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TRIAL CHAMBER IX

Before: Judge Bertram Schmitt, Single Judge

SITUATION IN UGANDA

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

Public

Decision on the Defence Request for Leave to Appeal the Decision on Request for Reports and Additional Resources to the Defence

To be notified, in accordance with Regulation 31 of the Regulations of the Court, to:

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Other

Judge Bertram Schmitt, acting as Single Judge on behalf of Trial Chamber IX ('Single Judge' and 'Chamber', respectively) of the International Criminal Court ('Court') in the case of *The Prosecutor v. Dominic Ongwen*, having regard to Article 82(1)(d) of the Rome Statute ('Statute'), issues the following 'Decision on the Defence Request for Leave to Appeal the Decision on Request for Reports and Additional Resources to the Defence'.

1. On 15 December 2017, the Defence for Mr Ongwen ('Defence') filed 'observations' with the Chamber in which it averred that Mr Ongwen's right to a fair trial had been violated due to an insufficient attribution of resources ('Initial Request').¹ Under 'remedy sought', it requested that the Chamber order the production of two reports (concerning resources and budgetary information related to the Ongwen trial) and to 'order additional resources for the Defence'.²
2. On 19 December 2017, the Single Judge issued a decision rejecting the Initial Request on the grounds that requests for legal assistance have to be addressed to the Registry and that the Chamber is confined to reviewing this decision ('Impugned Decision').³
3. On 21 December 2017, the Defence filed a request for leave to appeal the Impugned Decision ('Request for Leave to Appeal')⁴ on three issues:
 - i. The first and fundamental issue presented is whether the Trial Chamber, or the Registry, is the appropriate entity under the Rome Statute to decide whether the fair trial rights of the Accused are violated, and if yes, the remedy to be implemented for the violation(s) ('First Issue');

¹ Defence Observations on Fair Trial and Request for Orders on Prosecution Resources and Additional Defence Resources, ICC-02/04-01/15-1098.

² ICC-02/04-01/15-1098, para. 40 a) to c).

³ Decision on Request for Reports on the Resources of the Parties to the Case and Order for Additional Resources to the Defence, ICC-02/04-01/15-1114.

⁴ Defence Request for Leave to Appeal the Single Judge's "Decision on Request for Reports on the Resources of the Parties to the Case and Order for Additional Resources to the Defence", ICC-02/04-01/15-1115.

- ii. The second and related issue is whether, in respect to the resolution of fair trial violations within the Court's legal assistance program, the Trial Chamber's jurisdiction is conferred by Regulation 83(4) of the Regulations of the Court or by Article 64(2) of the Statute ('Second Issue'); and
 - iii. The third and related issue is whether the failure of the Trial Chamber to make an initial finding in respect to fair trial violations assists in ensuring that the trial is "fair and expeditious and is conducted with full respect for the rights of the accused," pursuant to Article 64(2) of the Statute, or does the procedure ordered in the Decision impede the implementation of the rights to present a defence? ('Third Issue').
4. On 22 December 2017, the Office of the Prosecutor filed its response, arguing that the Request for Leave to Appeal should be rejected as it fails to satisfy the requirements of Article 82(1)(d) of the Statute.⁵
 5. The Single Judge recalls the interpretation of Article 82(1)(d) of the Statute as set out in previous decisions in the present case.⁶ Especially, it is recalled that 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',⁷ as also identified by the Defence.⁸
 6. There seems to be a fundamental misunderstanding of the Impugned Decision. What the Defence sought in its Initial Request was additional resources for the Defence. This relief was supported with an assertion by the Defence that additional resources are necessary in order to ensure the accused's right to a fair trial. The Impugned Decision clarifies the manner in which the Defence must

⁵ Prosecution's response to "Defence Request for Leave to Appeal the Single Judge's Decision for Report on the Resources of the Parties to the Case and Order for Additional Resources to the Defence", ICC-02/04-01/15-1098, ICC-02/04-01/15-1118.

⁶ See, for example, Decision on the Defence request for leave to appeal the decision on the confirmation of charges, 29 April 2016, ICC-02/04-01/15-428, paras 5-9; Decision on Defence Request for Leave to Appeal Decision ICC-02/04-01/15-521, 2 September 2016, ICC-02/04-01/15-529, paras 4-8.

⁷ Appeals Chamber, *Situation in the Democratic Republic of the Congo*, "Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal", 13 July 2006, ICC-01/04-168, para. 9.

⁸ Request for Leave to Appeal, ICC-02/04-01/15-1115, para. 9.

request those resources and does not engage with the issue whether any alleged violation exists. This misunderstanding of the Impugned Decision permeates the issues formulated in the Request for Leave to Appeal.⁹

7. The First Issue, as submitted by the Defence, concerns the competent body to make a finding that the accused's right to a fair trial has been violated (and, in a second step, the decision on an appropriate remedy). The Single Judge notes that at no point does the Impugned Decision pronounce itself on this issue. Rather, the Impugned Decision ruled on the relief sought in the Initial Request: the production of the two reports and the ordering of additional legal assistance for the defence. Accordingly, the Single Judge finds that the First Issue does not arise from the Impugned Decision.
8. The Second Issue, as presented by the Defence, concerns the powers of the Chamber in the case of a fair trial violation. Equally, the Single Judge finds that this issue does not arise from the Impugned decision, but seems to be an abstract legal question unconnected with the ruling of the Impugned Decision on the relief sought in the Initial Request.
9. In respect of the Third Issue, namely whether the Impugned Decision should have made a finding in respect to fair trial violations, the Single Judge reiterates that the Initial Request did not seek such a finding. Accordingly, the Single Judge finds that the Third Issue does not arise from the Impugned Decision.

⁹ See, for instance, paragraph 25 of the Request for Leave to Appeal: '*Nor does the [Impugned] Decision make any finding on the Defence arguments regarding fair trial violations, [...].*'

FOR THE FOREGOING REASONS, THE SINGLE JUDGE HEREBY

REJECTS the Request for Leave to Appeal.

Done in both English and French, the English version being authoritative.



Judge Bertram Schmitt
Single Judge

Dated 4 January 2018

At The Hague, The Netherlands