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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
‘Decision on Prosecution Request to Submit Interception Related Evidence’
(ICC-02/04-01/15-615)”**

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 ‘Decision on Prosecution Request to Submit Interception Related Evidence’ (ICC-02/04-01/15-615)” (the “Request”)² fails to identify any appealable issue. Therefore, on this ground alone, the Request should be dismissed.

2. Assuming *arguendo* that the Chamber considers that the purported 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 (the “Statute”) are not fulfilled and therefore the Request should also be rejected.

II. PROCEDURAL BACKGROUND

3. On 13 July 2016, Trial Chamber IX (the “Chamber”) issued the “Initial Directions on the Conduct of the Proceedings”, setting out, among others, general procedures for submitting various forms of evidence (the “Initial Directions”).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 ‘Decision on Prosecution Request to Submit Interception Related Evidence’ (ICC-02/04-01/15-615)”, No. ICC-02/04-01/15-625, 07 December 2016 (the “Request”).

³ See the “Initial Directions on the Conduct of the Proceedings”, No. ICC-02/04-01/15-497, 13 July 2016 (the “Initial Directions”), paras. 24 – 33.

4. On 01 December 2016, the Chamber issued the “Decision on Prosecution Request to Submit Interception Related Evidence” (the “Impugned Decision”)⁴ recognizing submission of 2,507 items related to the interception of LRA’s radio communications by the Ugandan government (the “intercept evidence”).

5. On 07 December 2016, the Defence filed its Request seeking leave to appeal the Impugned Decision.⁵

III. SUBMISSIONS

A. Legal standard for interlocutory appeals

6. 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 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.

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”.⁶ 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”.⁷

⁴ See the “Decision on Prosecution Request to Submit Interception Related Evidence”, No. ICC-02/04-01/15-615, 01 December 2016 (the “Impugned Decision”), paras. 22-26.

⁵ See the Request, *supra* note 2.

⁶ 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.

⁷ *Idem*, para. 20.

8. Consequently, it must first be determined whether the purported “issue” in the Request is an “appealable issue” within the meaning of article 82(l)(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”*.⁸

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:

*“the scope of ‘procedural objections’ required to be examined pursuant to submission under Article 69(3).”*⁹

10. The Common Legal Representative submits that this purported issue does not properly constitute an appealable issue. Indeed, the Defence arguments are based on the false premise that, in the Impugned Decision, the Chamber made factual findings in relation to or render rulings based on “procedural bars” provided in the Statute or the Rules.¹⁰ In fact, no such finding or ruling was made.

11. The terms of the Initial Directions and Impugned Decision are crystal clear. Firstly, in the Initial Directions, the Chamber unequivocally held that “[a]s a general rule, this Chamber will defer its assessment of the admissibility of the evidence until deliberating its judgment pursuant to Article 74(2) of the Statute. When the participants formally submit evidence during trial, all the Chamber will generally do is recognise their

⁸ 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.

⁹ See the Request, *supra* note 2, paras. 2 and 12.

¹⁰ *Idem*, paras. 7 and 8.

*formal submission. The Chamber will consider the relevance, probative value and potential prejudice of each item of evidence submitted when deliberating the judgment [...]*¹¹

12. This ruling was rehearsed, as the Defence admits,¹² in the Impugned Decision.¹³ In doing so, the Chamber simply reiterated the standard evidentiary criteria previously adopted in the Initial Directions and indicated that they apply to the evidence collected through interception. Most importantly, the Chamber never considered the intercept evidence as a special type of evidence whose submission is subject to any special “procedural bars.”

13. This matter of raising “procedural bars” was mentioned in the Impugned Decision only as a part of the Chamber’s explanation to its general approach to standard evidentiary criteria. In particular, the Chamber stated that “[it] *will rule upfront on certain issues related to the admissibility of evidence when this is deemed appropriate, particularly when procedural bars are raised which may foreclose consideration of the standard evidentiary criteria.*”¹⁴ Then the Chamber also recalled that it has previously issued three decisions pursuant to rule 68(2)(b) of the Rules and article 56 of the Statute which recognised the submission of evidence while only examining whether any procedural bars rendered them inadmissible.¹⁵ The Chamber also plainly stated that “*objections raised under article 69(7) of the Statute or the procedural pre-requisites contained in Rule 68 of the Rules*” are examples of “procedural bars.”¹⁶

14. Therefore, these specific terms of the Impugned Decision make clear that the Chamber mentioned “procedural bars” only to re-emphasize the importance of the general approach to standard criteria of evidence, as articulated in the Initial Directions. Indeed, the Chamber did not make any finding or ruling in relation to special “procedural bars” provided in the Statute or the Rules. Nor was it required to

¹¹ See the Initial Directions, *supra* note 3, para. 24.

¹² See the Request, *supra* note 2, para. 7.

¹³ See Impugned Decision, *supra* note 4, para. 4(ii) –(iii)

¹⁴ *Idem*, para. 4 (iv).

¹⁵ *Ibidem*, para. 5 and footnote 10.

¹⁶ *Ibid.*, footnote 11.

specify the precise scope of any “procedural bars” since the intercept evidence was not introduced under any special evidentiary regime such as those provided in article 69(7) of the Statute or rule 68 of the Rules.

15. Consequently, the Common Legal Representative submits that the purported issue raised in the Request calls for a purely academic exercise. As stressed earlier, an appealable “issue” must be as “*subject or topic requiring a decision for its resolution*”¹⁷, identifying “*a specific factual and/or legal error.*”¹⁸ On the contrary, the Request is raising a hypothetical issue; namely; “*the scope of ‘procedural objections’ required to be examined pursuant to submission under Article 69(3)*”, which did not form part of the Chamber’s ruling in the Impugned Decision and thus is unavailable for the Appeals Chamber’s review.

16. While the scope of “procedural bars” that the Chamber mentioned may be of interest to the Defence, “*the mere fact that an issue is of general interest or that, given its overall importance, could be raised in, or affect, future pre-trial or trial proceedings before the Court is not sufficient to warrant the granting of leave to appeal*”.¹⁹ This reflects the narrow parameters of interlocutory appeals under the Statute, excluding any possibility to lodge appeals on matters such as general importance to proceedings, like other international criminal tribunals have allowed.²⁰

17. Consequently, the Common Legal Representative contends that the Request fails to raise a properly constituted appealable issue. Therefore, on this ground alone, the Request should be dismissed in its entirety.

¹⁷ 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”, *supra* note 6, para. 9

¹⁸ 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 8, para. 70.

¹⁹ See the “Decision on Prosecutor’s Application for Leave to Appeal in Part Pre-Trial Chamber II’s Decision on the Prosecutor’s Applications for Warrants of Arrest under Article 58” (Pre-Trial Chamber II), No. ICC-02/04-01/05-20-US-Exp, 19 August 2005 (unsealed pursuant to Decision no. ICC-02/04-01/05-52 dated 13 October 2005), para. 21.

²⁰ *Idem*, para. 16.

18. 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 Statute are not fulfilled.

19. 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. The purported issue - the scope of “procedural bars” – cannot possibly have any impact on fair and expeditious conduct of proceedings or the outcome of the trial since the Chamber never made any factual findings or binding rulings in relation to “procedural bars”. The Defence’s arguments related to *potential* difficulties it might face due to the alleged uncertainty of the scope of “procedural bars” in the future are purely speculative and grossly unsubstantiated.

20. Moreover, an immediate resolution by the Appeals Chamber of the issue identified in the Request would not materially advance the proceedings. Indeed, it must be stressed that the Appeals Chamber’s review is “*corrective in nature*”²¹ and an appeal is conducted with the purpose of reviewing the proceedings that took place before a lower Chamber.²² Yet again, in the Impugned Decision, the Chamber did not make any factual finding in relation to or render ruling as to the scope of “procedural bars”. Consequently, the Appeals Chamber cannot be asked to engage in a purely academic exercise, supported by speculative arguments.

21. In sum, 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.

²¹ See the “Judgment on the appeal of the Prosecutor against the decision of Trial Chamber IV of 12 September 2011 entitled ‘Reasons for the Order on translation of witness statements (ICC-02/05-03/09-199) and additional instructions on translation’” (Appeals Chamber), No. ICC-02/05-03/09-295 OA2, 17 February 2012, para. 20.

²² See the “Decision on the ‘Filing of Updated Investigation Report by the Government of Kenya in the Appeal against the Pre-Trial Chamber’s Decision on Admissibility’” (Appeals Chamber), No. ICC-01/09-02/11-202 OA, 28 July 2011, par. 11.

FOR THE FOREGOING REASONS, the Common Legal Representative respectfully requests the Chamber to dismiss the 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 12th day of December 2016

At The Hague, The Netherlands