

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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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's Response to the "Defence Request for Leave to Appeal 'Decision on Further Defence Motion Alleging Defects in the Confirmation Decision'"

Source: The Office of the Prosecutor

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

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Introduction

1. The Defence Request¹ for leave to appeal the Decision on Further Defence Motion Alleging Defects in the Confirmation Decision² should be rejected. The Defence Request identifies no genuine issue arising from the Impugned Decision, merely states a disagreement with the Chamber's determination, and fails to satisfy the requirements of article 82(1)(d) of the Rome Statute.

Submissions

The Proposed Issue Does Not Arise from the Impugned Decision

2. The issue proposed by the Defence for the exceptional measure of interlocutory appeal is whether the Trial Chamber's "application of rule 134 of the Rules, in the instant case, was consistent with the requirements of a fair and expeditious trial and Mr Ongwen's rights as an accused person."³ Such a vague challenge merely questions the wisdom of the decision in general, without articulating any precise issue for appeal. The Defence Request identifies no incorrect legal standard applied by the Chamber, no error of law, no unreasonable finding of fact, nor indeed any concrete way in which the Chamber abused its discretion.

3. The Defence does take issue with two specific determinations in the Impugned Decision, but neither warrants interlocutory appellate review. First, the Defence argues that it could not have raised the current challenge to the confirmation decision because of "the development of this Court's jurisprudence and the progress in the *Ongwen* case" and because, "due to inadequate resources and personnel, the Defence was unable to conduct a proper analysis and raise this matter with the Chamber until September 2019."⁴ However, nowhere in the Defence

¹ ICC-02/04-01/15-1636 ("Defence Request").

² ICC-02/04-01/15-1630 ("Impugned Decision").

³ Defence Request, para. 1.

⁴ Defence Request, para. 9.

Request or in the original SGBC “defects” motion⁵ has the Defence indicated which jurisprudential developments supposedly triggered the current challenge. With regard to resources, the Defence managed to marshal the necessary resources to bring the rest of the challenges in its “defects series” at an earlier date, and again the Defence offers no explanation for why the SGBC component could not have been raised simultaneously with the other grounds. The Prosecution also submits that the Defence’s determination of litigation priorities (low or high) cannot reasonably justify a decision to challenge the form of the charges nearly three years after the trial began and just a few months before it ends.

4. Second, the Defence contends that the Impugned Decision was “misleading” in stating that the Defence had failed to justify its late filing of the SGBC “defects” motion.⁶ The Defence argues that it did in fact provide a justification for its late challenge – the very alleged lack of notice to which the Defence objects and the prejudice which it claims is suffered by the Accused. However, one cannot justify the exceptional consideration of a (years-) late application merely on the basis that the application exists. The Defence has yet again failed to explain *why* this particular challenge, having not been raised earlier, should nevertheless be allowed at such a late stage in the proceedings. At its highest, the assertions in paragraphs 10 and 11 of the Defence Request are nothing more than mere disagreement with the Impugned Decision which does not warrant interlocutory appellate review.

5. In any event, the Appeals Chamber has held in clear terms that the original “defects series” was properly dismissed *in limine*.⁷ The Defence has sought to amend, in fact expand, that “defects series” to include an additional challenge to the confirmation decision. The Trial Chamber quite rightly dismissed this additional

⁵ ICC-02/04-01/15-1603.

⁶ Defence Request, para. 10.

⁷ ICC02/04-01/1562, para. 163.

request *in limine*, for similar reasons as the original “defects series” and relying on the Appeals Chamber’s judgment. That straightforward implementation of Appeals Chamber precedent should not give rise to an interlocutory appeal.⁸

The Proposed Issue Does Not Satisfy the Cumulative Article 82(1)(d) Requirements

6. Even if the proposed issue did arise from the Impugned Decision, the Defence Request fails to meet the cumulative requirements of article 82(1)(d) of the Rome Statute.

7. First, under the particular circumstances, the proposed issue would not significantly affect the fair and expeditious conduct of the proceedings or the outcome of trial. Although challenges to the form of the charges or the jurisdiction of the Court may often have, as a general matter, the potential to substantially impact a trial, that is not the case where the relevant issues have already been definitively decided by the Appeals Chamber.

8. Second, interlocutory appeal would not materially advance these proceedings. To the contrary, appellate review now would risk substantially delaying trial proceedings in which, after nearly three years, the Parties are due to complete the presentation of evidence in a matter of weeks.

⁸ Compare *Prosecutor v. Bemba*, Public Redacted Version of "Decision on 'Defence Request for Leave to Appeal the Decision on the Temporary Suspension of the Proceedings Pursuant to Regulation 55(2) of the Regulations of the Court and related Procedural Deadlines'", ICC01/05-01/08-2487- Red, 11 January 2013, para. 28 (issues that have already been resolved or decided upon by the Appeals Chamber do not constitute appealable issues arising from an impugned decision).

Conclusion

9. For the reasons stated above, the Prosecution submits that the Defence Request should be rejected.



Fatou Bensouda, Prosecutor

Dated this 17th day of October 2019

At The Hague, the Netherlands