

**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 Annex A

**Defence Request for Leave to Appeal ‘Decision on Prosecution Request for Disclosure of
Material Provided to Defence Expert’**

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 11 February 2019, the Trial Chamber IX ('Trial Chamber') issued 'Decision on Prosecution Request for Disclosure of Material Provided to Defence Expert' ('Decision 1443').¹ In the Decision 1443, the Trial Chamber granted the Prosecution's request for disclosure of items provided by the Defence to its expert witness D-0133.
2. Thus, the Defence for Dominic Ongwen ('Defence') seeks leave to appeal the Decision 1443 on three issues which arise from it and meet the criteria for leave to appeal under Article 82(1)(d) of the Statute.²
3. Although the Trial Chamber already issued the Decision 1443's disclosure order and the Defence complied with the order,³ the Defence requests that the Trial Chamber notify the Appeals Chamber of the Defence application for suspensive effect in respect of the disclosure of D-0133's material, as prescribed by Article 82(3) of the Statute.

II. APPLICABLE LAW

4. 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.⁴

¹ *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 *See*, Confidential Annex A.

⁴ *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.

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”.⁵
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.”⁶
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”.⁷
8. The Trial Chamber in the *Ongwen* case held that “the Single Judge agrees with the international criminal jurisprudence to the effect that ‘sources used in support of any expert witness statement must be clearly indicated and easily accessible to the other party upon request’” and that “‘for the purpose of disclosure, there is no meaningful difference between an expert “using” a source and “relying upon” that source’”.⁸
9. The Trial Chamber VII in the *Bemba et al.* case held that “[t]he disclosure obligations of the Defence and Prosecution differ significantly because of the particular role of the two parties have at trial. This said, the Defence must permit the Prosecution to inspect any books, documents, photographs and other tangible objects in their possession or control, which are intended for use by the Defence as evidence for purposes at trial”.⁹

⁵ *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.

⁶ *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.

⁷ *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.

⁸ *Ongwen* case, Decision on the ‘Prosecution Request for Disclosure of Material Underlying the Defence Psychiatric Expert Report’, ICC-02/04-01/15-709, 21 February 2017 (**‘Decision 709’**), paras 12-13.

⁹ *Bemba et al.* case, Directions on Defence Presentation of Evidence, ICC-01/05-01/13-1450, 3 November 2015, para. 2 (ii).

10. The Trial Chamber VII in the *Bemba et al.* case also found that “[i]n the words of Trial Chamber I in the *Lubanga case*, ‘[t]he starting-point for consideration of this issue [of ordering the defence to disclose evidence] is that the fundamental rights of the accused not to incriminate himself or herself and to remain silent must not be undermined by any obligations imposed on the defence’”.¹⁰

III. SUBMISSIONS

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

11. The Defence seeks leave to appeal the Decision on the following three issues (‘Issues’):
- (i) Whether the Defence is obliged to disclose material or sources of information that are not contained in the expert report, irrespective of whether the expert ‘used’ the material or was merely ‘relying upon’ them (‘First Issue’).
 - (ii) Whether the right to remain silent under Article 67(1)(g) of the Statute has any implications in respect of the disclosure of material provided to the expert witness to aid in production of her or his report (‘Second Issue’).
 - (iii) 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 (‘Third Issue’).¹¹

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

12. 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,”¹² and its resolution must be “essential for the determination of the matters arising in the judicial cause under examination”.¹³

¹⁰ *Bemba et al.* case, Decision on Prosecution Request to Order the Disclosure of Material in Possession of the Defence, ICC-01/05-01/13-1820, 20 April 2016, para. 6.

¹¹ 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.

¹² Decision on Extraordinary Review Application, para. 9.

¹³ Decision on Extraordinary Review Application, para. 9.

13. As set out below, the three Issues are interrelated and arise from the Decision 1443.
14. The **First Issue** arises from the Trial Chamber's holding that "[i]t is noted that the report at issue does not contain this information".¹⁴ The Trial Chamber thereby noted that the expert report under discussion does not consult, or contain any information or a reference to material provided by the Defence to the expert witness. In fact, the list of material provided to the Trial Chamber, Prosecution, and LRVs confirms that none of the listed items appear in the expert report.¹⁵
15. In determining whether or not this fact contradicts the Defence disclosure obligations, the Trial Chamber departed from its prior case law on related disclosure matters¹⁶ and found that "[i]t can be presumed that the expert will have looked at all the information and material which provided to [...]" and that "it is also reasonable to assume that this information or material will form part of the expert's starting point for the production of the report".¹⁷ It is respectfully submitted that the Trial Chamber erred by failing to adhere to its prior case law on related disclosure matters, and, in case of ambiguity, interpret the law at hand in favour of the accused.¹⁸ Accordingly, the First Issue is an appealable issue.
16. The **Second Issue** arises from the Trial Chamber's holding that "[a]s to the argument by the Defence that the accused has a right to remain silent, the Single Judge is of the view that disclosure of the Material does not implicate Article 67(1)(g) of the Statute".¹⁹
17. To support its ruling the Trial Chamber further finds that "[b]y using, and having given the Material a certain value and role in the proceedings, it cannot subsequently oppose disclosure by claiming the right to remain silent".²⁰ Therefore, by evaluating the role and value of the material in the proceedings against the right to remain silent, the Trial Chamber in fact

¹⁴ Decision 1443, para.9.

¹⁵ See, Confidential Annex A.

¹⁶ Decision 709, para. 13.

¹⁷ Decision 1443, para. 9.

¹⁸ 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 *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".

¹⁹ Decision 1443, para. 11.

²⁰ Decision 1443, para. 11.

acknowledged that the disclosure of such material implicates Article 67(1)(g) of the Statute. Accordingly, the Second Issue arises from the Decision 1443.

18. The **Third Issue** emanates from the Trial Chamber's ruling ordering "the Defence to provide the Material to the Prosecution and LRVs within 3 days of the reception of this at the latest".²¹ The Trial Chamber must ensure that all statutory rights of the accused at this Court are guaranteed, specifically the right to seek leave to appeal under Article 82(1)(d) within the time-limit of five days,²² and the right to seek an effective remedy before the Appeals Chamber.
19. The Defence respectfully submits that the Trial Chamber's unreasonable deadline of three days automatically rendered Mr Ongwen's right to file a leave to appeal under Article 82(1)(d) within five days moot, and thus his right to seek an effective remedy before the Appeals Chamber (*i.e.*, the ruling on non-disclosure of the expert witness items) is also extinguished. It is, therefore, unclear to the Defence under what circumstances, or to what extent, the Trial Chamber is empowered to exercise its discretion in such a way that it allows it to negate – in effect – certain statutory provisions of this Court. The Third Issue, therefore, arises from the Decision 1443.

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

20. 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 instruments,"²³ 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".²⁴
21. At its core, the First Issue concerns the issue of whether the Defence is obliged to disclose material or sources of information that are not contained in the expert report; and this is irrespective of whether the expert ever 'used' the information or material or was merely 'relying upon' them.

²¹ Decision 1443, para. 12.

²² 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.

²³ *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.

²⁴ Decision on Extraordinary Review Application, para. 11.

22. Rule 78 of the Rules stipulates that items which are intended for use by the defence as evidence have to be disclosed. In other words, only an item which the Defence ‘intends to use’ falls under its disclosure obligations, and therefore the scope of Rule 78 is entirely limited to the Defence’s choice of evidence.²⁵ In this regard, Trial Chamber VII confirms that “this narrow interpretation of the defence’s disclosure obligations is in accordance with the required protection of the rights of the defence”.²⁶
23. Having regard to the facts that a) none of the items that the Defence was ordered to disclose appear in the expert report; b) it is not known to the Defence whether the expert witness ever ‘used’ or ‘relied upon’ them; and c) the Trial Chamber only “presumed that the expert will have looked at them”,²⁷ the Defence submits that the Trial Chamber erred by failing to adhere to the narrow interpretation of the defence’s disclosure obligations. The Defence never intended to use some of the items for the purposes at trial, and yet it was ordered to disclose these items, and was forced to implicitly concede that these items somehow form the opinion of its expert witness. The Decision 1443’s disclosure order is therefore overly broad, unduly prejudicial, and thus significantly affects the *Ongwen* case proceedings.
24. The Second Issue raises an important question, that is, whether by providing information or material to the expert witness, the Defence cannot subsequently invoke its fundamental right to remain silent, *i.e.*, automatically waives its right to remain silent under Article 67(1)(g) of the Statute. Therefore, the above question that arises from **paragraph 11** of the Decision 1443 implicates Mr Ongwen’s Article 67(1)(g) fundamental rights.
25. First, the Defence avers that such ruling sets a dangerous precedent that is in manifest violation with a cornerstone – the right to remain silent – of any criminal trial, and contradicts the Trial Chamber’s role to ensure that the trial is conducted with full respect for the rights of the accused, as established in Articles 21, 64(2), and 67(1) of the Statute. Second, the Trial Chamber provides no legal basis or case law to support its finding. In fact, the Defence

²⁵ *Bemba et al.*, Decision on Prosecution Request to Order the Disclosure of Material in Possession of the Defence, ICC-01/05-01/13-1820, 20 April 2016, para. 6.

²⁶ *Bemba et al.*, Decision on Prosecution Request to Order the Disclosure of Material in Possession of the Defence, ICC-01/05-01/13-1820, 20 April 2016, para. 6.

²⁷ Decision 1443, para. 9.

provided²⁸ this Trial Chamber with relevant Trial Chamber VII's case law, which unequivocally establishes that:

‘The starting-point for consideration of this issue [of ordering the defence to disclose evidence] is that the fundamental rights of the accused not to incriminate himself or herself and to remain silent **must not be undermined by any obligations imposed on the defence**’.²⁹ (Bold added).

26. In light of the above, the Defence submits that this Trial Chamber in fact recognized the implications of Article 67(1)(g) of the Statute in the matter at hand, and at the same time undermined these fundamental rights by imposing disclosure obligations on the Defence because it gave the material “certain value and role in the proceedings”.³⁰ Accordingly, and in light of **paragraph 20** above, the Second Issue significantly affects the *Ongwen* case proceedings.
27. At last, regarding the Third 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.³¹

28. 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,

²⁸ *Ongwen* case, Defence Response to the Prosecution's Request for Disclosure, ICC-02/04-01/15-1437, 6 February 2009, para. 3.

²⁹ *Bemba et al.* case, Decision on Prosecution Request to Order the Disclosure of Material in Possession of the Defence, ICC-01/05-01/13-1820, 20 April 2016, para. 6.

³⁰ Decision 1443, para. 11.

³¹ Decision on Extraordinary Review Application, para. 20.

and thus made it factually and legally impossible for Mr Ongwen to seek an effective remedy at the Court.

29. 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.³² 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.³³

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

30. 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 three 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".³⁴
31. If the three 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 the items disclosed in accordance with the Decision 1443's order.
32. With respect to the First Issue, part of the D-0133's testimony will have been obtained in contradiction with the Defence's Rule 78 disclosure obligations. In respect of the Second Issue, part of the D-0133's testimony would be obtained in breach of Mr Ongwen's fundamental rights not to incriminate himself and to remain silent, which as the Trial Chamber VII held

³² This would support the expeditiousness of the proceedings and allow the Prosecution to analyse the material and conduct an effective questioning on its basis.

³³ See, *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>).

³⁴ Decision on Extraordinary Review Application, para. 13.

“must not be undermined by any obligations imposed on the defence”.³⁵ Finally, regarding the Third Issue, part of the D-0133’s testimony would be 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.

33. During the appeal 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 legal and procedural errors, the jeopardy to fair trial and prejudice to Mr Ongwen of excluding parts of D-0133’s testimony is such that the outcome of the trial is significantly affected by the three Issues raised.

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

34. The word “advance” in this prong of 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 [...]”.³⁶
35. The Defence submits that immediate resolution of the three Issues by the Appeals Chamber will materially advance the proceedings in the *Ongwen* case for the following reasons.
36. First, if leave to appeal is denied, it is possible that the Decision 1443’s impact will be wider and more significant than the current disclosure of items to the Prosecution. It can be presumed that the Prosecution will submit further requests for the disclosure of items provided to expert witnesses, quoting the unduly prejudicial Decision 1443. For this reason, it is reasonable to anticipate that the Trial Chamber will continue to enforce its holding that obliges the Defence to disclose material or sources of information that are clearly not contained in the expert report,³⁷ irrespective of whether the expert ‘used’ the material or was merely ‘relying upon’ them. In other words, the Defence is obliged to disclose ‘everything’, regardless of whether or

³⁵ *Bemba et al.* case, Decision on Prosecution Request to Order the Disclosure of Material in Possession of the Defence, ICC-01/05-01/13-1820, 20 April 2016, para. 6.

³⁶ Decision on Extraordinary Review Application, para. 15.

³⁷ See, Confidential Annex A.

not the Defence intends to use the item in question for the purposes at trial. Such disclosure is overly broad, unduly prejudicial, and in contradiction with Rule 78 disclosure obligations.³⁸

37. Second, if leave to appeal is denied, and in light of **paragraphs 24 to 26** above, violation of Mr Ongwen's fundamental right not to incriminate himself and to remain silent under Article 67(1)(g) of the Statute will remain uncorrected, and it is also reasonable to assume that this erroneous case law will continue to prejudice him for the remainder of the trial proceedings. It is, therefore, submitted that in order to prevent any further interference with Mr Ongwen's fundamental rights not to incriminate himself and to remain silent in respect of disclosure of items provided to his expert witnesses, the Appeals Chamber's immediate resolution is warranted.
38. Third, the Defence avers that immediate resolution of the three Issues by the Appeals Chamber will materially advance the proceedings. This is 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, 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.
39. 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; rather on the contrary they will be set back. Determination of the three 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".³⁹

IV. RELIEF SOUGHT

40. For the reasons set out above, the Defence respectfully requests that the Trial Chamber:

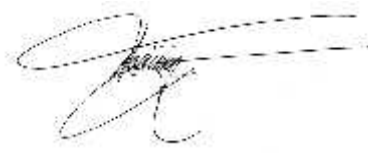
A) **GRANT** leave to appeal the three Issues discussed above pursuant to Article 82(1)(d) of the Statute.

³⁸ *Bemba et al.* case, Directions on Defence Presentation of Evidence, ICC-01/05-01/13-1450, 3 November 2015, para. 2 (ii).

³⁹ Decision on Extraordinary Review Application, paras 14-15.

B) **NOTIFY** the Appeals Chamber of the Defence application for suspensive effect in respect of the disclosure of the expert witness items under Article 82(3) of the Statute.

Respectfully submitted,



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Hon. Krispus Ayena Odongo
On behalf of Dominic Ongwen

Dated this 18th day of February, 2019

At The Hague, Netherlands