned Decisions. It is now only a matter of time that the Defence receives the totality of the Acholi translations of the material in question.

16. Moreover, an immediate resolution by the Appeals Chamber of the issue identified in the Request would not materially advance the proceedings. Indeed, the Prosecution's disclosure of evidence has reached an advanced stage and the formal opening of the trial is imminent. Therefore, an intervention by the Appeals Chamber cannot in any way accelerate the ongoing disclosure of evidence or facilitate speedy translations of those statements and related documents in Acholi.

17. Consequently, the Common Legal Representative submits that the Request should be rejected due to its failure to meet all of the requirements of article 82(1)(d) of the Rome Statute.

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

A handwritten signature in black ink, reading "Paolina Massidda". The signature is written in a cursive style with a prominent initial 'P' and a long horizontal stroke at the end.

Paolina Massidda
Principal Counsel

Dated this 02nd day of December, 2016

At The Hague, The Netherlands