

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: **16 August 2016**

TRIAL CHAMBER IX

Before: Judge Bertram Schmitt, Single Judge
Judge Péter Kovács
Judge Raul C. Pangalangan

SITUATION IN UGANDA

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

Public

Defence Request for Leave to Appeal Decision ICC-02/04-01/15-521

Source: Defence for Dominic Ongwen

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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I. INTRODUCTION

1. Pursuant to Article 82(1)(d), the Defence for Dominic Ongwen ('Defence') requests leave to appeal decision ICC-02/04-01/15-521, "Decision on Prosecution 'Request for an order that Mr Ongwen cease and disclose payments to witnesses and that the Registry disclose certain calls made by Mr Ongwen'", ('Impugned Decision').¹
2. The Defence hereby seeks leave to appeal the Impugned Decision because the order to disclose financial transactions to Mr Ongwen's family which are potential witnesses violates Mr Ongwen's right to remain silent pursuant to Articles 55(1)(a) and 67(1)(g). The Defence makes this statement whilst maintaining that Mr Ongwen did nothing more than try to provide for his family.²

II. SUBMISSIONS

Applicable Law

3. Pursuant to Article 82(1)(d) of Statute, either party may appeal a decision that involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings. The purpose of such procedure is to "pre-empt the repercussions of erroneous decisions on the fairness of the proceedings or the outcome of the trial".³ The Pre-Trial Chamber is vested with the power to certify the existence of an appealable issue,⁴ however, when determining whether leave to appeal should be granted, the Pre-Trial Chamber

¹ ICC-02/04-01/15-521.

² See ICC-02/04-01/15-490-Conf and ICC-02/04-01/15-490-Red.

³ ICC-01/04-168, para. 19.

⁴ *Ibid.*, para. 20.

must not justify or defend the correctness of its decision, but instead determine whether the issues presented significantly affect the fairness of the proceedings.⁵

4. According to Rule 155(1) of the Rules of Procedure and Evidence ('RPE'), a party shall make a written application for leave to appeal to the Chamber that gave the decision, setting out the reasons for the request for leave to appeal. The application for leave to appeal shall state the name and number of the case or situation and shall specify the legal and/or factual reasons in support thereof, in accordance with Regulation 65(1) of the Regulations of the Court ('RoC'). It shall also specify the reasons warranting immediate resolution by the Appeals Chamber of the matter at issue.⁶
5. The Appeals Chamber has ruled that only an "issue" may form the subject-matter of an appealable decision, which it defined as "an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion".⁷ Further, an issue is "a subject the resolution of which is essential for the determination of the matters arising in the judicial cause under examination" and may be "legal or factual or a mixed one".⁸ The issue must be one apt to "significantly affect", that is, in a material way, either the fair and expeditious conduct of the proceedings, or the outcome of the trial.⁹ In other words, the issue "must be one likely to have repercussions on either of these two elements of justice".¹⁰
6. The Appeals Chamber has defined the term "fair" as being associated with the norms of a fair trial and corresponding human rights, as per Article 64(2) and 67(1) of the Statute.¹¹ In particular, it noted that the "expeditious conduct of the

⁵ See e.g. ICC-01/09-02/11-253, para. 28.

⁶ Regulation 155 (2) of the RoC.

⁷ ICC-01/04-168, para. 9.

⁸ *Ibid.*

⁹ *Ibid.*, para. 10.

¹⁰ *Ibid.*

¹¹ *Ibid.*, para. 11.

proceedings in one form or another constitutes an attribute to a fair trial”.¹² The term “proceedings” extends to proceedings prior and subsequent to the current proceedings.¹³

7. The Appeals Chamber also held that an issue will be appealable “where the possibility of error in an interlocutory or intermediate decision may have a bearing” on the outcome of the trial.¹⁴ The Pre-Trial Chamber, when deciding on a request for leave to appeal, “must ponder the possible implications of a given issue being wrongly decided on the outcome of the case”, thereby forecasting the consequences of such an occurrence.¹⁵
8. Regarding the second aspect of a request for leave to appeal (the immediate resolution by the Appeals Chamber), the Appeals Chamber has held that this criterion will be satisfied if the relevant Chamber rules that an authoritative determination on the appeal would “move forward” the proceedings and “remove doubts about the correctness of the decision or map a course of action along the right lines”.¹⁶ The issue at stake must also be “such that its immediate resolution by the Appeals Chamber will settle the matter posing for decision through its authoritative determination, ridding thereby the judicial process of possible mistakes that might taint either the fairness of the proceedings or mar [*sic*] the outcome of the trial”.¹⁷ The solving of the issue by the Appeals Chamber is aimed to “ensure that the proceedings follow the right course”.¹⁸

¹² *Ibid.*

¹³ *Ibid.*, para. 12.

¹⁴ *Ibid.*, para. 13.

¹⁵ *Ibid.*, para. 13.

¹⁶ *Ibid.*, paras 14-15.

¹⁷ *Ibid.*, para. 14.

¹⁸ *Ibid.*, para. 15.

Grounds for Leave to Appeal

a) The issue arises from the Impugned Decision

9. In its submissions, the Prosecution requested that the Defence be ordered to disclose monies allegedly paid and promises of monies to be paid (directly or indirectly) to witness and potential witnesses for the purpose of evaluating any Article 70 misconduct.¹⁹
10. Trial Chamber IX ('Chamber') order the Defence to disclose to the Prosecution, on a confidential basis, "all financial or in-kind payments or promises of money made by Mr Ongwen to persons currently identified as potential Prosecution or Defence witnesses in this case."²⁰ The Defence notes that the Chamber informed the Prosecution that the Pre-Trial Chamber was the appropriate venue for any Article 70 issues.
11. The Prosecution has alluded that it is contemplating an Article 70 investigation. Pursuant to Article 55(1)(a), a person under investigation has the right to remain silent, and pursuant to Article 67(1)(g), Mr Ongwen has the right to remain silent in case number ICC-02/04-01/15.
12. Since the Prosecution's intentions are unclear, the Defence asserts that forcing Mr Ongwen to disclose any alleged payments of monies or promises of cash-or-kind violates Mr Ongwen's rights, and is an appealable issue before the Appeals Chamber which arises from the Impugned Decision.

¹⁹ ICC-02/04-01/15-482-Conf, para. 7.

²⁰ *Impugned Decision*, para. 16.

b) Disclosure to the Prosecution would affect the fair and expeditious conduct of proceedings

13. As the Prosecution has alluded,²¹ it wishes to determine if there was a violation of Article 70 of the Statute. Requiring the Defence to disclose any records is a violation of Mr Ongwen's right to remain silent, which would fundamentally affect his fair trial rights.²²

14. A resolution by the Appeals Chamber is necessary to ensure that time and resources of both the Defence and Prosecution are not wasted on claims which have little bearing on the case-at-hand. Ordering the Defence to disclose these materials, especially at such an early stage, has the possibility to taint the entire proceedings, which could quite possibly cause a necessary re-trial should there be a conviction on any charge.

c) An immediate resolution by the Appeals Chamber will materially advance the proceedings

15. The trial proceedings are still within its infancy. Requiring the Defence to disclose any alleged payments, promises of payments or in-kind payments at such an early stage, especially those witnesses which the Defence are still unsure whether their testimonies shall be needed,²³ have a real and serious possibility to taint the entire proceedings. Requiring an accused or suspect to give any alleged evidence goes directly to fundamental trial and international recognised human rights, and the potential impact on Mr Ongwen rights would be damning. Finally, since the Prosecution has suggested its intended use for the materials, such disclosure could taint an entirely different proceeding.

²¹ *Supra*, para. 11.

²² See Articles 55(1)(a) and 67(1)(g).

²³ The Defence notes that ICC-02/04-01/15-517-Conf-AnxA is only a provisional list. The Defence is in no position to know which persons it shall call to testify.

III. RELIEF

16. The Defence respectfully requests the Chamber to grant leave to appeal the Impugned Decision on the issue that requiring Mr Ongwen to disclose the records violates his right to remain silent pursuant to Articles 55(1)(a) and 67(1)(g).

Respectfully submitted,



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Hon. Krispus Ayena Odongo
On behalf of Dominic Ongwen

Dated this 16th day of August, 2016

At Den Haag, Netherlands