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**International
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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

**Prosecution Response to Defence Request for Leave to Appeal Decision
Recognising Intercept-Related Evidence as Formally Submitted (Decision 615)**

Source: Office of the Prosecutor

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

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Introduction

1. The Defence request for leave to appeal¹ the Trial Chamber's decision recognising intercept-related evidence as formally submitted² should be denied.
2. The issue proposed for certification—"the scope of 'procedural objections' required to be examined pursuant to submission under Article 69(3)"³ ("Issue")—does not meet the standard for an appealable issue. The Issue has been raised in an untimely fashion, does not genuinely arise from the Decision, and represents nothing more than an attempt to challenge the Chamber's general approach to assessing evidence.
3. Moreover, the Defence fails to establish that the Issue will have a significant impact on the fair and expeditious conduct of the proceedings or the outcome of the trial or that immediate resolution of the Issue by the Appeals Chamber will materially advance the proceedings.

Submissions

i. Applicable law

4. Interlocutory appeals are "exceptional"⁴ and should not be a device "to express mere disagreement with any of the Chamber[s] decisions."⁵ An "issue" for the purpose of article 82(1)(d) is "an identifiable and discrete subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion."⁶ Such subject or topic must be "essential for

¹ ICC-02/04-01/15-625 ("Request").

² ICC-02/04-01/15-615 ("Decision").

³ Request, para. 2.

⁴ See e.g. ICC-02/05-03/09-109, para. 2; ICC-02/04-01/15-428, para. 4.

⁵ See e.g. ICC-01/05-01/13-T-10-Red-ENG, p. 11 (lns. 4-8); ICC-01/12-01/15-T-1-ENG, p. 12 (lns. 11-12).

⁶ See e.g. ICC-01/04-168 OA3 ("DRC Appeal Decision"), para. 9.

the determination of matters arising in the judicial cause under examination”⁷ and genuinely arise from the impugned decision.⁸ The failure of an applicant to raise a proposed issue for appeal in a timely fashion may negatively impact on their right to later seek leave to appeal.⁹

ii. The Request should be rejected because the Issue does not arise from the Decision

5. The Request effectively seeks leave to appeal the admissibility regime set out in the Rule 140 Decision.¹⁰ However, the Defence did not seek leave to appeal that decision within the prescribed time limit. Indeed, if the Defence thought that there was some lack of clarity in "the scope of 'procedural objections' required to be examined pursuant to submission under Article 69(3)," then it should have challenged the Rule 140 Decision where the Chamber set out its regime on admissibility. As noted in the Decision, "[t]he Chamber has already issued three decisions which recognise the submission or introduction of evidence while only examining whether any procedural bars rendered them admissible."¹¹ Presumably, the lack of clarity perceived by the Defence also existed in that context, but the Defence did not seek leave to appeal on this point. It is too late now. On this basis alone, the Request can be dismissed.
6. Moreover, the Issue, as articulated by the Defence, is founded on a strained or mistaken reading of the Decision, compounded by a misunderstanding of the admissibility regime in this case. It ultimately reflects nothing more than a disagreement with the Chamber's approach to assessing evidence, a matter which falls well within the Chamber's discretion.

⁷ See e.g. DRC Appeal Decision, para. 9.

⁸ See e.g. ICC-01/05-01/13-1278, paras. 9-10.

⁹ See e.g. ICC-01/04-01/06-338, p. 8.

¹⁰ ICC-02/04-01/15-497 ("Rule 140 Decision").

¹¹ Decision, para. 5.

7. The Decision clearly outlines the Chamber's approach to assessing evidence, reiterating its prior rulings, including that: (i) as a general rule, evidentiary objections that relate to standard evidentiary criteria (relevance, probative value, and potential prejudice) will be considered during the Chamber's deliberations, not at the time of submission;¹² and (ii) evidence introduced during the proceedings generally will be recognised only as submitted, not as admitted.¹³
8. Despite this clear summary of the principles relating to "submission" of evidence, the Defence apparently reads the Decision as ruling that "some issues are within the scope of procedural bars to submission" but that the Defence's arguments did not fall within this scope.¹⁴ However, the Chamber made no such ruling. Instead, consistent with the Rule 140 Decision, the Chamber indicated that, in certain circumstances, it would make an *exception* to its usual submission-only practice and rule "upfront" on admissibility issues.¹⁵ The Chamber went on to specify that it would depart from the usual practice "particularly when procedural bars are raised which may foreclose consideration of the standard evidentiary criteria."¹⁶ As the Chamber had explained previously, examples of such "procedural bars" include those in article 69(7) of the Statute and the procedural prerequisites contained in rule 68 of the Rules.¹⁷ No such procedural bar arises here since the Chamber concluded—and the Defence does not dispute¹⁸—that its challenges to the intercept evidence related to relevance, probative value and potential prejudice, and therefore fall within the scope of standard evidentiary criteria.¹⁹

¹² See Decision, paras. 4(ii), 26.

¹³ Decision, para. 4 (iii).

¹⁴ Request, paras. 11-12.

¹⁵ Decision, para. 4(iv).

¹⁶ Decision, para. 4(iv).

¹⁷ Rule 140 Decision, para. 26, n.19.

¹⁸ See Request, paras. 10-11.

¹⁹ Decision, para. 22.

9. Although the Defence may prefer that the Chamber rule on its evidentiary objections at the point of submission, rather than considering them at the point of final deliberations, the Chamber is not required to do so. Indeed, as noted in the Decision,²⁰ the Appeals Chamber has already ruled that a Trial Chamber may defer consideration of relevance and/or admissibility of evidence until its deliberations.²¹ The Defence's mere disagreement with the outcome of the Decision does not render the Issue appealable.
10. For these reasons, the Defence has failed to identify an appealable issue, and the Request can be dismissed without further consideration.

iii. The remaining article 82(1)(d) criteria are not met

11. In addition to failing to identify an appealable "issue," the Request also fails to meet the other criteria for leave to appeal, as detailed below.²²

a. The Issue does not significantly affect the fairness of the proceedings

12. The Defence's allegation that the Issue creates procedural uncertainty²³ impacting on the fairness of the proceedings is speculative and unsubstantiated. As the Chamber observed in the Decision, "*prima facie* rulings on the standard evidentiary criteria would not provide the Defence with any meaningful additional clarity on how the Prosecution or Chamber will ultimately rely upon the submitted evidence."²⁴ In fact, the Chamber's discretionary determination to defer consideration of the Defence's various objections until the judgment and in

²⁰ Decision, para. 4(i).

²¹ ICC-01/05-01/08-1386, OA 5 OA 6, para. 37.

²² Article 82(1)(d) criteria are cumulative: a failure to fulfill one of the criteria is fatal to any application for leave to appeal. The Prosecution notes that while the Defence asserts that the Issue "potentially" impacts on the outcome of the trial (*see* Request, para. 17), that point is not further developed. The Prosecution submits that its arguments below in relation to fairness and expeditiousness are responsive to that (unsubstantiated) assertion.

²³ Request, para. 18.

²⁴ Decision, para. 25.

light of the entirety of the evidence will not undermine the fairness of the proceedings, since the Defence will have the “entirety of the trial to examine Prosecution witnesses on interception related materials, call witnesses of its own and submit evidence itself.”²⁵

13. Furthermore, the Defence’s claim that the Issue casts doubt on how and when an evidentiary objection should be raised²⁶ is unfounded. Nothing in the Decision indicates that the Defence should depart from the ordinary procedure of raising objections at the point when the Prosecution submits items of evidence, as required pursuant to rule 64(1) of the Rules.²⁷ That the Chamber may decide not to rule on the Defence’s objections at the time of the objection and before recognising items as “submitted” does not mean that those objections will be disregarded. Indeed, the Decision specifically states that the Chamber will consider the Defence’s objections or observations in its final assessment of the evidence²⁸ and anticipates that the Defence may be afforded the opportunity to raise further evidentiary objections.²⁹

14. Finally, while the Defence claims that its preparations are now “confused” in light of the uncertainty created by the Decision, the Prosecution notes that it has been clear since the Rule 140 Decision, issued almost five months ago, that (1) the Chamber would only recognise the formal “submission” of evidence when submitted³⁰ and (2) the Chamber would allow introduction of evidence through the bar table.³¹

²⁵ Decision, para. 23.

²⁶ Request, paras. 19-20.

²⁷ *See also* Rule 140 Decision, para. 27 (stating that, “in accordance with Rule 64(1) of the Rules, any objection to the relevance or admissibility of evidence must generally be made at the first opportunity”).

²⁸ Decision, para. 11.

²⁹ Decision, para. 25.

³⁰ Rule 140 Decision, para. 24.

³¹ Rule 140 Decision, para. 27.

b. The Issue does not significantly affect the expeditious conduct of the proceedings

15. The Defence's claims about the Issue's purported impact on the expeditiousness of the trial are speculative and unsupported. For example, it is not clear—and the Defence does not explain—why it would, “out of an abundance of caution,” need to object to submission of items pre-emptively.³² Nor does the Defence explain why the Chamber would need significant time to consider those objections³³—an implausible proposition given that substantive assessment of the objections that are not ruled upon when raised are likely to be deferred until the Chamber's final deliberations.

16. The Defence's no-case-to-answer example³⁴ is similarly unhelpful and speculative. First, they assume that the Chamber will conclude that a “no case to answer” determination is warranted in the specific circumstances of this case, which may or may not happen. Second, even if the Chamber was to embark on a “no case to answer” determination at the completion of the Prosecution's case, the Defence's arguments still fail;³⁵ indeed, the Chamber would consider and assess the evidence before it at that time to a standard lower than the one enshrined in article 66(3). Crucially, there is no uncertainty: all the evidence tendered is considered as “submitted” unless the Chamber indicates otherwise.³⁶

³² Request, para. 22.

³³ Request, para. 22.

³⁴ Request, para. 23.

³⁵ Request, para. 23.

³⁶ Decision, para. 11; Rule 140 Decision, para. 26.

- c. Immediate resolution by the Appeals Chamber will not materially advance the proceedings

17. The Request fails to show that immediate resolution of the Issue may materially advance the proceedings. The Defence argues that immediate resolution of the Issue “shall decisively determine the procedural requirements to take before recognising evidence submitted via the bar table”³⁷ and give “appellate guidance on critical issues.”³⁸ However, the Appeals Chamber has already ruled, in the *Bemba* case, that Trial Chambers may defer their admissibility assessment until the end of the proceedings.³⁹ There is no reason to revisit this issue on interlocutory appeal in another case because the Defence hopes for a different result.

Conclusion

18. For the reasons set out above, the Request should be rejected.



Fatou Bensouda
Prosecutor

Dated 12th day of December 2016
At The Hague, The Netherlands

³⁷ Request, para. 27.

³⁸ Request, para. 25.

³⁹ ICC-01/05-01/08-1386, OA 5 OA 6, para. 37.