

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No.: ICC-02/04-01/15
Date: **12 February 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

**Prosecution's Response to Defence Request for Leave to Appeal Decision
ICC-02/04-01/15-1161**

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 Request for Leave to Appeal¹ (“Request”) the “Decision on Defence Request for Disclosure of Certain Requests for Assistance and Related Items”,² (“Decision”) should be denied. The five issues, as framed by the Defence, are not appealable because they do not arise from the Decision.

Submissions

The five issues, as framed by the Defence, do not arise from the Decision

2. With regard to the first issue, the Defence misunderstands the Decision since the Single Judge has applied the correct standard. As the Defence concedes, the Single Judge expressly referred to and endorsed the *Lubanga* case standard.³ The Single Judge did so after having referred to previous decisions setting out the Prosecution’s disclosure obligations in this case, including with respect to requests for assistance (“RFAs”).⁴ The Defence simply disagrees with the Single Judge’s conclusion that “the Defence argument that this information is required to effectively ‘challenge the reliability of the impugned evidence’ appears to be untenable” and, thus, that the requested RFAs are not rule 77 material.⁵ That disagreement is not an “issue” susceptible of clarification on appeal.⁶
3. The Prosecution again emphasises that it has received no response to the RFA at issue, and thus it has received no evidence, about the circumstances of Otti’s

¹ ICC-02/04-01/15-1174-Red (“Request”).

² ICC-02/04-01/15-1161 (“Decision”).

³ Request, para. 21, footnote 28 referring to Decision, para. 7, fn. 12.

⁴ Decision, para. 3.

⁵ Decision, para. 7.

⁶ ICC-01/04-168 OA3, 13 July 2006, para. 9 (“Only an ‘issue’ may form the subject matter of an appealable decision. 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”).

death or other matters, in response.⁷ Therefore, the Prosecution is not withholding any evidence.

4. The second issue also does not arise from the Decision. It is also a mere disagreement with the Single Judge's finding that the requested RFA is not material to assess the credibility of the witnesses.
5. With regard to the third issue, the Defence, once again, misunderstands the Decision and disagrees with the Single Judge's conclusion. Thus, there is no appealable issue arising from the Decision. Indeed, although the Single Judge regretted that the Prosecution could not locate an RFA, he clearly explained why the Defence had not suffered prejudice and Mr Ongwen's fair trial rights had not been violated. In particular, the Single Judge noted that (i) nothing suggests that the RFA led to incriminating evidence and (ii) even if the RFA led to incriminating evidence, nothing suggests that the Prosecution had not disclosed it.⁸
6. More fundamentally, the Prosecution reiterates that it is by no means clear that an RFA dated or sent on 9 April 2004 has been "lost". The Defence's assertions of its existence were based solely on one possible interpretation of a one-page facsimile cover sheet, which may just as likely refer to another RFA or to none at all.⁹ In any event, despite the efforts of the Prosecution to locate such an item, none has been found.
7. The fourth issue also does not arise from the Decision. Contrary to the Defence assertion, the Single Judge did not disregard the "Decision on Disclosure Issues

⁷ ICC-02/04-01/15-1142, para. 5.

⁸ Decision, para. 14.

⁹ ICC-02/04-01/15-1149, para. 9.

Arising Out of First Status Conference”¹⁰ (“Disclosure Decision”).¹¹ Rather, the Defence merely disagrees with the Single Judge’s conclusion that the requested RFA is not material to the Defence’s preparation, and hence not disclosable pursuant to rule 77.¹² Moreover, since the RFA did not lead to incriminating evidence relied upon by the Prosecution, it falls outside the scope of the Disclosure Decision.¹³

8. The argument framed in the fifth issue, was at no point before the Single Judge, and it cannot now form the basis of an application for leave to appeal the Decision.

The five issues do not meet the remaining article 82(1)(d) criteria

9. Article 82(1)(d) criteria are cumulative: a failure to fulfil any one of the criteria is fatal to any application for leave to appeal.¹⁴ As none of the Issues arise from the Decision, the Request should be dismissed on this basis alone. Even if any of them arose, they do not meet the remaining criteria of article 82(1)(d) of the Statute, namely, they don’t significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, nor an immediate resolution by the Appeals Chamber would materially advance the proceedings.
10. Notably, the basic circumstances of Otti’s death have not been disputed by the Parties. Moreover, the Defence has had the opportunity to ask questions related to Otti’s death in the course of the proceedings, has done so (including regarding the circumstances which the Defence alleges to constitute duress), and can continue to do so with any future witnesses. Thus, any purported inconsistencies

¹⁰ ICC-02/04-01/15-457.

¹¹ Request, para. 38, footnote 49 referring to Disclosure Decision, para. 14.

¹² Decision, para. 7.

¹³ Decision, para. 7.

¹⁴ ICC-01/05-01/08-3273, para. 8.

between witnesses' testimony can be tested, without the need for the requested RFAs.

11. Contrary to Defence's assertion, the Single Judge was fully aware of the Defence's duress defence, and of the alleged inconsistencies among Prosecution witnesses, when he ruled that the requested RFAs are not material to the preparation of the Defence. The Defence merely disagrees with that conclusion.
12. Finally, the Defence has failed to plausibly substantiate any of its arguments on how appellate intervention would expedite the current proceedings. On this basis too, the Request should be dismissed.

Conclusion

13. For the reasons set out above, the Defence Request should be rejected.



Fatou Bensouda,
Prosecutor

Dated 12th day of February 2018

At The Hague, The Netherlands