

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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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
ICC-02/04-01/15-1147**

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 Appeal¹ (“Request”) the “Decision on Defence Request for Findings on Fair Trial Violations Related to the Acholi Translation of the Confirmation Decision,”² (“Decision”) should be dismissed because it does not meet the requirements for leave to appeal under article 82(1)(d) of the Rome Statute (“Statute”).

2. The issues as framed by the Defence are not appealable because they do not arise from the Decision. Although the Defence presents four issues, they are all inter-related and essentially concern the alleged inadequacy of the reading of the charges at the commencement of trial – an issue not ruled upon in the Decision.

3. Rather, the Request is a belated attempt to appeal the Initial Directions on the Conduct of Proceedings³ (“Proceedings Decision”), issued in July 2016, and the Chamber’s Oral Ruling of 6 December 2016.⁴ Furthermore, the Defence fails to articulate how the issues affect the fair and expeditious conduct of the proceedings or the outcome of the trial, or how appellate intervention would materially advance the proceedings.

Submissions

The First Issue does not arise from the Decision

4. The First Issue as framed by the Defence – whether the reading of the charges constituted “incomplete” notice - does not arise from the Decision. In its initial request for alleged fair trial violations and addendum, the Defence sought a stay

¹ ICC-02/04-01/15-1156 (“Request”).

² ICC-02/04-01/15-1147 (“Decision”).

³ ICC-02/04-01/15-497 (“Proceedings Decision”).

⁴ ICC-02/04-01/15-T-26-ENG, page 17, line 23 to page 20, line 4.

of proceedings pending full translation of the Confirmation Decision and Separate Opinion (“Stay Request”).⁵ The Chamber rejected the Stay Request, noting that the Accused had received an Acholi translation of the Document Containing the Charges – including a translation of the modes of liability – which were repeated in the Confirmation Decision.⁶ Critically, in its Stay Request, the Defence made *no* submissions in relation to the adequacy of the reading of the charges at the commencement of trial, and the Chamber made no such ruling thereon. The issue of completeness or adequacy of the notice provided in that manner to the Accused accordingly did not form part of the Decision’s *ratio decidendi*, and cannot constitute an appealable issue.

5. The Defence instead expresses dissatisfaction with the Proceedings Decision issued in July 2016, which stated how the reading of the charges at the commencement of trial would proceed, in abbreviated form, and that no waiver was required from the Accused.⁷ The Defence did not seek leave to appeal that decision, and cannot do so now, over 1.5 years later. Moreover, the Defence made no objection at the time the charges were read to the Accused, and raised no objection in relation to the adequacy of the plea made by Dominic Ongwen, which was “not guilty” to all of the charges.⁸
6. As such, the First Issue does not arise from the Decision.

The Second Issue does not arise from the Decision

7. The Second Issue as framed – on what legal basis can the Single Judge decide that seeking a waiver for a summary or limited reading of the charges from the

⁵ ICC-02/04-01/15-1127 and Addendum, ICC-02/04-01/15-1129.

⁶ Decision, para. 7.

⁷ Request, para. 9-12, *citing to* Proceedings Decision, para. 6.

⁸ ICC-02/04-01/15-T-26-ENG ET, p. 21, lines 2-6.

Accused is not required – is intrinsically linked to the First Issue, since it assumes a ruling on the alleged inadequacy of the abbreviated reading of the charges to the Accused. As noted above, no such ruling is involved in the Decision, and the Defence did not seek leave to appeal at the time the Proceedings Decision, where the Chamber laid out the procedure to be followed and determined that a waiver was unnecessary.⁹ Thus, the Second Issue likewise does not arise from the Decision, and should be dismissed.

The Third Issue does not arise from the Decision

8. The Third Issue—whether the Decision violates the Accused’s rights under article 67(1)(e)¹⁰—seeks to re-litigate *ex novo* before the Appeals Chamber the entire Decision.¹¹ Thus, the Third Issue does not constitute an appellate issue within the terms of article 82(1)(d).

The Fourth Issue does not arise from the Decision

9. In formulating its Fourth Issue the Defence states that the non-guilty plea taken from Dominic Ongwen was not valid, as he did not understand the charges.¹²
10. As noted above, in its Stay Request, the Defence made *no* submissions in relation to the adequacy of reading of the charges, or the plea taken from the Accused. As such, the Chamber made no such ruling in the Decision.

⁹ Proceedings Decision, para. 6.

¹⁰ Although the Defence refers to the Accused’s right under article 67(1)(a) in the heading, it then refers to article 67(1)(e) in the text.

¹¹ ICC-02/11-01/11-307, para.70; ICC-01/04-02/06-604, para. 17 (“the Second Issue appears to merely challenge the entirety of the reasoning in the Impugned Decision and to seek a *de novo* review of the matter by the Appeals Chamber”).

¹² Request, para. 34-45.

11. It should be recalled that following the Chamber's Oral ruling on 6 December 2016 determining that the Accused did understand the charges, the Defence sought leave to appeal that ruling.¹³ Leave was denied.¹⁴
12. The Fourth Issue is thus an attempt to re-litigate matters already decided, and does not arise from the Decision.

The Four Issues do not meet the remaining article 82(1)(d) criteria

13. Article 82(1)(d) criteria are cumulative: a failure to fulfil any one of the criteria is fatal to any application for leave to appeal.¹⁵ As none of the Issues arise from the Decision, the Request should be dismissed on this basis alone. In any event, the Defence does not substantiate its arguments on how the Issues affect the fairness and expeditiousness of the proceedings, the outcome of the trial, or how appellate intervention would expedite the current proceedings. On this basis too, the Request should be dismissed. In any event, the Prosecution submits that it would not expedite the proceedings to re-read the charges to the Accused, inclusive of each mode of liability, only for the Accused to re-enter a plea of not guilty. In addition, it is irrelevant for granting leave to appeal that the issue for which leave is sought is of general interest or may arise in other cases.¹⁶ The Appeals Chamber is not an advisory body.¹⁷

¹³ ICC-02/04-01/15-632.

¹⁴ ICC-02/04-01/15-645.

¹⁵ ICC-01/05-01/08-3273, para. 8.

¹⁶ ICC-01/04-01/06-1557, para. 25; ICC-02/04-01/05-20, para. 21, ICC-01/04-135-tEN, para. 21; ICC-01/04-01/06-1191, para. 11; ICC-01/05-01/08-1169, para. 25; ICC-01/05-01/08-980, para. 16; ICC-02/04-01/15-535, para. 14. Contra Request, para. 49 (arguing that "appellate resolution of these issues would provide guidance for the Ongwen case and for future cases").

¹⁷ "If the Appeals Chamber were to answer such a request, it would have to assume the role of an advisory body, which it considers to be beyond and outside the scope of its authority." See ICC-01/04-503 OA4 OA5 OA6, para. 30, citing ICC-01/04-01/07-3132 OA12, para. 7.

Conclusion

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



Fatou Bensouda

Prosecutor

Dated 5th day of February 2018

At The Hague, The Netherlands