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**International
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Court**

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Date: **21 May 2018**

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

CLRV Response to the “Defence Request for Leave to Appeal the Trial Chamber’s Oral Decision on the Exclusion of Certain Parts of the CLRV Expert Report”

Source: Office of Public Counsel for Victims

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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I. INTRODUCTION

1. The Common Legal Representative of the victims¹ (the “CLR V”) submits that the “Defence Request for Leave to Appeal the Trial Chamber’s Oral Decision on the Exclusion of Certain Parts of the CLR V Expert Report” (the “Request”)² should be rejected since it fails to meet the criteria for granting interlocutory appeal under article 82(1)(d) of the Rome Statute.

2. In particular, the CLR V submits that, in contrast with the established jurisprudence on granting interlocutory appeal, the Defence fails to identify clearly the appealable issue by indicating a specific factual and/or legal error committed by the Chamber. Most importantly, the Defence simply expresses a disagreement with the ruling of the Chamber.

II. PROCEDURAL BACKGROUND

3. On 6 March 2018, Trial Chamber IX (the “Chamber”) issued its Decision Authorising the Presentation of Evidence by the Legal Representatives of Victims, partially granting the requests to present evidence by both teams.³

4. On 23 March 2018, the CLR V informed the Chamber, the parties and participants of the availability of the expert witnesses to appear at the Court between

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; and the “Decision on the ‘Request for a determination concerning legal aid’ submitted by the legal representatives of victims” (Trial Chamber IX, Single Judge), No. ICC-02/04-01/15-445, 26 May 2016, para. 13.

² See the “Defence Request for Leave to Appeal the Trial Chamber’s Oral Decision on the Exclusion of Certain Parts of the CLR V Expert Report”, No. ICC-02/04-01/15-1261, 17 May 2018 (the “Request”).

³ See the “Decision on the Legal Representatives for Victims Requests to Present Evidence and Views and Concerns and related requests (Trial Chamber IX), No. ICC-02/04-01/15-1199-Conf, 06 March 2018, para. 79 (the “Decision Authorising the Presentation of Evidence”). A public redacted version of the decision was filed on the same day; see No. ICC-02/04-01/15-1199-Red.

14-16 and 23-24 May 2018.⁴ On 27 March 2018, the LRV also informed via email of the availability of their witnesses to testify in Court between 1 and 9 May 2018.⁵ On 27 March 2018, the Chamber communicated via email its decision setting the hearing schedule of the victims' presentation of evidence on 1-9, 14-16 and 23-24 May 2018.⁶

5. On 13 April 2018, the Prosecution filed its notice of the completion of evidence presentation.⁷ On 23 April 2018, the Defence filed its "Defence Urgent Request for Delay in Opening of LRV and CLRV Cases, Pursuant to Articles 67(1)(b) and 67(1)(e) of the Rome Statute" (the "Urgent Request").⁸ On 26 April 2018, the Prosecution⁹, the CLRV¹⁰ and the LRV¹¹ filed their respective responses to the Urgent Request. On the same day, the Chamber rejected the Urgent Request.¹²

6. From 1 to 4 May 2018, the Chamber heard the testimonies of all the witnesses called by the LRV.¹³ On 4 May 2018, the Defence filed a request seeking leave to appeal the decision rejecting its Urgent Request.¹⁴ On 09 and 11 May 2018

⁴ See the email from the Common Legal Representative of Victims sent on 23 March 2018 at 09:19.

⁵ See the email from the Legal Representatives of Victims sent on 27 March 2018 at 13:26.

⁶ See the email from Trial Chamber IX sent on 27 March 2018 at 15:28.

⁷ See the "Notice of the Prosecution's completion of evidence presentation", No. ICC-02/04-01/15-1225, 13 April 2018.

⁸ See the "Defence Urgent Request for Delay in Opening of LRV and CLRV Cases, Pursuant to Articles 67(1)(b) and 67(1)(e) of the Rome Statute", No. ICC-02/04-01/15-1239, 23 April 2018 (the "Urgent Request").

⁹ See the "Prosecution's Response to the Defence Urgent Request for Delay in Opening of LRV and CLRV Cases, No. ICC-02/04-01/15-1245, 26 April 2018.

¹⁰ See the "CLR Response to the 'Defence Urgent Request for Delay in Opening of LRV and CLRV Cases, Pursuant to Articles 67(1)(b) and 67(1)(e) of the Rome Statute'", No. ICC-02/04-01/15-1246, 26 April 2018.

¹¹ See the "Victims' response to "Defence Urgent Request for Delay in Opening of LRV and CLRV Cases, Pursuant to Articles 67(1)(b) and 67(1)(e) of the Rome Statute", No. ICC-02/04-01/15-1247, 26 April 2018.

¹² See the "Decision on Defence Urgent Request for Delay in Opening of LRV and CLRV Evidence Presentation" (Trial Chamber IX), No. ICC-02/04-01/15-1248, 26 April 2018.

¹³ See Transcripts No. ICC-02/04-01/15-T-171 to No. ICC-02/04-01/15-T-174.

¹⁴ See the "Defence Request for Leave to Appeal the "Decision on Defence Urgent Request for Delay in Opening of LRV and CLRV Evidence Presentation", 4 May 2018, No. ICC-02/04-01/15-1253.

respectively, the CLRV¹⁵ and the Prosecution¹⁶ responded to the Defence's request. The Chamber's decision on the matter is pending.

7. On 11 May 2018, the Defence notified via email the Chamber, the parties and participants of its intention to "*address the Chamber and place objections on the record regarding a number of pertinent issues, especially relating to UGA-PCV-0001 but also relating to the other upcoming CLRV witnesses*", before the witness is brought into court on 14 May 2018.¹⁷

8. On 14 May 2018, prior to the start of the testimony of UGA-PCV-0001, the Defence orally made a request (the "Oral Request") objecting: (i) to the admission of pages 38 to 42 of the expert report of UGA-PCV-0001 referring to testimonies of certain witnesses; and (ii) to the adequacy of the summaries of the testimonies of the CLRV expert and sought the translation of the expert reports into Acholi.¹⁸ The CLRV opposed the Defence's objections and requested the Chamber to dismiss the Oral Request.¹⁹ The Chamber immediately deliberated and issued a decision rejecting the Oral Request with regard to the Defence's objection to the admission of pages 38 to 42 of the expert report, while deciding not to rule on the latter part of the Oral Request since the matter is still pending before it (the "Impugned Decision").²⁰

9. From 14 to 15 May 2018, the Chamber heard the testimonies of expert witnesses UGA-PCV-0001 and UGA-PCV-0002.²¹

10. On 17 May 2018, the Defence filed its Request.²²

¹⁵ See the "CLRV Response to the 'Defence Request for Leave to Appeal the 'Decision on Defence Urgent Request for Delay in Opening of LRV and CLRV Evidence Presentation'", No. ICC-02/04-01/15-1257, 09 May 2018.

¹⁶ See the "Prosecution's Response to Defence Request for Leave to Appeal Decision ICC-02/04-01/15-1248", No. ICC-02/04-01/15-1258, 11 May 2018.

¹⁷ See the email sent by the Defence on 11 May 2018 at 16:27.

¹⁸ See Transcript No. ICC-02/04-01/15-T-175-CONF-ENG, p. 2 line 17 to p. 8 line 16.

¹⁹ *Idem*, p. 8 line 19 to p. 11 line 4.

²⁰ *Ibidem*, p. 11 line 14 to p. 13 line 7.

²¹ See Transcripts No. ICC-02/04-01/15-T-175-CONF-ENG and No. ICC-02/04-01/15-T-176-ENG.

²² See *supra* note 2.

III. SUBMISSIONS

11. Article 82(l)(d) of the Rome Statute (the “Statute”) sets out the criteria for granting a request for leave to appeal as follows: (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 the relevant Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

12. For the purposes of the first prong of the above mentioned 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”.²³ 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”.²⁴ 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 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”.²⁵

13. In the Request, the Defence seeks leave to appeal “[the Chamber’s] oral decision rejecting the Defence request to exclude certain parts of the [CLR] expert report.”²⁶ The

²³ 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.

²⁴ *Idem*, para. 20.

²⁵ 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.

²⁶ See the Request, *supra* note 2, para. 1.

Defence argues that the [Impugned Decision] *is inconsistent with the Trial Chamber's prior rulings regarding the scope of CLRV and [LRV's] presentation of evidence, restrictions on the evidence that the LRV and CLRV are allowed to elicit, and the purpose and content of the materials disclosed by the LRV and CLRV [referring to Decision No. ICC-02/04-01/15-1248, ICC-02/04-01/15-1199, para. 18; Oral decision of 4 April 2017]*".²⁷ Moreover, the Defence purportedly raises an issue framed as follows: "*Issue 1: Whether the Trial Chamber's decision is inconsistent with its previous rulings establishing the scope of the LRV and CLRV presentation of evidence, restrictions on the evidence that the LRV and CLRV are allowed to elicit, and the purpose and content of the materials disclosed by the LRV and CLRV.*"²⁸

14. In contrast with the established jurisprudence on granting interlocutory appeal, the Defence fails to identify clearly the appealable issue by indicating a specific factual and/or legal error.²⁹ Rather, the Defence challenges *the whole* of the Impugned Decision. Yet, article 82(1)(d) of the Statute "*requires the parties to articulate discrete issues for Appeals Chamber resolution and [...] it is generally insufficient to argue that the entirety of the Chamber's reasoning is erroneous when requesting leave to appeal*".³⁰

15. Most importantly, the Defence simply expresses a disagreement with the ruling of the Chamber. In particular, the Impugned Decision stated that:

"The request by the Defence to exclude pages 38 to 42 of the expert report into evidence is rejected. With regard to the argument that the report mentions the testimony of unknown witnesses, the Chamber notes that all references made in the four pages are done by witnesses that are known to the Defence, that the extracts cited are already in evidence. [...] The Chamber further stresses, as pointed out by the

²⁷ *Idem*, para. 2, footnote 3 (emphasis added.)

²⁸ *Ibidem*, para. 14.

²⁹ 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 25.

³⁰ See the "Decision on the joint defence request for leave to appeal the decision on witness preparation" (Trial Chamber V), No. ICC-01/09-01/11-596, 11 February 2013, para. 11 (emphasis added); and the "Decision on Defence Request for Reconsideration of or Leave to Appeal/Decision on 'Defence Request for Disclosure and Judicial Assistance'" (Trial Chamber VII), No. ICC-01/05-01/13-1282, 22 September 2015, para. 10.

Defence, the limited purpose of the testimony by these witnesses. It recalls decision 1199 and its oral instruction from 4 April 2017 that the victim representatives may [...]: "Appropriately ask certain questions to witnesses about other matters which are relevant to the personal interests of the victims." This may include questions about harms which the witnesses personally suffered or harms of other victims which the witness observed. The expert report is, therefore, not outside of these instructions. As to the last point raised by the Defence, it is of course ultimately up to the Chamber to make any legal assessment and to assess the evidence. As has been done in the past, the Chamber will take note of the evidence, and of course it will make the ultimate assessment of it. As also been done in the past, it will furthermore make its own legal conclusions. As has been done with the last expert, any references using terms with a legal connotation, such as rape, for instance, will of course be fully and only assessed by the Chamber. This is to assure the Defence that there will be no prejudice in that regard. [...] Accordingly, the Chamber rejects the exclusion of parts of the expert report and will, in line with its general approach, fully assess the evidence at the time of the issuance of the judgment. [...]"³¹

16. Therefore, in issuing the Impugned Decision, the Chamber did explicitly refer to – and its ruling was consistent with – the Decision Authorising the Presentation of Evidence (or “*decision 1199*”) and the oral decision of 4 April 2017 on the matter. Nonetheless, the Defence is in uncompromising disagreement with the Chamber as the former alleges the exact opposite of what the Chamber reasoned and ruled. As recalled above,³² such disagreements do not qualify for an appealable issue. Moreover, in its Request, the Defence repeats most of its arguments, including *verbatim* records, which were made orally before the Chamber.³³ Thus, in re-iterating the arguments already specifically addressed and ruled upon³⁴ by the Chamber in the Impugned Decision, Issue 1) of the Request also shows that the Defence is in disagreement with the ruling of the Chamber.

³¹ See the Impugned Decision, *supra* note 20, p. 11 line 16 - p. 12 line. 20 and p. 12 line 24 – p. 13 line. 7. (emphasis added.)

³² 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 23.

³³ See the Request, *supra* note 2, paras. 17 – 19.

³⁴ See the “Decision on the ‘Request for Leave to Appeal against the ‘Decision on the Request for an order for the commencement of the pre-confirmation phase by the Defence of Saif Al-Islam Gaddafi’” (Pre-Trial Chamber I), No. ICC-01/11-01/11-490, 1 December 2013, para. 31 and the “Decision on Defence requests for leave to appeal the ‘Order setting the commencement date for trial’” (Trial Chamber I), No. ICC-02/11-01/15-117, 2 July 2015, para. 22.

17. Furthermore, the Defence contends that the Chamber's finding - that the witnesses whose testimonies are referred to in the expert report are known to the Defence - is erroneous.³⁵ However, the Defence argues itself that "*it is irrelevant*" whether or not those witnesses are known to the Defence and also "*whether the Defence knows the particular witness and associated references is not the legal standard articulated in the Trial Chamber's instructions regarding the scope of the LRV and CLRV presentation of evidence.*"³⁶ Therefore, the Common Legal Representative submits that these Defence's arguments fail to identify an exact error (factual or legal) and are also confusing, self-contradictory and self-defeating.

18. In addition, the Defence argues that "*the CLRV expert PCV-0001 was allowed to comment on references that are of incriminatory nature and discuss elements of the crimes charged against Mr Ongwen*" thus violating his fair trial rights.³⁷ The Common Legal Representative submits that experts commenting on extract of the testimonies of crime-base witnesses and providing their professional opinion on the extent of the harm suffered does neither automatically make the expert evidence incriminatory nor part of the evidentiary elements of the crimes charged. As recalled by the Chamber³⁸, the extracts in question are already in evidence and the expert was not called to provide any new evidence against Mr. Ongwen for any wrong doing or presenting proof of a crime(s) or fault on his part. The expert was examined only in relation to the personal interests of the victims, including questions about harms which the witnesses personally suffered from or harms of other victims which the witnesses observed.³⁹ In this regard, the Defence fails to explain or substantiate how exactly such expert evidence turns out to be incriminatory in nature or goes to the heart of the element of the crimes charged.

³⁵ See the Request, *supra* note 2, para. 21.

³⁶ *Idem*.

³⁷ *Ibidem*, paras. 22-23.

³⁸ See *supra* note 31.

³⁹ See Transcript No. ICC-02/04-01/15-T-175-CONF-ENG.

19. Thus, there is no issue that would significantly affect the fair and expeditious conduct of proceedings or the outcome of the trial. The presentation of evidence by the CLRV has already begun and is more than halfway finished as the Chamber proceeded expeditiously with the witnesses called by both the LRV and the CLRV. Only one expert is still yet to testify, thus ending the presentation of evidence by the victims. Besides, the Defence fully participated in the recent trial hearings and questioned the experts called by the CLRV on equal and fair footing with the latter in terms of both scope and time.⁴⁰As a result, an intervention of the Appeals Chamber could not possibly materially advance the proceedings at such a late stage. Obviously, extra litigation of this matter on appeal will in fact produce the opposite effect by delaying the trial proceedings.

20. Therefore, the CLRV submits that the alleged issue identified by the Defence does not constitute appealable issues nor does it meet the stringent requirements for granting interlocutory appeal under article 82(1)(d) of the Rome Statute.

IV. CONCLUSION

21. For the foregoing reasons, the Common Legal Representative respectfully requests the Chamber to dismiss the Request.



Paolina Massidda
Principal Counsel

Dated this 21st day of May 2018
At The Hague (The Netherlands)

⁴⁰ See Transcripts No. ICC-02/04-01/15-T-175-CONF-ENG and No. ICC-02/04-01/15-T-176-ENG.