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Pénale
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**International
Criminal
Court**

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

Date: **26 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-02/04-01/15-1367**

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's request for leave to appeal Decision 1367¹ should be denied because it does not identify any appealable issue. The issue proposed for certification does not arise from this Decision.² Moreover, the Defence Request misreads the Impugned Decision, or merely disagrees with the Single Judge's assessment. In any case, the Defence Request does not meet the two remaining cumulative requirements under article 82(1)(d) of the Rome Statute.

Submissions

No appealable issue is identified

2. The Defence Request seeks leave for an interlocutory appeal on the issue of "[w]hether the Single Judge failed to consider all required circumstances in assessing the degree of the objective risk required by Appeals Chamber jurisprudence".³ However, almost the entirety of the Defence Request takes issue not with the Single Judge's consideration and analysis of the information available to him concerning the objective risk (as required by jurisprudence and the underlying rules and Statutory provisions), but rather with the various matters which the Defence considers to be "implied" in the Impugned Decision and with its alleged "inconsistency" with previous decisions.⁴ Moreover, as shown below, the Defence's complaint that the Single Judge misrepresented the Defence's position on the mental health experts' fears of reprisals,⁵ is unfounded. Further, the Defence Request repeats matters that the Defence has previously raised,⁶ and misreads the Single Judge's analysis of the risk to the experts' patients.⁷ Ultimately, none of these matters is

¹ ICC-02/04-01/15-1380 ("Defence Request").

² ICC-02/04-01/15-1367 ("Impugned Decision").

³ Defence Request, para. 1.

⁴ See, e.g., Defence Request, paras. 3-11.

⁵ Defence Request, paras. 3-4.

⁶ Defence Request, paras. 5-6 and 10.

⁷ Defence Request, paras. 7-9.

capable of identifying an appealable issue. In any event, they constitute a mere disagreement with the Single Judge's assessment.

3. Contrary to the Defence's claims, the Single Judge did not misrepresent its position on the experts' fears of reprisals. On 25 June 2018, the Defence stated that "[d]iscussions regarding their security concerns have not been concluded with the witnesses, especially concerning fears of reprisals and isolation from the communities in which they have been practicing".⁸ On 7 September 2018, in assessing the security concerns of Witness D26-0027, a former LRA insider, the Defence stated: "[w]hile the Defence believes that the fear of LRA reprisals in Uganda are an issue of the past, the witness still conducts business in South Sudan in areas which are still frequented by active LRA members".⁹ It is perfectly proper for the Single Judge to have considered the most recent information provided by the Defence concerning the possibility of reprisals. The Defence's complaints thus fail to show how the Single Judge misrepresented its submission, and in any event, they constitute a mere disagreement with the Single Judge's assessment.

4. In paragraphs 5, 6 and 10, the Defence only repeats the arguments that have already been raised and dismissed.¹⁰ The Single Judge has analysed these arguments and concluded that the risk to the experts' patients is purely speculative.¹¹ Furthermore, the mental health experts, who have been living and working with victims of the conflict for decades as the Defence stated,¹² voluntarily undertook the task of reporting and testifying and made no stipulation at the time of writing their reports about their names being kept away from the public.

5. Contrary to the Defence's assertion as a result of their misunderstanding of the Single Judge's analysis of the risk to the experts' patients, nowhere in the

⁸ ICC-02/04-01/15-1273-Conf, para. 69.

⁹ ICC-02/04-01/15-1333, para. 25.

¹⁰ ICC-02/04-01/15-1333, paras. 36-38 and 42-43.

¹¹ Impugned Decision, para. 20.

¹² Defence Request, para. 10.

Impugned Decision does the Single Judge require the Defence to provide the Chamber with the information demonstrating that a person needed treatment, or currently receiving treatment from one of the experts, has been dissuaded from seeking or continuing with such treatment.¹³ The Single Judge, rather, found that the Defence has provided no substantiation for the assertion that the experts' patients would discontinue treatment solely on the account of the fact that the experts are to testify at the request of the Defence.¹⁴

6. In short, the Defence's proposed issue – the Single Judge's alleged flawed consideration and analysis of the information available to him in assessing the objective risk required by jurisprudence – does not constitute an appealable issue. Given that the article 82(1)(d) requirements are cumulative, and since failure to fulfil one of the requirements is fatal to an application for leave to appeal,¹⁵ the Defence Request should be rejected on this basis alone.

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

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

8. First, the issue proposed for certification would not "significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial".¹⁶ The Defence alleges that it is possible that the experts are unable to participate, or that their capacity to provide candid testimony will be affected, and that this "may" impact upon the fairness or outcome of the trial.¹⁷ The Defence's assertions are unsupported and speculative. Additionally, the Defence ignores the Single Judge's stated intention to renew his assessment and decision on the necessity of protective

¹³ Defence Request, paras. 7-8.

¹⁴ Impugned Decision, para. 20.

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

¹⁶ Rome Statute, art. 82(1)(d).

¹⁷ Defence Request, para. 12.

measures should further information become available.¹⁸ If and when the Defence speculation about the future actions of the experts becomes concrete fact they can raise the matter again.

9. Second, immediate resolution by the Appeals Chamber of the issue proposed for appeal would not “materially advance the proceedings”.¹⁹ Instead of providing the Single Judge with supporting information to substantiate an objectively justifiable risk requiring protective measures for the mental health experts, the Defence chooses to request leave to appeal. There is no basis for believing that immediate appellate review of the Decision would have any impact on this case, much less cause the proceedings to move forward more rapidly or efficiently. The likely impact of an interlocutory appeal is, if anything, quite the opposite.

Conclusion

10. For the reasons set out above, the Defence Request for Leave to Appeal Decision 1367 should be rejected.



Fatou Bensouda, Prosecutor

Dated this 26th day of October 2018
At The Hague, the Netherlands

¹⁸ Impugned Decision, paras. 6 and 10.

¹⁹ Rome Statute, art. 82(1)(d).