

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: **28 August 2017**

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 on Prosecution’s Request to Add
Updated Forensic Report to its List of Evidence” (ICC-02/04-01/15-956-Corr)**

Source: Defence for Dominic Ongwen

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

The Office of the Prosecutor

Fatou Bensouda, Prosecutor
James Stewart, Deputy Prosecutor
Benjamin Gumpert, QC

Counsel for the Defence

Krispus Ayena Odongo
Chief Charles Achaleke Taku

Legal Representatives of the Victims

Joseph Akwenyu Manoba
Francisco Cox

Common Legal Representative for Victims

Paolina Massidda
Jane Adong

Unrepresented Victims**Unrepresented Applicants
(Participation/Reparation)****The Office of Public Counsel for Victims**

Paolina Massidda
Caroline Walter
Orchlon Narantsetseg
States' Representatives

**The Office of Public Counsel for the
Defence**

Xavier-Jean Keita

Amicus Curiae**REGISTRY****Registrar**

Herman Von Hebel

Counsel Support Section**Victims and Witnesses Unit****Detention Section****Victims Participation and Reparations Other
Section**

I. INTRODUCTION

1. Pursuant to Article 82(1)(d) of the Rome Statute, the Defence for Dominic Ongwen ('Defence') hereby requests leave to appeal the "Decision on Prosecution's Request to Add Updated Forensic Report to its List of Evidence."¹ ('Impugned Decision')
2. The Defence seeks leave to appeal from Trial Chamber IX ('Chamber') on the following issue: *The Chamber did not properly factor prejudice to the Accused when it allowed the addition of the Updated Forensic Report to the Prosecution's List of Evidence.*²

II. 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 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 Trial Chamber 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

¹ ICC-02/04-01/15-956-Corr.

² The Updated Forensic Report is found at ICC-02/04-01/15-933-Conf-AnxA.

³ ICC-01/04-168, para. 19.

⁴ *Ibid.*, para. 20.

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

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 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 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

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.

¹² *Ibid.*

¹³ *Ibid.*, para. 12.

¹⁴ *Ibid.*, para. 13.

¹⁵ *Ibid.*, para. 13.

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 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

III. SUBMISSIONS

The Chamber did not properly factor prejudice to the Accused when it allowed the addition of the Updated Forensic Report to the Prosecution’s List of Evidence

a) The Issue arises from the Impugned Decision

9. In the Impugned Decision, the Single Judge stated that “[n]o undue prejudice arises by the addition of the Updated Report.”¹⁹ He noted the alleged limited scope of the additional information and that the Defence would be able to examine P-0414 on its contents.²⁰
10. The Defence argued against the addition of the Updated Forensic Report in its response²¹ to the Prosecution’s request to add the report.²² The Defence also argued that the report was untimely.²³
11. The Single Judge placed an undue weight to the length of the report and its contents *vis-à-vis* an earlier disclosed report by the Prosecution.²⁴ The Single Judge ruled that the prejudice incurred by the Defence could be remedied by a changing of the

¹⁶ *Ibid.*, paras 14-15.

¹⁷ *Ibid.*, para. 14.

¹⁸ *Ibid.*, para. 15.

¹⁹ Impugned Decision, para. 12.

²⁰ *Ibid.*

²¹ See ICC-02/04-01/15-941-Conf.

²² See ICC-02/04-01/15-933 and associated confidential Annex A.

²³ Impugned Decision, paras 17-22.

²⁴ *Ibid.*, paras 11-12.

testimony date of P-0414.²⁵ As such, the Single Judge allotted an unwarranted and overburdened significance to the length of the report versus the timeliness of the disclosure and the perceived prejudice of the Updated Forensic Report.

12. Furthermore, this is not a disagreement over the interpretation of the Chamber's decision on the admission of potential evidence to the Prosecution's List of Evidence after 6 September 2016.²⁶ This is a material dispute between the prejudicial effect of untimely incriminating disclosure for which the Prosecution's only reason is that it was an oversight which lasted for nearly 16 months.
13. The Defence respectfully submits that the issue defined above is an appealable issue as defined by the Appeals Chamber.

b) The Issue could affect the outcome of the trial

14. The Defence argued that the Updated Forensic Report is highly prejudicial to the Accused.²⁷ The Single Judge agreed with the Prosecution that the Defence incurred no undue prejudice by the addition of this document onto the Prosecution's List of Evidence, and that the appropriate remedy was to allow the Parties to conduct *inter partes* discussions to reschedule the witness to a later date for his testimony.²⁸
15. The Defence maintains that the Updated Forensic Report is highly prejudicial to the Accused and the outcome of the trial. The material proffered in the Updated Forensic Report adds a distinct element to the case and the charges levied against the Accused. The additional information contained with the report *could* potentially lead to an ultimate decision on specific issues defined in the case.
16. Furthermore, this information should have been appropriately raised during the Article 56 hearings. The Updated Forensic Report belonged in those proceedings. Raising this issue with P-0414 is not an appropriate remedy for this prejudice; it is a further prejudice to the Accused.

²⁵ *Ibid.*, para. 13.

²⁶ See ICC-02/04-01/15-600, para. 14 and ICC-02/04-01/15-619, para. 10.

²⁷ ICC-02/04-01/15-941-Conf, para. 23-26.

²⁸ Impugned Decision, paras 11-13.

17. The Defence maintains that the introduction of the Updated Forensic Report could materially affect the outcome of the trial, and should be decided by the Appeals Chamber.
 - c) *An immediate resolution by the Appeals Chamber will materially advance the proceedings and is in the interest of justice*
18. The Prosecution has requested leave seven (7) times to included additional material in its List of Evidence.²⁹ The Updated Forensic Report is the latest in a long line of requests. An immediate resolution by the Appeals Chamber will conclusively determine the accuracy of the Impugned Decision and the proper course of the proceedings, *i.e.* remove doubt as to the correctness of its conclusion.
19. If the Impugned Decision is determined to be incorrect, the repercussions of the inclusion of the Updated Forensic Report shall irreparably mar the proceedings. A definitive decision from the Appeals Chamber before P-0414 testifies is the only avenue which will stop future litigation.
20. Additionally, the Defence asserts that it is in the interest of justice to grant leave to appeal the Issue. A proper determination as to the weight afforded to the different criteria delineated by the Single Judge in Decisions 600 and 619 will give further guidance to the Chamber in regards to future requests for late inclusions of material in the Prosecution's List of Evidence.
21. The Defence maintains that an immediate resolution by the Appeals Chamber will materially advance the proceedings, and the Defence should be granted leave to appeal the Issue.

²⁹ See ICC-02/04-01/15-941-Conf, paras 7-12 and 14.

IV. RELIEF

22. The Defence respectfully requests the Chamber to grant it leave to appeal the Issue defined above.

Respectfully submitted,



.....
Hon. Krispus Ayena Odongo
On behalf of Dominic Ongwen

Dated this 28th day of August, 2017
At Kampala, Uganda