

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

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

Date: **17 April 2019**

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 Response to the “Defence Request for Leave to Appeal ‘Decision on Defence Request for the Chamber to Issue an Immediate Ruling Confirming the Burden and Standard of Proof Applicable to Articles 31(1)(a) and (d) of the Rome Statute’ (ICC-02/04-01/15-1494)”

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 appeal decision 1494 (“Defence Request”)¹ should be denied, because it does not meet the criteria of article 82(1)(d) of the Rome Statute (“Statute”). The Defence has not demonstrated that the proposed issue would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, nor that an immediate resolution by the Appeals Chamber would materially advance the proceedings.

Submissions

The Defence has not demonstrated that its proposed issue would significantly affect the fair and expeditious conduct of the proceedings

2. The Defence seeks leave to appeal the issue of “whether the Trial Chamber’s failure to issue a decision as to the burden and standard of proof applicable to Articles 31(1)(a) and (d) violates Mr Ongwen’s right to a fair trial.”² The Defence does not question the Trial Chamber’s indication that it will interpret the requirements of article 31(1)(a) and (d) in its judgment.³ Rather, the core of the Defence’s challenge is an assertion that the Trial Chamber must provide further clarification on its approach to article 31 *immediately*.⁴

3. Nothing in the Statute or Rules obligates a Trial Chamber to announce its interpretation of the grounds for excluding criminal responsibility under article 31

¹ ICC-02/04-01/15-1499 (“Defence Request”).

² Defence Request, para. 23.

³ ICC-02/04-01/15-1494, para 16 (“Impugned Decision”). Cf. Defence Request, para. 9 (“[T]he Trial Chamber will have to decide the issues raised in the request in order to render a judgment.”)

⁴ E.g., Defence Request, para. 5, 7, 15, 21.

prior to the end of trial.⁵ In this and other international criminal jurisdictions, a wide range of fundamental legal issues – including the interpretation of elements of offenses, mental state requirements, and modes of liability – are routinely decided in the court’s final trial judgment, as the Trial Chamber has indicated it will do in this case.⁶ The Parties have no right to receive advisory legal opinions from the Trial Chamber at the time of their choosing.

4. Moreover, the Defence has failed to demonstrate any actual impact of the Impugned Decision on the conduct of these proceedings. The Defence suggests that the proposed issue “impacts upon ... allocation of [Defence] resources and time, [...] structuring a final brief, and whether to call certain witnesses.”⁷ Questions such as how the Defence chooses to allocate its resources or structure its final brief are not fair trial issues. Those are strategic choices for the Defence to make in light of the information available to it, just as the Prosecution and Legal Representatives were faced with similar choices during their presentations of evidence. The same is true of the decision to call, or not to call, “certain witnesses.” Without knowing which witnesses might be called (or not called) by the Defence, and what they might say, the Trial Chamber cannot possibly conclude that an interlocutory appeal is required to protect the fairness or expeditious conduct of the proceedings.

5. The Defence similarly suggests that it may choose to present “extra” evidence or argument regarding article 31. However, again the Defence Request gives no concrete indication of which evidence or arguments might be added or foregone. The mere possibility, in the abstract, that the Defence could present less or more evidence, or raise or forego certain arguments, is not a sufficient basis to conclude

⁵ The issue proposed in the Defence Request does not raise a question of jurisdiction or admissibility, which by contrast generally are dealt with prior to or at the beginning of proceedings under rules 58 and 133.

⁶ Impugned Decision, para. 16; *see also* ICC-02/04-01/15-1309, para. 10, 15.

⁷ Defence Request, para. 16.

that the proposed issue significantly affects the fair and expeditious conduct of the proceedings.

6. Finally, the Defence raises the spectre of a possible re-trial or the presentation of additional evidence on appeal if the Trial Chamber does not provide a further decision regarding article 31 now, mid-trial. Those speculative concerns do not relate directly to advancing these trial proceedings, and they could be raised in the abstract in almost every case. They are not a sufficient basis for an interlocutory appeal.

The Defence has not demonstrated that its proposed issue
would significantly affect the outcome of the trial

7. The Defence Request also fails to demonstrate that the proposed issue would significantly affect the outcome of the trial. While the Trial Chamber's interpretation of article 31, in a general sense, clearly has the potential to affect the outcome of this trial, the *timing* of its interpretation does not. The Trial Chamber has made clear that it will explain its interpretation of article 31 in its judgment.⁸ Under article 74, the Trial Chamber cannot apply its interpretation of the law to the facts any sooner than that anyhow, because the judgment must be based on "the entire proceedings."⁹ Consequently, there is no reason to think that the outcome of the trial will be any different if the Trial Chamber announces its legal interpretation in advance of, during, or at the completion of the trial.

8. The one scenario in which the timing of the Trial Chamber's ruling might affect the outcome of the trial is if the Trial Chamber's interpretation were erroneous

⁸ Impugned Decision, para. 16.

⁹ Art. 74(2).

and successfully challenged on appeal (post-conviction or after an acquittal) by one of the Parties. That scenario, however, remains entirely speculative.

An immediate resolution by the Appeals Chamber
will not materially advance the proceedings

9. Finally, the Defence has failed to demonstrate that an immediate resolution by the Appeals Chamber would materially advance these proceedings. As noted above, the Defence has not indicated which witnesses, or how many, might become necessary or unnecessary if the Trial Chamber were to immediately announce its interpretation of article 31. Nor does the Defence Request indicate any other concrete way in which the proceedings would be shortened or hastened as a result of an interlocutory appeal, particularly considering that the Trial Chamber has encouraged the Defence to present “all of the evidence that it has in support of the grounds for excluding criminal responsibility it has raised.”¹⁰

10. Meanwhile, it can be confidently predicted that granting leave to appeal will increase the litigation burden on the Parties and Participants. Given the advanced stage of these proceedings, the results of any interlocutory appeal also will most likely be known only at or near the end of this trial. On balance, therefore, an interlocutory appeal would appear more likely to slow these proceedings than to advance them.

11. The Defence Request suggests that this component of article 82(1)(d) is satisfied because the proposed issue “has a similarly serious character” as the issue recently certified for interlocutory appeal in Decision 1493.¹¹ However, the question

¹⁰ Impugned Decision, para. 15.

¹¹ Defence Request, para. 22 (citing ICC-02/04-01/15-1493).

is not whether the proposed issue is serious, but whether an immediate resolution by the Appeals Chamber would materially advance these proceedings. The Defence has not demonstrated that it would, and the Request should therefore be rejected.

Conclusion

12. For the reasons set forth above, the Defence Request should be denied.



Fatou Bensouda, Prosecutor

Dated this 17th day of April 2019
At The Hague, The Netherlands