



Original: English

No.: ICC-02/04-01/15
Date: 20 December 2016

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

**Decision on Defence Request for Leave to Appeal the Decision Recognising
Interception Related Evidence as Submitted**

To be notified, in accordance with Regulation 31 of the Regulations of the Court, to:

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States Representatives

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**Victims Participation and Reparations
Section**

Other

Trial Chamber IX ('Chamber') of the International Criminal Court ('Court') in the case of *The Prosecutor v. Dominic Ongwen*, having regard to Article 82(1)(d) of the Rome Statute ('Statute'), issues the following 'Decision on Defence Request for Leave to Appeal the Decision Recognising Interception Related Evidence as Submitted'.

I. Background and submissions

1. On 1 December 2016, the Chamber issued a decision ('Impugned Decision') allowing the Office of the Prosecutor's ('Prosecution's') submission of interception related evidence.¹
2. On 7 December 2016, the defence for Mr Ongwen ('Defence') filed a request for leave to appeal the Impugned Decision ('Request') on the issue of '*the scope of "procedural objections" required to be examined pursuant to submission under Article 69(3)*' ('Issue').²
3. On 12 December 2016, the Prosecution and the Common Legal Representative of Victims responded to the Request, opposing it.³

II. Analysis

4. The Chamber recalls the applicable law relating to Article 82(1)(d) of the Statute as set out in previous decisions.⁴

¹ Decision on Prosecution Request to Submit Interception Related Evidence, ICC-02/04-01/15-615.

² Defence Request for Leave to Appeal 'Decision on Prosecution Request to Submit Interception Related Evidence' (ICC-02/04-01/15-615), ICC-02/04-01/15-625.

³ Response to the 'Defence Request for Leave to Appeal Decision on Prosecution Request to Submit Interception Related Evidence (ICC-02/04-01/15-615)', ICC-02/04-01/15-630 and Prosecution's Response to 'Defence Request for Leave to Appeal Decision on Prosecution Request to Submit Interception Related Evidence' (Decision 615), ICC-02/04-01/15-631.

⁴ See Decision on Defence Request for Leave to Appeal Decision ICC-02/04-01/15-521, 2 September 2016, ICC-02/04-01/15-529, paras 4-8; Decision on Defence Request for Leave to Appeal the Decision on Article 56 Evidence, 9 September 2016, ICC-02/04-01/15-535, para. 7.

5. In its Request, the Defence raises the issue of the scope of the procedural objections required to be examined pursuant to submission under Article 69(3), arguing that in the Impugned Decision, the Chamber decided ‘that some issues are within the scope of the procedural bars to submission but did not consider the Defence arguments to fall within these’.⁵ This is a clear misreading of the Impugned Decision and indeed of the Chamber’s jurisprudence on the admission of evidence.

6. In the Impugned Decision, the Chamber recalled its ‘Initial Directions on the Conduct of Proceedings’ (‘Rule 140 Decision’)⁶ in which the Presiding Judge set out the Chamber’s approach to the consideration of relevance and admissibility of evidence.⁷ Specifically, the Chamber noted its statement in the Rule 140 Decision that:

[W]hen the participants formally submit evidence during trial, all the Chamber will generally do is recognise their formal submission...This said, the Chamber 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.⁸

7. The Chamber noted in footnote two such kinds of procedural bars, namely objections raised under Article 69(7) of the Statute and based on the procedural pre-requisites contained in Rule 68 of the Rules.⁹ The Chamber also recalled that it already issued three decisions which recognise the submission or introduction of evidence while only examining whether any procedural bars rendered them inadmissible.¹⁰

⁵ Request, ICC-02/04-01/15-625, paras 10-11.

⁶ Initial Directions on the Conduct of the Proceedings, 13 July 2016, ICC-02/04-01/15-497.

⁷ Impugned Decision, ICC-02/04-01/15-615, para. 4.

⁸ Impugned Decision, ICC-02/04-01/15-615, para. 4, *citing* Rule 140 Decision, ICC-02/04-01/15-497, paras 24 and 26.

⁹ Impugned Decision, ICC-02/04-01/15-615, footnote 11.

¹⁰ Impugned Decision, para. 5, *referencing* 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), 22 November 2016, ICC-02/04-01/15-600; Decision on the Prosecution’s Applications for

8. As clearly set forth in the Rule 140 Decision, and reiterated in the Impugned Decision and its other decisions on submission of evidence, the Chamber's general rule is that it will not rule on the relevance, probative value and potential prejudice (the 'standard evidentiary criteria') at the point of submission and will generally only recognise their formal submission and note the objections raised by the participants. Only when procedural bars are raised will it rule upfront on certain issues related to admissibility of evidence.¹¹

9. In the Impugned Decision, the Defence's objections fell squarely within the constraint of the standard evidentiary criteria,¹² thus the Chamber did not consider any procedural bars to their admission.¹³ No legal or factual findings about procedural bars or objections were made in the Impugned Decision. The Issue as articulated by the Defence is a mere hypothetical exercise that does not relate to the Chamber's actual ruling in the Impugned Decision – it is therefore insufficiently discrete to qualify as an appealable issue. As such the Chamber finds that the Issue, as alleged by the Defence, does not qualify as an appealable issue and, accordingly, the Request does not satisfy the criteria prescribed by Article 82(1)(d) of the Statute.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY:

REJECTS the Request.

Introduction of Prior Recorded Testimony under Rule 68(2)(b) of the Rules, 18 November 2016, ICC-02/04-01/15-596-Red, para. 7; Decision on Request to Admit Evidence Preserved under Article 56 of the Statute, 10 August 2016, ICC-02/04-01/15-520, para. 7.

¹¹ See Impugned Decision, paras 4-13.

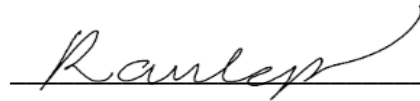
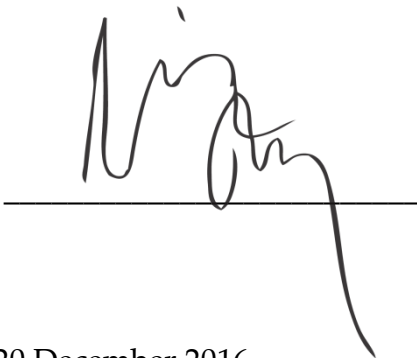
¹² Defence Response to 'Prosecution's formal submission of intercept evidence via the "bar table"' (ICC-02/04-01/15-580), ICC-02/04-01/15-599.

¹³ See Impugned Decision, ICC-02/04-01/15-615, paras 14-22.

Done in both English and French, the English version being authoritative.



Judge Bertram Schmitt, Presiding Judge



Dated 20 December 2016

At The Hague, The Netherlands