

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

No.: **ICC-02/04-01/15**

Date: **27 May 2019**

TRIAL CHAMBER IX

Before: Judge Bertram Schmitt, Single Judge

SITUATION IN UGANDA

IN THE CASE OF *THE PROSECUTOR v. DOMINIC ONGWEN*

Public

**Decision on Defence Request for Leave to Appeal the Decision on the Request for
Amendment of the Seating Schedule**

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

The Office of the Prosecutor

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Counsel Support Section

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Detention Section

**Victims Participation and Reparations
Section**

Others

Judge Bertram Schmitt, acting as Single Judge on behalf of Trial Chamber IX of the International Criminal 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 on the Request for Amendment of the Seating Schedule'.

I. Procedural history and submissions

1. On 1 May 2019, the Chamber informed the parties and participants of a change in the hearing schedule, cancelling six hearing days in May 2019.¹ The following day, the Chamber notified the parties and participants of the scheduling of five additional days, on 13, 14, 17, 18, and 20 June 2019 ('Additional Hearing Days').²
2. On 7 May 2019, the Defence filed a motion requesting that the Additional Hearing Days be removed from the calendar ('Initial Request').³
3. On 15 May 2019, the Single Judge issued a decision rejecting the Initial Request (the 'Impugned Decision').⁴
4. On 20 May 2019, the Defence requested leave to appeal the Impugned Decision (the 'Request').⁵ It requests leave to appeal on:

'[w]hether the Decision, based on the necessity to compensate for six hearing days and expeditious advancement of the trial proceedings, implements the Single Judge's obligations under Article 64(2) to "ensure that a trial is fair [...] and is conducted with full respect for the right of the accused" consistent with Articles 21(3) and 67(1)(e)' (the 'Issue').⁶

¹ E-mail from Trial Chamber IX Communications, 1 May 2019 at 14:36.

² E-mail from Trial Chamber IX Communications, 2 May 2019 at 10:03.

³ Defence Request for Amendment of the Seating Schedule, ICC-02/04-01/15-1507-Conf. A public redacted version was filed on the same day, ICC-02/04-01/15-1507-Red.

⁴ Decision on Defence Request for Amendment of the Seating Schedule, ICC-02/04-01/15-1512.

⁵ Defence Request for Leave to Appeal 'Decision on Defence Request for Amendment of the Seating Schedule', ICC-02/04-015-1515-Conf. A public redacted version was filed on the same day, ICC-02/04-01/15-1515-Red.

⁶ Request, ICC-02/04-01/15-1515-Red, para. 4.

5. The Defence submits that the Issue arises from the Impugned Decision since it scheduled the Additional Hearing Days in order to compensate for the cancellation of the six days in May, considering the expeditiousness of the trial over the objections of the Defence.⁷
6. The Defence argues that the fair and expeditious conduct of the proceedings is significantly affected since '[u]ltimately, the essence of the Issue is fair trial'.⁸ It further submits that the 'disregard for Mr Ongwen's vulnerable mental condition and disability and the risk of adverse mental effects, Medical Officer's reports and the Defence's submissions on this critical matter have the potential to amount to a mistrial.'⁹
7. It further submits that an immediate resolution by the Appeals Chamber may materially advance the proceedings since 'the Issue can potentially have a substantial impact on the trial.'¹⁰
8. On 23 May 2019, the Office of the Prosecutor (the 'Prosecution') submitted its response, seeking that the Request be rejected ('Response').¹¹

II. Analysis

9. The Chamber recalls the interpretation of Article 82(1)(d) of the Statute as set out in detail previously.¹²
10. The Single Judge notes that the Request contains an 'introduction' in which the Defence alleges that Mr Ongwen was deprived of his fair trial rights by the Single Judge. Since this claim is explicitly not part of the Defence submissions in support of its Request but labelled as a 'preliminary matter',¹³ the Single Judge will not address it in this decision. However, for future submissions the Defence is to refrain from making general statements with no relation to its relief sought.

⁷ Request, ICC-02/04-01/15-1515-Red, paras 7-8.

⁸ Request, ICC-02/04-01/15-1515-Red, para. 20.

⁹ Request, ICC-02/04-01/15-1515-Red, para. 20.

¹⁰ Request, ICC-02/04-01/15-1515-Red, para. 21.

¹¹ Prosecution's Response to "Defence Request for Leave to Appeal Decision on Defence Request for Amendment of the Seating Schedule", ICC-02/04-01/15-1522.

¹² 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 Prosecution Request to Introduce Evidence of Defence Witnesses via Rule 68(2)(b), 5 September 2018, ICC-02/04-01/15-1331, para. 8.

¹³ Request, ICC-02/04-01/15-1515-Red, para. 2.

11. The Single Judge notes that the Defence tries to re-argue the Impugned Decision. In its Initial Request, the Defence submitted that the Additional Hearing Days ‘violate the fair and expeditious conduct of proceeding and Mr Ongwen’s fair trial rights under Article 67(1)(e)’,¹⁴ and referred to Article 21(3) of the Statute.¹⁵ The Defence merely reiterates its previous submissions in what it now formulates as the Issue of the Request. The Impugned Decision was cognisant of these arguments when issuing the Impugned Decision and addressed them.¹⁶
12. A substantial part of the submissions on why the Issue qualifies as an appealable issue are arguments why the Impugned Decision constitutes an abuse of discretion of Article 64(2) of the Statute and is unreasonable.¹⁷ These arguments address the merits of the Issue, namely why the Impugned Decision should be overturned, but is not responsive to the criteria which need to be fulfilled for a leave to appeal to be authorised under Article 82(1)(d) of the Statute.
13. The Defence, evidently, disagrees with how its Initial Request was resolved, but this does not constitute a ground for appeal. The Request does not cite to any specific facts which the Impugned Decision would have allegedly ignored or misstated. The assertion that the Single Judge relied on his own medical opinion is underpinned with the argument that ‘the Decision incorrectly prioritised considerations’.¹⁸ Again, this is not a fact but an opinion by the Defence, stemming from its disagreement with the Impugned Decision. The Defence ignores in its submissions that the Impugned Decision did not make any medical findings but merely finds that the Defence provided no concrete information, failed to specify the request and was speculative.¹⁹ Accordingly, such allegations do not arise of the Impugned Decision.
14. The submissions made by the Defence on the Issue amount to an attack of the Impugned Decision in its entirety, simply repeating the original assertions raised in the Initial Request. Accordingly, the Single Judge finds that the Issue, as formulated by the

¹⁴ Initial Request, ICC-02/04-01/15-1507-Conf, para. 4. *See also*, paras 9, 13 and 14.

¹⁵ Initial Request, ICC-02/04-01/15-1507-Conf, para. 11.

¹⁶ Impugned Decision, ICC-02/04-01/15-1512, para. 5, 7-8.

¹⁷ Request, ICC-02/04-01/15-1515-Conf, paras 9-17.

¹⁸ Request, ICC-02/04-01/15-1515-Conf, para. 11.

¹⁹ Impugned Decision, ICC-02/04-01/15-1512, paras 6-8.

Defence, is insufficiently discrete to qualify as an appealable issue pursuant to Article 82(1)(d) of the Statute.

**FOR THE FOREGOING REASONS, THE SINGLE JUDGE HEREBY
REJECTS** the Request.

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


Judge Bertram Schmitt, Single Judge

Dated 27 May 2019

At The Hague, The Netherlands