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Original: **English**

No.: **ICC-02/04-01/15**
Date: **23 May 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's Response to "Defence Request for Leave to Appeal Decision on Defence Request for Amendment of the Seating Schedule"

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 ("Defence Request")[1] the Decision on Defence Request for Amendment of the Seating Schedule ("Decision")[2] should be rejected.

2. The issue for which the Defence seeks leave to appeal is predicated on a misinterpretation of the Decision and therefore does not arise from it. In addition, instead of raising an appealable issue within the meaning of article 82(1)(d), the Defence merely expresses its disagreement with the Decision. The issue raised by the Defence also does not meet the remaining cumulative requirements under article 82(1)(d) of the Statute.

Submissions

(i) *The Defence fails to identify an appealable issue*

3. The Defence seeks leave to appeal the Decision on the following issue:

> whether the Decision, based on necessity to compensate for six hearing days and expeditious advancement of the trial proceedings, implements the Single Judge's obligations under Article 64(2) to ensure that a trial is fair […] and is conducted with full respect for the right of the accused consistent with Articles 21(3) and 67(1)(e) ("Issue").[3]

4. This Issue is predicated on a misinterpretation of the Decision and its background and does therefore not arise from it. In addition, the Defence's arguments merely express a disagreement with the Decision, which falls short of identifying an appealable issue. The Defence Request should be rejected on this basis alone.

[1] ICC-02/04-01/15-1515-Red.
[2] ICC-02/04-01/15-1512.
[3] Defence Request, para. 4.

5. First, the Defence's preliminary suggestion[4] that the Single Judge, in managing the Ongwen trial proceedings, acted in conflict with multiple medical recommendations and failed to take into consideration Mr Ongwen's mental condition and disability is unfounded.

6. According to the Defence, the three ICC-DC Medical Officer recommendations ("the Recommendations") concerning Wednesdays off during five-day week hearings were disregarded by the Single Judge and only implemented on 29 October 2018, eight months after the first Recommendation[5] was communicated to him. This argument is unsupported. In fact, the Single Judge stated that the flow of the Defence's evidence may necessitate designating a non-sitting day other than Wednesday and further clarified that this approach does not contradict the motivation behind the Recommendation.[6] The Single Judge's intention appears to have been to avoid the unnecessary interruption of a witness's testimony and therefore to facilitate Mr Ongwen's continuous concentration on the evidence presented. The Single Judge has consistently ensured the full protection of Mr Ongwen's rights and has paid due regard to his health condition.[7] Of 243 calendar days between 28 February and 29 October 2018, the Chamber only sat 28 days. Within these 28 days, the Chamber never sat more than four days in a week. This is ample time for Mr Ongwen to rest and receive any treatment that was needed, in compliance with the Recommendations.

7. Second, in an attempt to demonstrate that the Issue is appealable, the Defence ignores the crux of the Single Judge's reasoning, namely that the Defence's original request failed to provide any concrete indication as to how the changes in June

[4] Defence Request, para. 2.
[5] According to the Defence, the first ICC-DC Medical Officer's recommendation was communicated to the Chamber on 28 February 2018 in ICC-02/04-01/15-Conf-Exp-Anx. See the Defence Request, para. 2.
[6] ICC-02/04-01/15-1330-Red, para. 7.
[7] ICC-02/04-01/15-T-199-CONF-ENG, p. 5, lines 9 to 16; ICC-02/04-01/15-T-210-CONF-ENG, p. 3, lines 9 to 13; ICC-02/04-01/15-637-Red, paras. 29-32; ICC-02/04-01/15-1330-Red, para. 8; ICC-02/04-01/15-1412-Red, para. 12; ICC-02/04-01/15-1512, paras. 9 and 11.

hearing dates could concretely impact the health and well-being of the accused or his ability to consult with and instruct his counsel.[8] The Defence also ignores the Single Judge's reasoning, indicating that he has taken into account Mr Ongwen's health and well-being and that he will continue to do so in future scheduling decisions.[9] In fact, the changes in June hearing dates fully reflect the Single Judge's statement, since the Chamber will never sit more than two days in a row.

8. The Defence's reliance on the ICTY Appeals Chamber's decision in the *Mladic* case[10] is misplaced, as it is an attempt to argue the merits of the Issue. It does not avail the applicant for leave to appeal under Article 82(1)(d) to attempt to demonstrate that the Decision is incorrect. The sole question is whether the Issue meets the criteria set out in the provision.[11] In any event, the Defence's reference to the *Mladic* case is also inapposite. The Trial Chamber in *Mladic* rejected the sitting schedule recommendations of a certified medical expert, as well as the repeated medical opinion of the United Nations Detention Unit Medical Officer who advised a four-day court schedule instead of five.[12] On the contrary, in the *Ongwen* case, the Chamber has implemented the Recommendations and even went beyond them when scheduling hearings in June 2019. The Chamber will sit four days in one week and only two or three days during each of the other weeks.

9. Insofar as the Defence argues that the Single Judge's decision is unreasonable,[13] this too argues the merits of the Issue and, in any event, is nothing more than a disagreement with the Decision. The Defence misrepresents the Decision when it describes as speculative the Single Judge's finding that the Accused will have sufficient time to consult with and instruct counsel.[14] The Single Judge

[8] Decision, paras. 5-8.
[9] Decision, para. 9.
[10] Defence Request, para. 12.
[11] ICC-02/04-01/05-20-US-Exp, para. 22, unsealed pursuant to Decision no. ICC-02/04-01/05-52.
[12] *Mladic*, Decision on Mladic's Interlocutory Appeal Regarding Modification of Trial Sitting Schedule due to Health Concerns, Appeals Chamber, IT-09-92-AR73.3, 22 October 2013, paras. 8-10.
[13] Defence Request, paras. 14-17.
[14] Defence Request, para. 14.

rendered the Decision based on information from the Defence while ensuring that Mr Ongwen's rights are properly protected. The Defence argues that its request was based on direct and daily interaction with Mr Ongwen, medical recommendations concerning his mental vulnerability, and the incident that happened in January 2019.[15] Apart from daily interaction with Mr Ongwen, the Single Judge's decision is based on the very same information. The Single Judge merely came to a different conclusion than the Defence. The Defence did not provide any new recommendations from a certified medical expert, but offered its own untrained medical opinion.[16]

10. For the above reasons, the Defence Request should be rejected.

(ii) The remaining article 82(1)(d) criteria are not met

11. Even if, *arguendo*, the Issue did arise from the Decision and was an appealable issue within the terms of article 82(1)(d), the Defence Request still fails to meet the remaining two cumulative requirements for an interlocutory appeal under article 82(1)(d) of the Statute. The Issue does not "significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial" and its immediate resolution by the Appeals Chamber would not "materially advance the proceedings". Accordingly, the Defence Request should be rejected on that basis.

9. The Defence does not provide any new arguments to suggest that the Issue meets these additional requirements, but merely relies on the same arguments advanced when attempting to identify an appealable issue arising from the Decision. However, these arguments do not demonstrate how the Issue affects the fair and expeditious conduct of the proceedings or the outcome of the trial, but merely provide speculative conclusions ("the potential to amount to a mistrial").[17] The

[15] Defence Request, para. 15.
[16] ICC-02/04-01/15-1507, para. 8.
[17] Defence Request, para. 20.

Prosecution has addressed these arguments above and does not consider it necessary to repeat its responses.

10. Immediate resolution by the Appeals Chamber of the Issue would also not "materially advance the proceedings". The Defence Request again fails to put forward any argument in support of its assertion[18] which should accordingly be rejected. Contrary to the Defence's repeated claims, the matter of the Accused's health has not been ignored by the Single Judge, but was instead carefully considered as is evident from the Decision's reasoning.

11. There is no basis to find that immediate appellate review would materially advance these proceedings. The likely impact would be the opposite: appellate intervention at this advanced stage of the trial for this particular Issue would delay rather than move the proceedings forward.

Conclusion

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

Fatou Bensouda, Prosecutor

Dated this 23rd day of May 2019
At The Hague, the Netherlands

[18] Defence Request, para. 21.