

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: **ICC-02/04-01/15**
Date: **7 December 2016**

TRIAL CHAMBER IX

Before: Judge Bertram Schmitt, Presiding Judge
Judge Peter Kovacs
Judge Raul C. Pangalangan

SITUATION IN UGANDA

**IN THE CASE OF
*THE PROSECUTOR v. DOMINIC ONGWEN***

Public

**Defence Request for Leave to Appeal
“Decision on Prosecution Request to Submit Interception Related Evidence”
(ICC-02/04-01/15-615)**

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, the Defence for Dominic Ongwen ('Defence') respectfully requests leave to appeal Trial Chamber IX's ('Trial Chamber') "Decision on Prosecution Request to Submit Interception Related Evidence" ('Impugned Decision').¹
2. The Defence requests leave to appeal on the issue of *the scope of 'procedural objections' required to be examined pursuant to submission under Article 69(3)*.

II. Applicable Law

3. Article 82(1)(d) sets the standard for interlocutory appeals before any chamber of the court. The standard for an interlocutory appeal is that:

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 Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

4. 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".² 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".³
5. The issue must be one apt to "significantly affect", that is, in a material way, either the fair and expeditious conduct of the proceedings, or the outcome of the

¹ ICC-02/04-01/15-615. ('Decision')

² ICC-01/04-168, para. 9.

³ ICC-01/04-168, para. 9.

trial.⁴ In other words, the issue “must be one likely to have repercussions on either of these two elements of justice”.⁵

6. The purpose of such procedure is to “pre-empt the repercussions of erroneous decisions on the fairness of the proceedings or the outcome of the trial”⁶ A Chamber is vested with the power to certify the existence of an appealable issue,⁷ however when determining whether leave to appeal should be granted, the Chamber must not justify or defend the correctness of its decision, but instead determine whether the issues presented significantly affect the fairness of the proceedings.⁸

III. SUBMISSIONS

A. The scope of ‘procedural objections’ required to be examined for submission pursuant to Article 69(3) is an issue that arises from the Impugned Decision

7. In taking the Impugned Decision, the Trial Chamber rehearsed⁹ the criteria from its decision on the conduct of proceedings pursuant to Rule 140 of the Rules of Procedure and Evidence (‘RPE’). Of particular relevance to the present request is the following passage:

This said, the Chamber will rule upfront on certain issues related to the admissibility of evidence when this is deemed appropriate, particularly when procedural bars are raised which may foreclose consideration of the standard evidentiary criteria.

8. In footnote 11, the Trial Chamber characterises procedural bars as objections such as those under “Article 69(7) of the Statute or the procedural pre-requisites contained in Rule 68 of the Rules”.

⁴ ICC-01/04-168, para. 10

⁵ ICC-01/04-168.

⁶ ICC-01/04-168, para. 19.

⁷ ICC-01/04-168, para. 20.

⁸ ICC-01/09-02/11-253, para. 28.

⁹ Impugned Decision, para. 4.

9. Furthermore, in response to the Defence submissions on the need for a *prima facie* examination, the Trial Chamber in the Impugned Decision stated that:

The Chamber emphasises that its general approach does not involve making any relevance, probative value or potential prejudice assessments at the point of submission – not even on a *prima facie* basis. As set out in the Rule 140 Decision, such assessments are not required by the Court’s statutory scheme and are considered to be unhelpful and unwarranted.¹⁰

10. As noted by the Trial Chamber, the Defence raised a range of objections which the Trial Chamber characterised as “relat[ing] to the relevance and probative value of the evidence concerned”¹¹ and also noted that the Defence raised the issue that Prosecution failed to explain the relevance of many items.¹² The Trial Chamber also recognised the potential prejudice to the Defence of submitting materials wholesale without discussion with a witness.¹³
11. The Trial Chamber thus decided that some issues are within the scope of procedural bars to submission, but did not consider the Defence arguments to fall within these. Particularly, the Trial Chamber considered that evidence that is argued to be *prima facie* irrelevant by party, lacks a specific explanation of relevance,¹⁴ or is prejudicial in the manner in which it is submitted¹⁵ was not a bar to submission.
12. In other words, the scope of ‘procedural objections’ required to be examined prior to submission through Article 69(3) is an issue that arises out of the decision. The issue is constituted by the wider subject of the jurisprudential shift

¹⁰ Impugned Decision, para. 7.

¹¹ Impugned Decision, para. 22.

¹² Impugned Decision, para. 24.

¹³ Impugned Decision, para. 10.

¹⁴ While ICC-02/04-01/15-615, para. 24 notes that the Prosecution Pre-Trial Brief provides notice, the point still remains that *formally speaking* items such as 1-381 of section (ii) in ICC-02/04-01/15-580-Conf-AnxC have *precisely* the same general explanation – they are not individualised.

¹⁵ “Even though it must be emphasised that the statutory scheme does not require that evidence be submitted only through a witness, the Chamber is aware of the potentially prejudicial effect submitting items in this manner can have on the Defence”, ICC-02/04-01/15-615, para. 10.

at the ICC to receiving extensive evidence through bar-table motions and delaying the evaluation of evidence to the Article 74 Judgment.

B. The issue is more than a mere disagreement

13. The issue above arise from the Decision and is not a mere disagreements with the Trial Chamber. While the Trial Chamber has a wide discretion regarding the conduct of proceedings, “[d]iscretionary decisions may give rise to appealable issues no differently from any other decision.”¹⁶
14. The fact that the Defence disagrees with the scope drawn by the Trial Chamber should not be a determinative basis for dismissing the present request. It is a given that where a party seeks leave to appeal, it will almost by definition disagree with the decision. The determinative question is whether the issue is an appealable one.
15. The Defence aims to place emphasis on the fact that, whatever its merits, the trend of receiving extensive non-testimonial evidence absent testimony as ‘submitted’ is a recent and novel practice at the ICC which is a clear departure from the practice of the *ad-hoc* tribunals and what could be characterised as ‘international customary criminal procedural law’.
16. While a departure from prior practice of the *ad-hocs* in an area as important as the consideration of evidence is clearly not determinative, it should at least be an indicator that a decision has the potential to seriously impact upon the fairness of proceedings.

C. The issues significantly affect the fair and expeditious conduct of the proceedings or the outcome of trial.

17. The issue raised significantly affects the fair and expeditious conduct of the proceedings, as well as potentially the outcome of the trial, and an immediate

¹⁶ ICC-02/11-01/15-388-Anx, para. 5.

determination by the Appeals Chamber would materially advance the proceedings and the functions of the Court.

18. The issue impacts upon the *fairness* of proceedings because of the procedural uncertainty it creates. Though the decision sought to provide clarification, and while it did in certain respects, the indeterminacy of the legal parameters of the issue has an impact upon fair-trial rights.
19. The absence of a fully articulated regime as to the appropriate stage for objections and the substance of those objections have left confused case-preparation for the Defence. The issue impacts upon attempts to anticipate how to organise Defence work, plan Defence strategy, respond to Prosecution motions, and take strategic decisions when any objections to evidence – an area critical to criminal defence – is involved.
20. The issue also leaves unclear when an objection will be disregarded, what subsequent mechanism should be used to subsequently challenge the submission of evidence, and what issues should be reserved for Closing Submissions. This uncertainty impacts upon the division of resources and time which undermines an effective and prepared defence.
21. For example, if the Trial Chamber does not consider a *prima facie* demonstration of irrelevance to be a procedural bar, and if the arguments are not made up-front when the items are submitted, then they must be made at a later time. If this is the correct reading of the decision, this burdens the Defence with compiling a closing brief that addresses the standard evidentiary criteria for each and every piece of evidence submitted. Undertaking this will potentially limit the scope of submissions that could be made in closing.
22. This uncertainty also impacts upon the *expeditiousness* of the trial because out of an abundance of caution, the Defence will in all likelihood need to object to the

submission of items pre-emptively. These objections will take time for the Trial Chamber to consider. Moreover, the absence of clarity will bedevil expeditiousness throughout the trial-process.

23. As one clear example, at the conclusion of the Prosecution's case, the Defence could choose to move the Trial Chamber to dismiss the case – or part of it – for lack of sufficient evidence.¹⁷ However, the indeterminacy of the status of items could render such an effort moot and lead to delays in the trial.

D. An immediate resolution of the issues by the Appeals Chamber may materially advance the proceedings.

24. The purpose of interlocutory appeals under Article 82(1)(d) is to “pre-empt the repercussions of erroneous decisions on the fairness of the proceedings or the outcome of the trial”.¹⁸
25. Leave for interlocutory appeals pursuant to Article 82(1)(d) is exceptional at the ICC,¹⁹ but is not a bar to appellate review during trial, especially where appellate guidance on critical issues would ensure legal certainty and predictability.
26. The issues relate to a procedural trial practice on which judicial opinion at this Court diverges as acknowledged in the Decision.²⁰ By allowing this interlocutory appeal, the Trial Chamber will entrust the Appeals Chamber with clarifying an issue which will impact upon most stages of the trial against Mr Ongwen.
27. An immediate resolution from the Appeals Chamber shall decisively determine the procedural requirements to take before recognising evidence submitted via the bar table. Such treatment will provide clarification for the parties and participants, and thus “settle the matter posing for decision through its authoritative determination, ridding thereby the judicial process of possible

¹⁷ ICC-01/09-01/11-1334.

¹⁸ ICC-01/04-168, para. 19

¹⁹ ICC-01/05-01/13-T-10-RED-ENG, p. 11 lns. 3-12, noting “[i]nterlocutory appeals are exceptional [...]”

²⁰ Impugned Decision, para. 8

mistakes that might taint either the fairness of the proceedings or mar the outcome of the trial”.²¹

28. With respects to the evidence in the Impugned Decision, direction from the Appeals Chamber would also potentially correct a potential an issue of unfairness for Mr. Ongwen given that potential prejudicial evidence that goes to the heart of the Prosecution case has been submitted.

IV. RELIEF

29. The Defence respectfully requests the Trial Chamber to grant leave to appeal on the issues outlined in paragraph 2 and discussed above.

Respectfully submitted,



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Hon. Krispus Ayena Odongo

On behalf of Dominic Ongwen

Dated this 7th day of December, 2016

At The Hague, Netherlands

²¹ ICC-01/04-168, para. 14.