

**Cour
Pénale
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**International
Criminal
Court**

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Date: **1 October 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 ‘Defence Request for Leave to Appeal “Decision on Defence Request for Amendment of the Seating Schedule”’, filed on 10 September 2018

Source: Defence for Dominic Ongwen

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

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I. INTRODUCTION

1. Pursuant to Article 82(1)(d) of the Rome Statute ('Statute'), the Defence for Dominic Ongwen ('Defence') seeks leave to appeal the Single Judge of Trial Chamber IX's ('Single Judge') "Decision on Defence Request for Amendment of the Seating Schedule ('Scheduling Decision')",¹ denying Mr Ongwen's request for an amendment of the seating schedule due to [REDACTED].²
2. Additionally, at the request of a party under Rule 7(3) or Rule 132*bis* (3) of the Rules of Procedure and Evidence ('RPE'), the Trial Chamber may decide that the functions of the Single Judge be exercised by the full Chamber. Given the inherent importance of the issue being litigated, *i.e.* [REDACTED],³ the Defence requests that the issue at hand is determined by the full Trial Chamber.

II. CONFIDENTIALITY

3. Pursuant to Regulation 23*bis* of the Regulations of the Court ('RoC'), the Defence files this request confidentially because it discusses the private details about [REDACTED]. A public redacted version shall be filed contemporaneously.

III. APPLICABLE LAW

4. Pursuant to Article 82(1)(d) of the Statute, either party may appeal a decision that involves an issue that would "significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings." The purpose of such a procedure is to "pre-empt the repercussions of erroneous decisions on the fairness of the proceedings or the outcome of the trial."⁴ The Chamber is vested with the power to certify the existence of an appealable issue.⁵ However, when determining whether or not leave to appeal

¹ ICC-02/04-01/15-1330.

² ICC-02/04-01/15-1326.

³ The Legal Representatives for Victims and the Common Legal Representatives for Victims both indicated *via* e-mail that they do not oppose the Defence request for an amendment of the seating schedule. E-mails to Trial Chamber IX Communications inbox on 29 September 2018, at 15:40 and on 30 September 2018, at 18:11.

⁴ ICC-01/04-168, para. 19.

⁵ ICC-01/04-168, para. 20.

should be granted, the Chamber must not justify or defend the correctness of its decision, but instead determine whether the issue presented significantly affects the fairness of the proceedings.⁶

5. According to Rule 155(1) of the RPE, a party shall “make a written application [for leave to appeal] to the Chamber that gave the decision, setting out the reasons for the request for leave to appeal.” The application for leave to appeal “shall state the name and number of the case or situation and shall specify the legal and/or factual reasons in support thereof.”⁷ This application must also “specify the reasons warranting immediate resolution by the Appeals Chamber of the matter at issue.”⁸
6. The Appeals Chamber has ruled that only an ‘issue’ may form the subject-matter of an appealable decision, which it defined as “an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion.”⁹ Further, an issue is “a subject the resolution of which is essential for the determination of the matters arising in the judicial cause under examination” and may be “legal or factual or a mixed one.”¹⁰ The issue must be one apt to “significantly affect” the fair and expeditious conduct of the proceedings or the outcome of the trial.¹¹ In other words, the issue “must be one likely to have repercussions on either of these two elements of justice.”¹²
7. The Appeals Chamber has defined the term “fair” as being associated with the norms of a fair trial and corresponding human rights, as per Articles 64(2) and Article 67(1) of the Statute.¹³ In particular, the Appeals Chamber noted that the “expeditious conduct of the proceedings in one form or another constitutes an attribute to a fair trial.”¹⁴ The term “proceedings” extends to proceedings prior and subsequent to the current proceedings.¹⁵
8. When determining whether or not a request for leave to appeal should be granted, the Trial Chamber must not justify or defend the correctness of its decision, but instead focus on

⁶ See e.g. ICC-01/09-02/11-253, para. 28.

⁷ Regulation 65(1) of the RoC.

⁸ Rule 155(1) of the RPE.

⁹ ICC-01/04-168, para. 9.

¹⁰ ICC-01/04-168, para. 9.

¹¹ ICC-01/04-168, para. 10.

¹² ICC-01/04-168, para. 10.

¹³ ICC-01/04-168, para. 11.

¹⁴ ICC-01/04-168, para. 11.

¹⁵ ICC-01/04-168, para. 12.

determining whether the issue presented significantly affects the fairness of the proceedings.¹⁶ Mr Ongwen has the right to a reasoned statement¹⁷ and “reasoned statement of the Trial Chamber’s findings on the evidence and conclusions” must be provided.¹⁸ A reasoned statement includes a “holistic evaluation and weighing of all the evidence taken together in relation to the fact at issue.”¹⁹

9. The Appeals Chamber also held an issue will be appealable “where the possibility of error in an interlocutory or intermediate decision may have a bearing” on the outcome of the trial.²⁰ The Chamber, when deciding on a request for leave to appeal, “must ponder the possible implications of a given issue being wrongly decided on the outcome of the case”, thereby forecasting the consequences of such an occurrence.²¹
10. Regarding the third aspect of a request for leave to appeal (the immediate resolution by the Appeals Chamber), the Appeals Chamber held this criterion will be satisfied if the relevant Chamber rules that an authoritative determination on the appeal would “move forward” the proceedings and remove “doubts about the correctness of the decision or [map] a course of action along the right lines.”²² The issue at stake must also be “such that its immediate resolution by the Appeals Chamber will settle the matter posing for decision through its authoritative determination, ridding thereby the judicial process of possible mistakes that might taint either the fairness of the proceedings or the outcome of the trial.”²³ By resolving the issue, the Appeals Chamber ensures “that the proceedings follow the right course.”²⁴
11. Pursuant to Regulation 91(1) of the RoC, Mr Ongwen “shall be treated with humanity and with respect for the inherent dignity of the human person.”
12. [REDACTED]
13. [REDACTED]

¹⁶ See e.g. ICC-02/09-02/11-253, para. 28.

¹⁷ ICC-01/05-01/13-2275-Red, para. 1540.

¹⁸ Article 74(5) of the Statute.

¹⁹ ICC-01/04-01/06-3121-Red, para. 22.

²⁰ ICC-01/04-168, para. 13.

²¹ ICC-01/04-168, para. 13.

²² ICC-01/04-168, paras 14-15.

²³ ICC-01/06-168, para. 14.

²⁴ ICC-01/04-168, para. 15.

IV. ISSUES

14. The issues to be determined are:

a. Issue 1:

Whether the Single Judge erred in law by failing to consider and adhere to relevant international legal standards concerning the [REDACTED] subject to proceedings before criminal court.

b. Issue 2:

Whether the Single Judge erred in fact by failing to attribute due weight and give appropriate consideration to the [REDACTED].

V. SUBMISSIONS

15. The Defence seeks leave to appeal the following issues arising from the Scheduling Decision:

Issue 1: Whether the Single Judge erred in law by failing to consider and adhere to relevant international legal standards concerning the [REDACTED] subject to proceedings before criminal court.

16. This issue arises from the Scheduling Decision. In particular, the Single Judge held that:

The Single Judge stresses again that this decision is taken in full consideration of the rights of the accused.²⁵

17. The Defence avers that the Single Judge failed to consider and adhere to relevant international legal standards that guarantee Mr Ongwen's rights as an accused and [REDACTED],²⁶ [REDACTED].²⁷

18. In accordance with Article 21 of the Statute, the Court shall apply, where appropriate, "applicable treaties and the principles and rules of international law". It is submitted that the Single Judge's decision violates certain provisions of the International Covenant on Economic, Social and Cultural Rights ('ICESCR') and [REDACTED].

²⁵ Scheduling Decision, para. 8.

²⁶ Articles [REDACTED].

²⁷ Article [REDACTED].

19. In particular, [REDACTED] of the ICESCR stipulates that:

[REDACTED].²⁸

20. Article [REDACTED] of the ICESCR also establishes that:

[REDACTED].²⁹

21. It is submitted that the Single Judge must abide by [REDACTED].

22. Article [REDACTED] establishes that:

[REDACTED].³⁰

23. Article [REDACTED] sets out that:

[REDACTED].

24. Finally, Article [REDACTED] stipulates that:

[REDACTED].

25. The Defence submits that the Single Judge is bound under Articles [REDACTED] to take all appropriate steps to ensure that [REDACTED] is made (in particular as concerns the sitting schedule) to ensure that Mr Ongwen's [REDACTED], in particular his right to a fair trial as enshrined under Article 67 of the Statute. In particular, and in addition the *chapeau* of Article 67(1) which guarantees Mr Ongwen's right to a fair trial, the Single Judge must ensure that [REDACTED] is made to preserve Mr Ongwen's right to communicate freely with his counsel and adequately prepare for his defence under Article 67(1)(b) of the Statute.

26. The submissions below concerning Issue 2 set out the [REDACTED].³¹ The same submissions demonstrate that the order of Single Judge violates the provisions of the ICESCR and the [REDACTED] referred to above.

Issue 2: Whether the Single Judge erred in fact by failing to attribute due weight and give appropriate consideration to [REDACTED]

²⁸ Article [REDACTED] of the ICESCR.

²⁹ Article [REDACTED] of the ICESCR.

³⁰ [REDACTED].

27. This issue arises from the ruling of the Single Judge, who rejected the Defence request to amend the seating schedule, as recommended [REDACTED], and reiterated that there will be “four full weeks of court hearings”.³¹ In particular, the Single Judge held that:

The Single Judge is of the view that it is not necessary to amend the Seating Schedule at this point in time.³²

28. And that:

At this point in time, the Single Judge considers it premature to declare that the Chamber will not sit every Wednesday in a five-day week. The flow of the Defence’s evidence may necessitate designating a non-sitting day other than Wednesday.³³

29. Given that the risk of Mr Ongwen [REDACTED] was an essential issue when considering the request to amend the seating schedule, the Single Judge’s rejection thereof without attributing appropriate weight to [REDACTED] is unreasonable in all the circumstances.

30. The [REDACTED]. It recommends that:

[REDACTED].³⁴

31. The above mentioned [REDACTED]. A prior [REDACTED], stating:

[REDACTED].³⁵

32. The [REDACTED] and have consistently maintained their recommendation that a four-day seating schedule be implemented with Wednesdays as rest days. Specifically, the [REDACTED] “[REDACTED]”³⁶ and that “[REDACTED]”.³⁷ Therefore, the [REDACTED] clearly conclude that an amendment of the sitting schedule is required; this conclusion arises in light of [REDACTED].

33. Despite the Single Judge’s holding wherein he acknowledges that he is “fully aware of the Recommendation”,³⁸ he rejected the Defence request and ignored the facts in [REDACTED] by

³¹ Scheduling Decision, para. 1; *see also*, E-mail from the Chamber to the parties and participants and the Registry, 20 August 2018, at 9:35.

³² Scheduling Decision, para. 5.

³³ Scheduling Decision, para. 7.

³⁴ ICC-02/04-01/15-1315-Conf-Exp-Anx, para. 2.

³⁵ ICC-02/04-01/15-1200-Conf-Exp-Anx.

³⁶ ICC-02/04-01/15-1315-Conf-Exp-Anx, para. 2.

³⁷ ICC-02/04-01/15-1200-Conf-Exp-Anx.

³⁸ Scheduling Decision, para. 5.

concluding that he “is of the view that it is not necessary to amend the Seating Schedule at this point in time.”³⁹

34. Beyond some general conclusions, such as “further reductions to current schedule may be made”⁴⁰ and “[t]he Single Judge stresses again that this decision is taken in full consideration of the rights of the accused,”⁴¹ the Single Judge failed to provide a reasoned opinion in rejecting [REDACTED] not to sit on Wednesdays.
35. The Single Judge also abused his discretion by substituting his own [REDACTED]. The Single Judge inappropriately prioritised considerations of trial expeditiousness over Mr Ongwen’s human rights and his right to a fair trial. The Single Judge is not [REDACTED] and yet his decision has had the effect of overruling the [REDACTED].⁴²
36. In a similar scenario, [REDACTED], the Appeals Chamber ruled that:
- [REDACTED].⁴³
37. And the Appeals Chamber in the [REDACTED] concluded that:
- [REDACTED].⁴⁴
38. The Defence also notes the Single Judge’s finding that “[t]he flow of the Defence’s evidence may necessitate designating a non-sitting day other than Wednesday.”⁴⁵ The Defence reiterates that considerations concerning the flow of the Defence’s evidence, the logistics of witness availability, or the efficiency of the examination of witnesses did not enter into the [REDACTED] for the proposed sitting schedule. A non-sitting day is a [REDACTED] necessity in light [REDACTED]; it was recommended [REDACTED] irrespective of whether or not a non-sitting day is necessitated by ‘the flow of the evidence’.
39. Furthermore, as discussed above, the [REDACTED] Mr Ongwen is not to sit on Wednesdays, to which the Single Judge responded that he “does not find any reason why taking a day, other

³⁹ Scheduling Decision, para. 5.

⁴⁰ Scheduling decision, para. 5.

⁴¹ Scheduling Decision, para. 8.

⁴² [REDACTED].

⁴³ [REDACTED].

⁴⁴ [REDACTED].

⁴⁵ Scheduling Decision, para. 7.

than Wednesday, off in a five-day week would be incompatible with the Recommendation.”⁴⁶
 In so finding, the Single Judge failed to attribute appropriate weight to [REDACTED]. The Single Judge inappropriately applied [REDACTED], which unequivocally recommended a regular mid-week break to “[REDACTED].”⁴⁷

40. In disregarding the recommendation, the Single failed to attribute appropriate weight to [REDACTED] “[REDACTED].”⁴⁸ The Defence understands that [REDACTED]. The Single Judge’s decision and the current sitting schedule render the Wednesday sessions impossible. In so ruling, the Single Judge has unfairly interfered with Mr Ongwen’s right to [REDACTED]. The Defence note that, prior to the rejection of the [REDACTED]; the Single Judge sought no further information from [REDACTED]. It is submitted that it was reasonable and necessary in the circumstances for the Single Judge to make these enquiries. It is further submitted that the Single Judge’s failure to make these enquiries further demonstrates that he failed to afford the opinion of [REDACTED] appropriate weight.
41. In sum, the Defence submits that a reasonable judge would:
- a. Give a due consideration to the [REDACTED] and amend the sitting schedule, as [REDACTED];
 - b. Not substitute [REDACTED]for that of [REDACTED];
 - c. Seek further information from [REDACTED], or order an alternative [REDACTED], if he indeed queried the [REDACTED];
 - d. Afford appropriate weight to the fact that Mr Ongwen [REDACTED], and would therefore not conclude that he “does not find any reason why taking a day, other than Wednesday, off in a five-day week would be incompatible with the Recommendation.”⁴⁹

⁴⁶ Scheduling Decision, para. 7.

⁴⁷ ICC-02/04-01/15-1315-Conf-Exp-Anx, para. 2.

⁴⁸ ICC-02/04-01/15-1315-Conf-Exp-Anx, para. 3. (Bold added).

⁴⁹ Scheduling Decision, para. 7.

The issues affect the fair and expeditious conduct of the proceedings against Mr Ongwen, or, the outcome of the Ongwen trial

42. For the reasons set out above, the Single Judge’s decision violates Mr Ongwen’s right to a fair trial.⁵⁰ The Decision unjustifiably ignores [REDACTED] and places [REDACTED]. A decline in [REDACTED] has been ignored and [REDACTED] has been denied, endangers his ability to participate fully in the proceedings against him and therefore negatively impacts upon his right to a fair trial.
43. International human rights law guarantees [REDACTED], first and foremost, as a human being with inherent dignity and specifically as a detainee, [REDACTED]. The effects of the Scheduling Decision violate Mr Ongwen’s right to the “[REDACTED].”⁵¹ To attain this [REDACTED]⁵² and implemented to ensure access to justice.⁵³ An [REDACTED] when:
- [REDACTED].⁵⁴
44. The Defence submits that its request for a change to the trial schedule⁵⁵ is justified under the above grounds. There is thorough documentation of [REDACTED], as well as a [REDACTED] that he does not attend trial on Wednesdays. These recommendations [REDACTED] “[REDACTED]”⁵⁶ and who have authority to [REDACTED]. Under [REDACTED].⁵⁷ The request to amend the sitting schedule is therefore necessary and appropriate.
45. The request does not impose a disproportionate or undue burden on the Court, as the extension of the trial would be minimal and the implementation of the schedule change would ensure that Mr Ongwen is able to enjoy his rights equally [REDACTED]. Failure to implement such accommodations is discriminatory, consequently rendering the proceedings unfair and in violation of Articles 21, 64(2) and 67(1) of the Statute.⁵⁸
46. The expeditiousness of the trial is also endangered by the Scheduling Decision refusing the [REDACTED]. There have been two instances in which the proceedings had to be postponed

⁵⁰ Article 64(2) of the Statute.

⁵¹ Article [REDACTED] of ICESCR.

⁵² Article [REDACTED] and Article [REDACTED] of the [REDACTED].

⁵³ Article [REDACTED].

⁵⁴ Article [REDACTED].

⁵⁵ ICC-02/04-01/15-1326.

⁵⁶ Rule [REDACTED].

⁵⁷ Rule [REDACTED].

⁵⁸ Article 64(2) and 67(1) of the Statute.

[REDACTED]. The Scheduling Decision increases the risk of [REDACTED]. Failure to fulfil the obligation of an expeditious trial would render the proceedings unfair under Article 64(2) of the Statute.

47. The Single Judge’s decision also risks potential violation of the obligation of the ICC Presidency, the Registrar and the Chief Custody Officer to ensure Mr Ongwen [REDACTED]. The Presidency, the Registrar and the Chief Custody Officer have, to date, sought to fulfil their obligations owed to Mr Ongwen.

An immediate resolution of the issues by the Appeals Chamber may materially advance the Ongwen case proceedings

48. The Defence highlights the urgent need to amend the seating schedule, as recommended [REDACTED]. It thus requests the Trial Chamber to allow the Defence to seize the Appeals Chamber with this matter in order to protect [REDACTED]. If [REDACTED] is not implemented, [REDACTED] and the integrity, legitimacy and fairness of the proceedings will be put in jeopardy.
49. Given that the intended sitting schedule starts in 21 days, the Defence submits that this matter must be dealt with urgently and cannot be postponed; there will be an immediate impact on [REDACTED]. The purpose of the [REDACTED] is that it is to [REDACTED].
50. Human rights obligations are positive obligations, meaning that they must be pre-emptively secured; it is not acceptable that they are implemented after a violation has occurred. As such, Mr Ongwen must not be required [REDACTED] and a fair trial have been violated before any further challenge can be brought. It is therefore the case that the Single Judge suggestion that “further reductions to the current schedule may be made in due course”⁵⁹ violates the requirement that Mr Ongwen’s human rights are pre-emptively secured. If [REDACTED] continue to be ignored, [REDACTED] and his fair trial rights will be violated.

VI. RELIEF SOUGHT

51. For the reasons stated above, the Defence respectfully requests that leave is granted by the Trial Chamber to appeal the following issues:

⁵⁹ Scheduling Decision, para. 5; *see also* E-mail from the Chamber to the parties and participants and the Registry, 20 August 2018, at 9:35.

Issue 1: Whether the Single Judge erred in law by failing to consider and adhere to relevant international legal standards concerning [REDACTED] subject to proceedings before criminal court.

Issue 2: Whether the Single Judge erred in fact by failing to attribute due weight and give appropriate consideration to [REDACTED].

Respectfully submitted,



Hon. Krispus Ayena Odongo
On behalf of Dominic Ongwen

Dated this 1st day of October, 2018

At The Hague, The Netherlands