

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No.: **ICC-02/04-01/15**
Date: **28 September 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

Public Redacted Version of “Prosecution’s Response to Defence Request for Leave to Appeal Decision ICC-02/04-01/15-1326”, filed on 14 September 2018, ICC-02/04-01/15-1338-Conf

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 Chamber should reject the Defence Request (“Request”) for Leave to Appeal¹ the “Decision on Defence Request for Amendment of the Seating Schedule”,² (“Decision”). The two issues, as framed by the Defence, do not constitute an appealable issue and they fail to satisfy the remaining criteria of article 82(1)(d) of the Rome Statute (“Statute”).

Confidentiality

2. Pursuant to regulation 23*bis*(2) of the Regulations of the Court, this document is classified as confidential because it responds to a filing so designated. Should the Defence file a public redacted version of the filing, the Prosecution will do the same or request reclassification of this response.

Submissions

3. The Appeals Chamber has ruled that “[o]nly 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. This conflict of opinion does not define an appealable subject. An issue is constituted by a subject the resolution of which is essential for the determination of matters arising in the judicial cause under examination”.³
4. Article 82(1)(d) of the Statute specifies that only decisions involving an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial are subject to leave to appeal. Furthermore, even if those criteria are satisfied, the applicant must show that an immediate resolution by the Appeals Chamber may materially advance the proceedings. This wording

¹ ICC-02/04-01/15-1334.

² ICC-02/04-01/15-1330.

³ ICC-02/04-168, para. 9.

“reflects the intention of the drafters of the Statute to limit the scope of interlocutory appeals to issues of crucial importance to the fairness and expeditiousness of the proceedings or to the outcome of the trial”.⁴ The criteria set out in article 82(1)(d) are cumulative and the absence of any one will result in rejection.

The issues do not arise from the Decision

5. The Defence frames the issues for the interlocutory appeal as “[w]hether the Single Judge erred in law by failing to consider and adhere to relevant international legal standards concerning the treatment of detained persons [REDACTED] subject to proceedings before the criminal court” (“issue 1”) and “[w]hether the Single Judge erred in fact by failing to attribute due weight and give appropriate consideration to the [REDACTED]” (“issue 2”).⁵
6. Neither of these issues arises from the Decision. The Defence simply disagrees with the Single Judge’s reasoned decision to reject the Defence’s request to amend the sitting schedule *at this stage* without identifying an appealable issue. It merely attempts to improperly re-litigate the matter *ex novo* before the Appeals Chamber.⁶
7. In addition, the Defence does not accurately present the Decision. The Single Judge considered the [REDACTED] that there should be no hearings Wednesdays during a five-day court week, [REDACTED].⁷ However, the Single Judge rejected the Request because it considered “*premature* to declare that the Chamber will not sit every Wednesday in a five-day week”.⁸ As the Single Judge noted, “[t]he flow of the Defence’s evidence may necessitate designating a non-sitting day other

⁴ ICC-02/04-01/15-64, para. 19.

⁵ The Request, para. 14.

⁶ ICC-02/11-01/11-307, para. 70; ICC-01/04-02/06-604, para. 17.

⁷ See the original “Defence notification of -[REDACTED] as ordered by Trial Chamber IX”, ICC-02/04-01/15-1321-Conf at para 12(3). See Decision, paras. 2 and 7.

⁸ Decision, para. 7 (emphasis added).

than Wednesday”.⁹ Notably, the Single Judge noted that his decision was “not in opposition to motivation behind the Recommendation”¹⁰ – which underlying circumstances may change¹¹ - and was “taken in full consideration of the rights of the accused”.¹²

8. The Prosecution further notes that the Defence refers to information contained in filings classified as *ex parte*¹³ which the Prosecution has no access to. The Prosecution cannot, therefore, take a position on or make any meaningful submissions with regard to such matters. However, the material provided does not support the Defence’s far-reaching submissions that - [REDACTED] or that - [REDACTED] In addition, the Defence requested to move two hearings days for reasons entirely apart from considerations [REDACTED] of the Accused and without further justification.¹⁴

Other article 82(1)(d) criteria are also not met

9. Even if, *in arguendo*, the Chamber finds that any of the issues arises from the Decision, neither of them constitutes an appealable issue in the meaning of article 82(1)(d). The Defence has failed to demonstrate that they would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial. It has also failed to show that an immediate resolution by the Appeals Chamber may materially advance the proceedings.
10. As already submitted, the Single Judge considered the [REDACTED] and the circumstances underpinning it. The Single Judge underscored that his Decision

⁹ Decision, para. 7.

¹⁰ Decision, para. 7. *Contra* Defence Request, paras. 39 and 44. The Defence refers to the [REDACTED]. It must be emphasised though, that the Defence fails to quote the rules with sufficient precision, leaving out the word - [REDACTED] from the full text of the -[REDACTED] rules, and thus omitting an important qualification to its claim that these rules should be held to prevent the Single Judge from ruling as he has.

¹¹ Decision, para. 8.

¹² Decision, para. 8.

¹³ See for example, the Request, paras. 34-35, 48.

¹⁴ Decision, para. 7.

was not in opposition to the motivation behind the recommendation. He also considered the realities of trial proceedings which might require to nevertheless amend the scheduled five-days sitting. A rigid decision not to sit on Wednesdays would foreclose the necessary flexibility to manage the conduct of the proceedings. Hence, the Decision does not significantly affect the fairness of the proceedings nor their outcome.

11. In addition, granting the Request would not materially advance the proceedings. To the contrary, since the current sitting schedule might be adjusted anyway, the Request is premature and granting it would unnecessarily delay the conduct of the proceedings. It is the Single Judge's "necessary retention of flexibility in the scheduling of the court hearings"¹⁵ that will protect Mr Ongwen's rights to an expeditious and fair trial.

Conclusion

12. The Chamber should reject the Request.



Fatou Bensouda, Prosecutor

Dated 28th of September 2018

At The Hague, The Netherlands

¹⁵ Decision, para. 7.