

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: **English**

No.: **ICC-02/04-01/15**  
Date: **4 December 2015**

**PRE-TRIAL CHAMBER II**

**Before: Judge Cuno Tarfusser, Single Judge**

**SITUATION IN UGANDA**

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

**Confidential**

**Prosecution's Response to Request for Leave to Appeal the "Decision on the  
Defence 'Request to Postpone Confirmation of Charges Hearing'"**

**Source: Office of the Prosecutor**

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

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**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations Other  
Section**

## Introduction

1. The motion seeking leave to appeal the decision declining to postpone the confirmation of charges hearing should be dismissed.<sup>1</sup> The three issues apparently proposed for certification relate to a quintessential matter of case management—the timing of a hearing—and represent no more than a disagreement with the Decision. Nor in any event do these issues meet the requirements of article 82(1)(d) of the Rome Statute. As such, they may not be certified for appeal.

## Confidentiality

2. Consistent with regulation 23bis(2) of the Regulations of the Court, this response is filed confidentially because the Motion was filed confidentially. Should the Defence file a redacted version of the Motion,<sup>2</sup> the Prosecution will file a redacted version of this response.

## Submissions

3. None of the three issues apparently proposed for certification by the Defence is an 'appealable' issue arising from the Decision. Nothing in the Motion demonstrates that any of the proposed issues significantly affects the fairness and expedition of the proceedings or the outcome of the trial, or that the immediate intervention of the Appeals Chamber will materially advance the proceedings.

### A. The Motion is no more than a disagreement with the Decision

4. The Motion fails to meet the threshold requirement of any application for leave to appeal, which is the identification of an 'appealable' issue arising from the

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<sup>1</sup> *Contra* ICC-02/04-01/15-360-Conf ("Motion"), para. 20. *See also* ICC-02/04-01/15-348-Conf ("Decision").

<sup>2</sup> *Cf.* Motion, para. 3 ("the Defence submits this response as Confidential as it refers to matters classified confidential"). *But see* Decision (also filed publicly with redactions to paragraphs 2 and 8 only). Although the Prosecution agrees that some of the matters addressed in the Motion are presently classified as confidential, this may not be so for the entirety of the Motion.

Decision. As this Court has consistently ruled, an “issue” is “‘an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion’.”<sup>3</sup> Such issues must, moreover, be of such significance in the context that their resolution is “essential for the determination of matters arising in the judicial cause under examination.”<sup>4</sup> An issue must also genuinely arise from the impugned decision.<sup>5</sup>

5. The Motion fails to formulate the issues proposed for appeal with sufficient precision.<sup>6</sup> This is unhelpful.<sup>7</sup> The Prosecution has therefore endeavoured to provide responses to the arguments advanced as they may best be understood.

6. The Defence fails to show that the “Single Judge failed to reasonably consider the cumulative circumstances in this case”,<sup>8</sup> either with regard to “the abundance of disclosure received by the Defence” (which the Prosecution understands to be the first issue proposed),<sup>9</sup> the effect of the “Article 56 proceedings” (which the Prosecution understands to be the second issue proposed),<sup>10</sup> or the need to “review [...] victims’ applications” (which the Prosecution understands to be the third issue proposed).<sup>11</sup> To the contrary, these matters were expressly addressed in the Decision.<sup>12</sup> The Decision concluded, moreover, that “the Defence is in position to properly prepare for the confirmation of charges hearing as currently scheduled” and “none of the reasons put forward by the Defence, whether individually or

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<sup>3</sup> See e.g. ICC-01/05-01/13-1258, para. 8 (citing ICC-01/04-168 (“DRC Appeal Decision”), para. 9).

<sup>4</sup> DRC Appeal Decision, para. 9.

<sup>5</sup> See e.g. ICC-01/05-01/13-1278, paras. 9-10.

<sup>6</sup> See Motion, paras. 9-17.

<sup>7</sup> See ICC-01/05-01/13-1489, para. 6 (disapproving the formulation of issues proposed for certification which “create[] unnecessary difficulties in identifying the legal or factual topic proposed for determination on appeal”).

<sup>8</sup> *Contra* Motion, para. 9.

<sup>9</sup> See Motion, paras. 10-12.

<sup>10</sup> See Motion, paras. 13-15.

<sup>11</sup> See Motion, paras. 16-17.

<sup>12</sup> See Decision, paras. 7 (concerning “the amount of disclosure received by the Defence”), 8 (concerning “the taking of evidence from eight witnesses pursuant to article 56 of the Statute” and whether “this has amounted to a significant disruption of the Defence work”), 9 (concerning “the number of victims’ applications for participation”).

cumulatively, warrant a postponement.”<sup>13</sup> In this most basic respect, therefore, the issues proposed for certification do not genuinely arise from the Decision, and merely disagree with it.

7. Moreover, the framing of the proposed issues further demonstrates that the Motion, improperly, merely seeks to reargue the merits of the Decision.

- The Defence asserts that the Single Judge “failed to take into account that the present case is indeed the *largest* case before the Court”, and hence that it is “unreasonable to fail to consider the challenges that volume poses” because “[o]ne must review evidence in order to ascertain its relevancy.”<sup>14</sup> Yet this mistakes the point of the Decision. For the purpose of confirmation proceedings, “it is the responsibility of counsel to *identify and select* that evidence and information which needs to be focused on”, and accordingly “the time accorded to the Defence is sufficient”.<sup>15</sup> The Decision expressly recalled the factors which enabled the Defence “to advance its preparation for the confirmation of charges hearing” for “months before” the present time.<sup>16</sup>
- The Defence further suggests that “missing or imprecise metadata” led to “additional work” in “obtaining a complete understanding of the scope of the evidence”.<sup>17</sup> But this takes no account of the Single Judge’s observation that disclosure “has been (and is being)” conducted “on a rolling basis”,<sup>18</sup> reducing the need for evidence to be identified and selected in bulk, as well as affording time for remedial measures to be undertaken if necessary.<sup>19</sup> This

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<sup>13</sup> Decision, para. 5.

<sup>14</sup> Motion, paras. 10-11.

<sup>15</sup> Decision, para. 7 (emphasis added).

<sup>16</sup> See Decision, para. 6.

<sup>17</sup> Motion, para. 12.

<sup>18</sup> Decision, para. 7.

<sup>19</sup> In this regard, see also ICC-02/04-01/15-T-19-CONF-ENG, p. 4, lns. 1-25 (concerning offers by the Prosecution to the Defence “to assist [...] in order to help them carry ou[t] searches that they need for their preparation”).

very issue has already been argued once before the Single Judge in relation to the Decision.<sup>20</sup>

- The Defence asserts that the “the Defence cancelled 53 days of investigations”, and that the Single Judge failed to take into account the time “necessary to address the breadth of the case” and the “further challenges in investigating a case of this magnitude” given “the passage of time”.<sup>21</sup> As noted in the Decision, however, the Defence argument that preparations for the article 56 proceedings disrupted and were irrelevant to preparations for the confirmation proceedings did “not appear well-founded”.<sup>22</sup> Since the Defence purports now to accept the relevance of this work to its confirmation preparation,<sup>23</sup> its assertion that the preparation time available is nonetheless insufficient can only be understood as a naked disagreement with the assessment in the Decision.
- The Defence asserts that the “abundance” of victims’ applications to participate in the proceedings “compounds” the other issues.<sup>24</sup> This ignores the reasoning in the Decision that, if this was so, relief is and was available by seeking an extension of the time limit for submitting observations on the victims’ applications.<sup>25</sup>

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<sup>20</sup> See ICC-02/04-01/15-341-Conf (“Prosecution Response”), para. 7 (“General complaints about difficulties resulting from ‘incorrect or missing metadata’ are not something on which the Prosecution can act without notification. To date, the Prosecution has only been notified about specific missing/incorrect metadata issues on two occasions and has acted speedily to cure those defects”).

<sup>21</sup> Motion, paras. 13-15.

<sup>22</sup> Decision, para. 8 (noting, *inter alia*, “the relatively little litigation on the subject [of the article 56 proceedings], the length of the proceedings in court, and the absence, to the Single Judge’s knowledge, of any Defence investigative activity which was taken for the exclusive purpose of the article 56 proceedings and would not prove relevant to the Defence preparation for the confirmation of charges hearing”).

<sup>23</sup> Motion, para. 15 (“The Defence also agrees that the Article 56 proceedings form part of the work in the present case”).

<sup>24</sup> Motion, para. 16.

<sup>25</sup> Decision, para. 9.

- Finally, the Defence asserts that “insufficient staffing resources” further compound its concerns.<sup>26</sup> It is unclear how this claim—which appears to be novel, and not an argument presented to the Single Judge for the purpose of the Decision—precisely relates to the issues proposed for appeal. Yet in any event, as the Prosecution has previously recalled, “the Defence has been aware of the scope of material earmarked for disclosure since March 2015” and “was therefore able to anticipate the resources it would require to review it.”<sup>27</sup>

**B. The requirements of article 82(1)(d) are not met**

8. Since none of the proposed issues constitutes an ‘appealable’ issue arising from the Decision, they cannot meet the requirements of article 82(1)(d). The Motion should thus be rejected without further consideration. Yet in any event the Motion fails to show that any of the issues significantly affects the fairness and expedition of the proceedings or the outcome of the trial, or that their immediate resolution will materially advance the proceedings.

*i. None of the proposed issues significantly affects the fairness and expedition of the proceedings or the outcome of the trial*

9. Although the Motion appears to recall correctly the legal test under article 82(1)(d),<sup>28</sup> it does not apply it properly to the issues proposed for certification. Rather than demonstrating (or, indeed, even asserting) that any of the proposed issues significantly affects the fairness and expedition of the proceedings, or the outcome of the trial, the Motion merely submits that “the interests of justice demand the

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<sup>26</sup> Motion, para. 17.

<sup>27</sup> Prosecution Response, para. 6.

<sup>28</sup> See Motion, paras. 7-8.

granting of leave to appeal since the issues directly relate to the fair conduct of the proceedings and the ability of the Defence to adequately prepare its case”.<sup>29</sup>

10. As this Court has consistently emphasised, a “general reference” to “the accused’s fundamental rights and how the alleged violation necessarily affects the fairness of the proceedings, without more, cannot satisfy the leave to appeal criteria”. Rather, to justify certification for appeal, a “specific link” must be shown between the proposed issue(s) and the procedural impact and urgency implicit in the criteria required for leave to appeal.<sup>30</sup>

11. The Defence shows no such link between the proposed issues (which are merely disagreements with the Decision) and the necessary impact on the fairness and expedition of the proceedings or the outcome of the trial. The undeveloped assertion that, as a consequence of the Decision, “the Defence is not in a position to adequately respond to the Prosecution’s intended charges” is insufficient. The Defence fails to articulate how any of the proposed issues—the volume of disclosure, the article 56 proceedings, or the need to review victims’ applications—significantly affects the fair and expeditious conduct of the proceedings, individually or cumulatively. To the contrary, they are normal aspects of proceedings before this Court.

12. The Motion makes no argument that any of the proposed issues significantly affects the outcome of the trial.

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<sup>29</sup> See Motion, para. 18 (submitting merely that “the interests of justice demand the granting of leave to appeal since the issues directly relate to the fair conduct of the proceedings and the ability of the Defence to adequately prepare its case”).

<sup>30</sup> See e.g. ICC-02/11-01/15-117, para. 23. See also ICC-01/05-01/13-1361, para. 7 (“To the extent [the applicants] are challenging the exercise of the Chamber’s discretion, ‘failing to take into account the rights of the accused’ is comparable to challenging the entirety of the Chamber’s reasoning—this is insufficiently discrete to qualify as an appealable issue”).



*ii. Immediate resolution by the Appeals Chamber will not materially advance the proceedings*

13. In any event, the Motion fails to show that immediate resolution by the Appeals Chamber of any of the proposed issues will materially advance the proceedings. To the contrary, it merely asserts that the Appeals Chamber should intervene to “ensure that the rights of Mr Ongwen are preserved” and to avoid “needless litigation to protect his rights”.<sup>31</sup> Since nothing in the Motion shows that Mr Ongwen’s rights are imperilled, this claim is wholly speculative. The Appeals Chamber is not a venue for the Parties to obtain an alternative decision on procedural determinations with which they simply disagree. Nor in any event is the Defence prevented from seeking relief from the Pre-Trial Chamber should it be required.

**Conclusion**

14. For all the reasons above, the Motion should be dismissed.



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**Fatou Bensouda, Prosecutor**

Dated this 4<sup>th</sup> day of December 2015

At The Hague, The Netherlands

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<sup>31</sup> Motion, para. 19.