

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No.: ICC-02/04-01/15
Date: 22 November 2019

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

Confidential

**Prosecution's Response to Defence Request for Leave to Appeal Decision
ICC-02/04-01/15-1665**

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 Chamber should reject the Defence Request¹ because the purported issue raised for certification is not appealable within the meaning of article 82(1)(d) of the Rome Statute. In addition, the Defence Request does not meet the remaining cumulative criteria under article 82(1)(d).

Submissions

The Defence Request merely disagrees with the Impugned Decision

2. The Defence seeks leave to appeal the Impugned Decision² in relation to the following issue:

“The Chamber used an improper standard by assessing the meaningfulness of the interviews conducted by the Office of the Prosecutor when determining whether the prior recorded testimony could be submitted into evidence through Rule 68(2)(a) of the Rules of Procedure and Evidence.”³

3. In the Impugned Decision, the Chamber considered whether three separate, consecutive sets of investigative interviews with Witness D-0036 complied with the rule 68(2)(a) requirements, namely that both the Prosecution and the Defence “had the opportunity to examine the witness during the recording”. The Chamber found on that basis that they had not. The purported issue merely disagrees with the Impugned Decision.

4. The Chamber reasoned that although the Prosecution and the Defence interviewed D-0036 at various points, both Parties were present during just one of the interviews. While the Prosecution’s representative was present during the 2016 interview with the Defence, the contact protocol prevented the Prosecution from asking him questions. The Chamber thus correctly concluded that the Prosecution had no possibility to test D-0036’s statements, as it would have done in the

¹ ICC-02/04-01/15-1674 (“Defence Request”).

² ICC-02/04-01/15-1665 (“Impugned Decision”).

³ Defence Request, paras. 2, 7, 32.

courtroom. The Prosecution's concerns regarding D-0036's veracity and reliability, the Chamber reasoned, demonstrated that the Prosecution's mere presence during one of the interviews was insufficient to satisfy the rule 68(2)(a) requirements.⁴

5. In sum, the purported issue merely disagrees with the Impugned Decision and does not qualify as appealable within the meaning of article 82(1)(d) of the Statute. Given that article 82(1)(d) criteria are cumulative, and that failure to fulfill one of the criteria is fatal to an application for leave to appeal,⁵ the Chamber should reject the Defence Request on that basis alone.

The Defence Request does not meet the remaining article 82(1)(d) criteria

6. In any event, and even assuming, *arguendo*, that the purported issue does constitute an appealable issue, neither of the remaining cumulative criteria under article 82(1)(d) are met.

7. First, the purported issue would not "significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial".⁶ The fact that Witness D-0036 refused to testify in the case at such a late stage in the proceedings⁷ does not create an automatic entitlement to introduce his prior recorded testimony under rule 68(2)(a), much less when its requirements are not met. Indeed, rule 68(2) states that the Chamber "may allow" the introduction of a previously recorded testimony. Given the countervailing considerations under articles 69(2) and 69(4), in particular concerns about D-0036's veracity and reliability, the purported issue would not significantly affect the fair and expeditious conduct of proceedings or the outcome of the trial.

⁴ Impugned Decision, para. 10.

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

⁶ Rome Statute, article 82(1)(d).

⁷ Defence Request, para. 19.

8. Second, an immediate resolution of the purported issue by the Appeals Chamber would not “materially advance the proceedings”.⁸ The Defence Request fails to demonstrate otherwise, and merely refers to the novel nature of the issue. Given that the Defence’s presentation of evidence is about to conclude, and the closing submissions are scheduled for February and March 2020, appellate litigation regarding the purported issue at this stage would only delay the proceedings.

Conclusion

9. The Chamber should reject the Defence Request because it fails to meet the criteria under article 82(1)(d).



Fatou Bensouda, Prosecutor

Dated this 22nd day of November 2019

At The Hague, the Netherlands

⁸ Rome Statute, article 82(1)(d).