

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No.: **ICC-02/04-01/15**
Date: **18 February 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***

PUBLIC, with CONFIDENTIAL Annexes A and B

**Defence Request for Leave to Appeal Decision on ‘Ongwen Defence request in light of
Decision 1443’**

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. On 12 February 2019, the Trial Chamber IX ('Trial Chamber') issued an e-mail decision on 'Ongwen Defence request in light of Decision 1443' ('Decision').¹ In the Decision, the Trial Chamber denied the Defence for Dominic Ongwen ('Defence') request to suspend the deadline for disclosure to permit the Defence to exercise its statutory right to seek leave to appeal under Article 82(1)(d) of the Rome Statute ('Statute') within five days,² and possibly seek an effective remedy against the disclosure order before the Appeals Chamber.
2. Thus, the Defence seeks leave to appeal the Decision on two issues which arise from it and meet the criteria for leave to appeal under Article 82(1)(d) of the Statute.

II. APPLICABLE LAW

3. Pursuant to Article 82(1)(d) of the 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 Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings." However, when determining whether or not leave to appeal should be granted, the Chamber must not justify or defend the correctness of its decision, but instead determine whether the issue presented significantly affects the fairness of the proceedings.³
4. Mr Ongwen has the right to a reasoned statement⁴ and "reasoned statement of the Trial Chamber's findings on the evidence and conclusions" must be provided.⁵

¹ See, Confidential Annex A; *see also*, *Ongwen* case, Decision on Prosecution Request for Disclosure of Material Provided to Defence Expert, ICC-02/04-01/15-1443, 11 February 2019 ('**Decision 1443**').

² Rule 155 of the Rules of Procedure and Evidence ('Rules'): When a party wishes to appeal a decision under Article 82, paragraph 1(d) [...] that party shall, within five days of being notified of that decision, make a written application to the Chamber that gave the decision, setting out the reasons for the request for leave to appeal.

³ *Kenyatta* case, Decision on the "Prosecution's Application for Leave to Appeal the 'Decision with Respect to the Question of Invalidating the Appointment of Counsel to the Defence (ICC-01/09-02/11-185)'" , ICC-01/09-02/11-253, 18 August 2011, para. 28.

⁴ *Bemba et al.* case, Judgment on the appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled "Judgment pursuant to Article 74 of the Statute", ICC-01/05-01/13-2275-Red, para. 1540.

⁵ Article 74(5) of the Statute.

5. The Trial Chamber in the *Ruto and Sang* case found that “the requirement of fairness is closely linked to the concepts of ‘equality of arms’ or balance between the parties during the proceedings”.⁶
6. The Appeals Chamber in the *Kony et al.* case and in the *Bemba* case held that “Counsel for the Defence is entitled to rely on procedural errors as the basis for impugning the [...] Chamber’s decision.”⁷
7. The Pre-Trial Chamber II in the Situation in Uganda held that “the concept of fairness of proceedings under article 82(1)(d) of the Statute requires looking into the broad concept of a fair trial enshrined in human rights instruments. This is consistent with the essence of the Statute, which requires that the application of its provisions be consonant with internationally recognised human rights”.⁸
8. Article 6 § 1 of the European Convention on Human Rights (‘ECHR’) establishes that “In the determination of [...] any criminal charge against him, everyone is entitled to a [...] hearing [...] by a tribunal [...]”.
9. In respect of the right to appeal, the ECtHR Chamber in the *Papon v. France* case ruled that

That being so, the Court sees no reason to depart from the conclusion it reached in *Khalifaoui*. Noting that the applicant forfeited his right to appeal on points of law because he had failed to surrender to custody as required by Article 583 of the Code of Criminal Procedure as applicable at the time, it considers that, regard being had to all the circumstances of the case, he suffered disproportionate interference with **his right of access to a court and, therefore, with his right to a fair trial** (see *Goth v. France*, no. 53613/99, § 36, 16 May 2002). There has accordingly been a violation of Article 6 § 1 of the Convention.⁹ (Bold added).

⁶ *Ruto and Sang* case, Decision on Prosecution's Application for Leave to Appeal the 'Decision on Mr Ruto's Request for Excusal from Continuous Presence at Trial', ICC-01/09-01/11-817, 18 July 2013, para. 15.

⁷ *Kony et al.* case, Judgment on the appeal of the Defence against the ‘Decision on admissibility of the case under article 19(1) of the Statute’ of 10 March 2009, ICC-02/04-01/05-408 (OA3), 16 September 2009, para. 47; *Bemba* case, Corrigendum to Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 24 June 2010 entitled “Decision on the Admissibility and Abuse of Process Challenges”, ICC-01/05-01/08-962-Corr, 26 October 2010, para. 101.

⁸ *Situation in Uganda*, Decision on the Prosecution's Application for Leave to Appeal the Decision on Victims' Applications for Participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06, ICC-02/04-112, 19 December 2007, para. 26.

⁹ *Papon v. France* case, Judgment, ECtHR, Application no. 54210/100, 25 July 2002 (‘*Papon Judgment*’), para. 100 (available at <http://hudoc.echr.coe.int/eng?i=001-60633>).

III. SUBMISSIONS

A. The two Issues on which the Defence seek leave to appeal

10. The Defence seeks leave to appeal the Decision on the following two issues ('Issues'):
 - (i) Whether the standard of "exceptional basis" applied by the Trial Chamber in rejecting the Defence request to suspend the disclosure order is correct ('First Issue').
 - (ii) Whether, or to what extent, the Trial Chamber has a discretionary power to enforce its order, before allowing the accused to exhaust its statutory right to request for leave to appeal the order under Article 82(1)(d), or possibly seek its right to an effective appellate remedy against the order before the Appeals Chamber ('Second Issue').¹⁰

B. Each Issue constitute an appealable issue pursuant to Article 82(1)(d)

11. For the purposes of Article 82(1)(d), an appealable issue must arise from the ruling of a decision, must be "an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion,"¹¹ and its resolution must be "essential for the determination of the matters arising in the judicial cause under examination".¹² As set out below, the two Issues satisfy these requirements.
12. The **First Issue** arises from the Trial Chamber's holding that "irrespective of the possibility to grant such request on an exceptional basis, the Chamber is of the view that decision -1443 is not of the nature to warrant such an exceptional step".¹³
13. In determining whether or not to grant the Defence request to suspend the disclosure order, it appears that Trial Chamber required the Defence to satisfy the "exceptional circumstances" test under Article 81(3)(c)(i) of the Statute.¹⁴ It is the Defence position that the Trial Chamber

¹⁰ The Defence raises the same issue in two separate requests for leave to appeal, because it is of the view that the issue emanates from both the Decision 1443 and the e-mail decision from 12 February 2019.

¹¹ *Situation in the Democratic Republic of Congo*, Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, ICC-01/04-168, 13 July 2006 ('**Decision on Extraordinary Review Application**'), para. 9.

¹² Decision on Extraordinary Review Application, para. 9.

¹³ See, Confidential Annex A.

¹⁴ Article 81(3)(c)(i) of the Statute: In case of an acquittal, the accused shall be released immediately, subject to the following: (i) Under **exceptional circumstances**, and having regard, inter alia, to the concrete risk of flight, the seriousness of the offence charged and the probability of success on appeal, the Trial Chamber, at the request of the Prosecutor, may maintain the detention of the person pending appeal. (Bold added).

applied an incorrect standard.¹⁵ Unlike the issue at hand (*i.e.*, disclosure), Article 81(3)(c)(i) test applies in situations when an acquitted person is being kept in detention pending the determination of a party's appeal.¹⁶ The application of an incorrect standard is further supported by the Trial Chamber's unclear reference to "issues of security or question of central consequence".¹⁷ Accordingly, the First Issue is appealable issue.

14. The **Second Issue** emanates from the Trial Chamber's holding that the Defence "fails to properly motivate its request" and that "decision -1443 is not of the nature" to grant the Defence request for suspension. On the contrary, the motivation behind the request was made very clear to the Trial Chamber. The Defence submitted that it "intends to seek leave to appeal Decision 1443," that "[p]rovision of the D-0133 material to the Prosecution and LRVs before having a ruling on the Defence request for leave to appeal, or potentially Appeals Chamber's judgment, would render the procedure under Article 82(1)(d) moot," and that by being denied its statutory right under Article 82(1)(d) "the Defence automatically loses its right to a remedy against Decision 1443 before the Appeals Chamber which defeats the purpose of the system of appellate review envisioned by the Statute in Part 8".¹⁸
15. In effect, the Trial Chamber enforced the disclosure of items (*i.e.*, the operative part of Decision 1443) despite being duly notified of the Defence intention to file a request for leave to appeal and present its submissions in support of it under Article 82(1)(d) within five days, as prescribed by the Statute. The Second Issue, therefore, arises from the Decision.

C. The two Issues significantly affect the fair and expeditious conduct of proceedings

16. The jurisprudence confirms that "the concept of fairness of proceedings under article 82(1)(d) of the Statute requires looking into the broad concept of a fair trial enshrined in human rights

¹⁵ For example, Regulation 35(2) of the RoC empowers the Trial Chamber to extend or reduce a time limit if **good cause** is shown. (Bold added). The Defence highlights Confidential Annex B, being an email communications between the Prosecution and Trial Chamber IX dated 24 April 2018 whereby the Prosecution requested a suspension on its disclosure obligation. The Trial Chamber suspended the Prosecution's disclosure obligation even though the Prosecution did not provide any legal basis for its request, except for Article 74(2) of the Statute which indicated its motivation behind the suspension request. By analogy, the Defence also motivated its request for suspension on Article 82(1)(d) of the Statute in its email communication to the Trial Chamber on 11 February 2019.

¹⁶ See, *e.g.*, *Gbagbo and Blé Goudé Case*, Decision on the Prosecutor's request for suspensive effect of her appeal under article 81(3)(c)(ii) of the Statute and directions on the conduct of the appeal proceedings, ICC-02/11-01/15-2543, 18 January 2019.

¹⁷ See, Confidential Annex A.

¹⁸ See, Confidential Annex A.

instruments,”¹⁹ that the term “fair” is being associated with the norms of a fair trial and corresponding human rights, as per Articles 64(2) and 67(1), and that the “expeditious conduct of the proceedings in one form or another constitutes an attribute to a fair trial”.²⁰

17. The First Issue raises the question whether the Trial Chamber rejected the Defence request to suspend the disclosure order on a correct legal basis and standard. The Trial Chamber applied the standard of “exceptional circumstances” under Article 81(3)(c)(i) of the Statute.
18. Although the Defence could have specified the legal basis for its request (*i.e.*, suspension of the disclosure order), it is still the Trial Chamber who remains obliged to apply the correct standard *sua sponte*,²¹ and ensure that the trial is conducted with full respect for the rights of the accused, as prescribed by the Article 64(2) of the Statute. It is respectfully submitted that the significance of the impact on the fairness of the proceedings is further aggravated by the fact that the Trial Chamber applied an incorrect – and much higher – standard of “exceptional circumstances” under Article 81(3)(c)(i) of the Statute, and thus rejected the Defence request on the wrong legal basis.
19. In respect of the Second Issue, the Defence recognizes that Article 82(1)(d) does not automatically confer a right to appeal decisions of the Trial Chamber. Indeed, a right to appeal arises only if the Trial Chamber is of the opinion that any such decision must receive the immediate attention of the Appeals Chamber. In other words, the Trial Chamber has a power under Article 82(1)(d) to certify the existence of an appealable issue. In this regard, the Appeals Chamber concluded that:

It may be regarded as axiomatic that, if any power is conferred upon a court to make an order or issue a decision, the parties have an implicit right to move the Chamber to exercise it.²²

¹⁹ *Situation in Uganda*, Decision on the Prosecution's Application for Leave to Appeal the Decision on Victims' Applications for Participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06 to a/0104/06 and a/0111/06 to a/0127/06, ICC-02/04-112, 19 December 2007, para. 26.

²⁰ Decision on Extraordinary Review Application, para. 11.

²¹ Article 22(2) of the Statute: In case of ambiguity, the Trial Chamber is obliged to interpret the law in favour of the accused; *see also*, *Ngudjolo Chui* case, Judgment pursuant to Article 74 of the Statute, Concurring Opinion of Judge Christine Van den Wyngaert, ICC-01/04-02/12-4, 18 December 2012, para. 19: “I believe that the express inclusion of the in *dubio pro reo* standard in Article 22(2) of the Statute is a highly significant characteristic of the Statute. By including this principle in Part III of the Statute, the drafters wanted to make sure that the Court could not engage in the kind of 'judicial creativity' of which other jurisdictions may at times have been suspected. Moreover, this principle is an essential safeguard to ensure both the necessary predictability and legal certainty that are essential for a system that is based on the rule of law”.

²² Decision on Extraordinary Review Application, para. 20.

20. It is, therefore, implicit that the Defence has a statutory right to seek leave to appeal under Article 82(1)(d). It is also in the best interests of the Defence and its client to motivate its request for leave to appeal in such a way that it satisfies the Article 82(1)(d) test and permits the Defence to seek an effective appellate remedy before the Appeals Chamber (*i.e.*, the ruling on non-disclosure of the D-0133 items). Nonetheless, the Trial Chamber set a time-limit of three days for the disclosure, which rendered the five-day procedure under Article 82(1)(d) moot, and thus restricted Mr Ongwen's right to seek an effective remedy at the Court.
21. The Defence further notes that it is a common practice for this Trial Chamber to shorten time-limits in order to expedite the litigation between the parties. Such intervention would have been a reasonable compromise, as it would permit the Defence to exhaust its statutory right, but also allow the Trial Chamber to issue its decision in an expedited manner. It is submitted that the Trial Chamber's failure to make these interventions further demonstrates that the Trial Chamber acted unreasonably, which significantly affected Mr Ongwen's statutory right to seek a remedy before the Court, guarantees of due process, and therefore his right to fair trial.²³

D. The two Issues significantly affect the outcome of the trial

22. Given the disjunctive nature of this leg of Article 82(1)(d) test, the Defence avers that, even if the Chamber determines that none of the Issues significantly affect the "fair and expeditious conduct of proceedings", the two Issues significantly affect the outcome of the trial. The Appeals Chamber held that the 'outcome of the trial' part of Article 82(1)(d) test requires the Chamber to "ponder the possible implications of a given issue being wrongly decided on the outcome of the case", a process which "involves a forecast of the consequences of such an occurrence".²⁴
23. If the two Issues were erroneously decided, the consequences will significantly affect the outcome of the *Ongwen* trial, specifically the Article 74 judgment and the subsequent appeals proceedings. The judgment will be based, in part, on the testimony of the Defence expert witness D-0133, including his/her cross-examination by the Prosecution and LRVs in respect of

²³ *Papon* Judgment, para. 100; Article 6 §1 of the ECHR. The Court appeared to reject the argument that because the applicant in the *Papon* case failed to meet a seemingly procedural requirement (*i.e.*, surrender to custody as required by a Statutory provision) that was enough for the applicant to forfeit his right to appeal, which is protected by Article 6(1) ECHR thus a fair trial right. By analogy, the fact that the Trial Chamber IX denied the leave to appeal because the Defence did not "specify the legal basis for its request, and properly motivate its request" is not enough to forfeit Mr Ongwen's right to appeal.

²⁴ Decision on Extraordinary Review Application, para. 13.

the items disclosed in accordance with the Decision 1443's order. Therefore, in respect of the First and Second Issue, part of the D-0133's testimony will have been obtained in violation of Mr Ongwen's statutory right to seek a remedy before the Court, guarantees of due process of law, and therefore a right to fair trial.

24. During the appeals proceedings, the Statute provides the Appeals Chamber with certain options in which it can 'significantly affect' the outcome of the *Ongwen* proceedings, including the recurrence of certain parts of the trial proceedings. If the Appeals Chamber – pursuant to Article 81 of the Statute – were to find that the Decision constituted multiple errors, the jeopardy of excluding parts of D-0133's testimony is such that the outcome of the trial is significantly affected by the two Issues raised.

E. Immediate resolution of the two Issues by the Appeals Chamber could materially advance the proceedings

25. The word “advance” in this prong of the Article 82(1)(d) test requires that an immediate and “authoritative determination” by the Appeals Chamber of the issues will “ensur[e] that the proceedings follow the right course” by “[r]emoving doubts about the correctness of a decision or mapping a course of action along the right lines [...]”.²⁵
26. The Defence submits that immediate resolution of the two Issues by the Appeals Chamber will materially advance the proceedings in the *Ongwen* case for the following two reasons.
27. First, if leave to appeal is denied, it is possible that the Decision's impact will be wider than the current disclosure of items to the Prosecution, because the Prosecution will presumably submit further requests for the disclosure of items provided to Defence expert witnesses. For this reason, it is reasonable to anticipate that the Trial Chamber will continue to enforce an incorrect standard of “exceptional basis”, in situations when a party requests for suspension of an order (*e.g.*, disclosure order) to be able to exercise its statutory rights at the trial level.
28. Second, and in light of **paragraphs 20 and 21** above, the Defence avers that immediate resolution of the two Issues by the Appeals Chamber will materially advance proceedings, because it will determine whether the Trial Chamber erred in demanding Mr Ongwen to comply with its disclosure order before exhausting his right to seek leave to appeal the order,

²⁵ Decision on Extraordinary Review Application, para. 15.

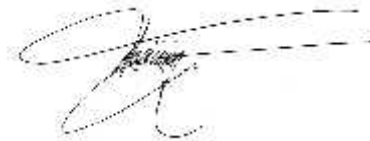
and his right to an effective appellate remedy against the order before the Appeals Chamber, as guaranteed by the principles of due process and envisioned by the Statute in Part 8.

29. In other words, if the Decision is wrong, it will taint the *Ongwen* case going forward. In these circumstances, the proceedings will not be advanced but on the contrary they will be set back. Determination of the two Issues by the Appeals Chamber at this stage would, therefore, ensure that the *Ongwen* case proceedings “follow the right course”, and “rid thereby the judicial process of possible mistakes that might taint either the fairness of the proceedings or the outcome of the trial”.²⁶

IV. RELIEF SOUGHT

30. For the reasons set out above, the Defence respectfully requests that the Trial Chamber grant leave to appeal the two Issues discussed above pursuant to Article 82(1)(d) of the Statute.

Respectfully submitted,



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

Dated this 18th day of February, 2019
At The Hague, Netherlands

²⁶ Decision on Extraordinary Review Application, paras 14-15.