

**Cour
Pénale
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**International
Criminal
Court**

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No.: **ICC-02/04-01/15**
Date: **10 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

**Prosecution's Response to Defence Request for Leave to Appeal Decision
ICC-02/04-01/15-1351**

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 Prosecution opposes the Defence Request for Leave to Appeal Decision 1351¹ because the issue identified does not arise from the Decision,² and because the other two cumulative requirements under article 82(1)(d) of the Rome Statute are not met.

Submissions

The proposed issue does not arise from the Decision

2. The Defence Request seeks leave for an interlocutory appeal on the issue of “whether the Single Judge applied the Court’s jurisprudence in respect to disclosure too restrictively”.³ However, almost the entirety of the Defence Request takes issue not with the Single Judge’s interpretation or application of jurisprudence (or the underlying rules or statute provisions), but rather with the Single Judge’s understanding and interpretation of the Defence’s own disclosure application.⁴ Rather than defend that application, which the Single Judge found to have insufficiently formulated the relief sought,⁵ the Defence Request complains that the Single Judge failed to unilaterally adopt a “wider interpretation” of its application,⁶ to independently search the trial record for a better indication of what exactly the Defence was arguing,⁷ or to order some more narrow form of relief than what the Defence actually asked for.⁸ This is already an extraordinary argument by the Defence, but it is particularly bold given that the Single Judge in fact described the

¹ ICC-02/04-01/15-1360 (“Defence Request”).

² ICC-02/04-01/15-1351 (“Decision”).

³ Defence Request, para. 1.

⁴ See, e.g., Defence Request, para. 5-11, 13.

⁵ Decision, para. 7. Contrary to the suggestion in the Defence Request, the Single Judge did not appear to criticise the whole of the application, but only the formulation of relief sought.

⁶ Defence Request, para. 7, 13.

⁷ Defence Request, para. 9-10.

⁸ Defence Request, para. 11.

Defence application in very broad terms,⁹ including the precise language used in the application.¹⁰ These portions of the Defence Request therefore fail to support the identified issue.

3. The Defence Request places particular emphasis on its arguments that the material sought is relevant because, they say, it relates to 1) other contributors to the crimes charged against the Accused and 2) the Defence claim of duress. Both arguments serve to underline just how far removed the Defence disclosure application was from the facts of this case. The first argument would extend rule 77 to “information about [other contributors’] participation in other crimes or attacks more generally or simply information about them and their life in the LRA”.¹¹ That is far broader than any judicial interpretation of rule 77 of which the Prosecution is aware. The duress argument, meanwhile, repeats the Defence’s flawed conflation of duress with one of the requirements for indirect co-perpetration,¹² and also extends on its face well past the limits of this case by including indications of duress even against people other than the Accused.¹³

4. In short, the Defence Request purports to identify an appealable issue – the Single Judge’s application of jurisprudence – but fails entirely to support that contention, complaining instead about something quite different, and repeating the Defence’s own unsupported and impractical interpretation of this Court’s disclosure rules. The identified issue does not arise from the Decision, but instead amounts to a mere disagreement with the Decision.

⁹ Decision, para. 17 (interpreting the application as reaching even information unrelated to alleged crimes), 19 (interpreting the application as seeking “everything related to the investigation of 13 people”), 21 (interpreting the application as seeking “all material related to the investigation of these persons without further limitations”).

¹⁰ Decision, para. 11-13 (summarising and quoting from the application).

¹¹ Defence Request, para. 12.

¹² Defence Request, para. 13 (suggesting that the automatic execution of orders by subordinates is somehow tantamount to duress).

¹³ Defence Request, para. 13.

5. Given that the article 82(1)(d) requirements are cumulative, and failure to fulfil one of the requirements is fatal to an application for leave to appeal,¹⁴ the Defence Request should be rejected on this basis alone.

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

6. Neither of the remaining two cumulate requirements for an interlocutory appeal under article 82(1)(d) is met.

7. First, the issue proposed for certification would not “significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial”.¹⁵ The Defence Request offers nothing but bare speculation that “if” the Decision were incorrectly decided that “may” deny the Defence access to rule 77 or potentially exculpatory information.¹⁶ Similarly the Defence contends that its purported confusion about the finality of the Decision “may” lead to unnecessary or pointless further disclosure requests and “may” impact on expeditiousness insofar as the Defence will continue raising arguments in closing submissions or on appeal.¹⁷ Moreover, the Defence posits that “if” the Decision were wrongly decided, that has “the potential to” impact the outcome of the trial. These arguments are nothing more than hypotheses, and alone cannot warrant interlocutory appeal.

8. Second, immediate resolution by the Appeals Chamber of the issue proposed for appeal would not “materially advance the proceedings”.¹⁸ The Defence Request fails to put forward any argument at all on this prong, except apparently to incorporate by reference its arguments related to expedition, and should be rejected for that reason alone. In fact, there is no basis for believing that immediate appellate review of the Decision would have any impact on this case, much less cause the

¹⁴ ICC-01/05-01/08-3273, para. 8; ICC-02/11-01/15-117, para. 26; ICC-02/11-01/15-132, para. 5.

¹⁵ Rome Statute, art. 82(1)(d).

¹⁶ Defence Request, para. 14

¹⁷ Defence Request, para. 16.

¹⁸ Rome Statute, art. 82(1)(d).

proceedings to move forward more rapidly or efficiently. The likely impact of an interlocutory appeal is, if anything, quite the opposite.

Conclusion

9. For the reasons set out above, the Defence Request for Leave to Appeal Decision 1351 should be rejected.



Fatou Bensouda, Prosecutor

Dated this 10th day of October 2018
At The Hague, the Netherlands