

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: **10 May 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

**Defence Request for Leave to Appeal
‘Decision on Defence Request for Authorization to Apply Redactions to
Item UGA-D26-0015-1219’ (ICC-02/04-01/15-1506-Conf), filed 3 May 2019**

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**

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I. INTRODUCTION

1. Pursuant to Article 82(1)(d) of the Rome Statute ('Statute'), the Defence for Dominic Ongwen ('Defence') seeks leave to appeal the Single Judge of Trial Chamber IX's ('Single Judge' and 'Trial Chamber' respectively) "Decision on Defence Request for Authorization to Apply Redactions to Item UGA-D26-0015-1219".¹ The appellate issue is:

whether the Trial Chamber can foreclose the right to seek leave to appeal pursuant to Article 82(1)(d) on decisions requesting non-standard redactions and preclude an appellate remedy.

2. The Defence submits that the issue is one that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which an immediate resolution by the Appeals Chamber may materially advance the proceedings.
3. The Defence incorporates by reference the jurisprudence of the Appeals Chamber with respect to seeking leave to appeal as set out in prior requests.²

II. SUBMISSIONS

A. The issue: whether the Trial Chamber can foreclose the right to seek leave to appeal pursuant to Article 82(1)(d) on decisions requesting non-standard redactions and preclude an appellate remedy

4. The issue that arises from the decision is whether it is within the power of the Trial Chamber to reduce the time limit for seeking leave to appeal of a decision on non-standard redactions to the point whereby no opportunity is provided for the Defence to identify legal, factual, or procedural errors that could constitute appealable issues within the meaning of Article 82(1)(d).
5. The standard time limit for seeking leave for an interlocutory appeal is five days.³ Article 82(1)(d) is a provision that covers situations not enumerated in Article 82(1)(a) through (c).
6. In its 3 May 2019 decision, the Trial Chamber through the Single Judge annexed⁴ a redacted version of the document which was the subject of the Defence request for non-standard

¹ ICC-02/04-01/15-1506-Conf ('Decision').

² ICC-02/04-01/15-1334-Red, paras 4 to 10.

³ Rule 155(1) of the Rules of Procedure and Evidence ('RPE').

redactions.⁵ This document was thereby made available to the other participants and Prosecutions before the Defence had the opportunity to seek leave to appeal. The Redacted Document included material for which the Defence had sought non-standard redactions. By providing the Redacted Document, the Single Judge foreclosed any possibility of seeking leave to appeal of his decisions and thereby pre-emptively decided upon the eligibility of any conceivable appeal under Article 82(1)(d) or simply foreclosed the possibility of seeking leave.

7. The Defence previously highlighted⁶ Appeals Chamber jurisprudence which stated:

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.⁷

8. It also noted that following this, the Defence therefore has an implicit statutory right to seek leave to appeal under Article 82(1)(d). The tension between the above appeals statement with the current circumstances is a question which the Defence submits the Appeals Chamber needs to resolve.
9. While the Defence disputes the conclusions in paragraph 10 and 11 of the Decision, the threshold issue is a procedural one. During a trial Judges are called upon to take big and small decisions. There may be a class of *de minimis* decisions where precluding the possibility of appeals is warranted. However, the Defence submits that non-standard redactions in this case do not fall into this class, and the possibility of appeal should not be precluded.
10. A previous decision by the Single Judge on a request for leave to appeal on similar matters rejected the Defence request referring to several factors to consider in the context of the issue raised by the Decision. These were considered:
 - a. The seeking of leave to appeal was not in the Single Judge's view moot following the provision of the information;⁸
 - b. A reduced period of time in which to file leave to appeal had existed;⁹ and

⁴ Decision, p. 7.

⁵ ICC-02/04-01/15-1506-Conf-AnxA ('Redacted Document').

⁶ ICC-02/04-01/15-1451, para. 19; ICC-02/04-01/15-1453, para. 27.

⁷ ICC-01/04-168 OA3, para. 20.

⁸ ICC-02/04-01/15-1474, para. 14.

⁹ *Ibid.*, para. 15.

c. The information was obtainable by the Prosecution.¹⁰

11. Here the damage cannot be undone and no time to appeal was given prior to the provision of the Redacted Document. Moreover, there was no urgency. The disclosure of the item was premised upon the basis of assisting the Prosecution to properly question Defence witnesses D-41 and D-42 yet these witnesses are not scheduled to testify in the near future.
12. In light of the above, the Defence submits that the issue arises from the Decision.

B. The issue would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and immediate resolution by the Appeals Chamber may materially advance the proceedings

13. The issue significantly affects the fair conduct of proceedings because by providing the material directly in the decision, the possibility of seeking appellate relief in respect to any identified legal or factual error was foreclosed. The Defence raised a number of discrete reasons for redacting information. Notwithstanding whether the Trial Chamber dealt with these issues correctly or incorrectly, several of the interests identified are impacted as soon as the information is made available. This impacts upon fairness by itself but moreover some of the reasons raised by the Defence are tightly connected to fair-trial rights protected by the Statute, for example, the Defence submissions previously indicated that Article 67(1)(b) was implicated by the request.¹¹
14. The issue also significantly impacts upon expeditiousness. The denial of an opportunity to seek leave to appeal in advance of the provision of information means that issues will now arise consequent to the provision of that information. Those discrete matters will have to be resolved individually through litigation. If the outcome is impacted as described below, then there may have to be recurrence of parts of the trial following an appeal in the event of a conviction. Granting leave on the issue identified above will avoid this delay by enabling the Appeals Chamber to pronounce on whether it should have been possible to seek leave and thus prejudice perhaps avoided.
15. The basis for the request concerned weighty issues. The issue impacts on the outcome because, procedurally, the Defence was not in a position to seek leave to appeal in respect to the individual decisions on the particular redactions. The justifications for the non-standard

¹⁰ ICC-02/04-01/15-1474, para. 16.

¹¹ ICC-02/04-01/15-1485-Conf-Exp, paras 13 and 14.

redactions – *inter alia* lawyer-client privilege and the disclosure of internal work-products – relate to important fair-trial protections. Errors on issues such as these have the capacity to lead to major impacts upon the outcome of trial.

16. The proliferation of problems pursuant to this issue will hinder the trial. Failing to resolve it now will possibly cloud important factual issues and burden a future appeal. Treatment of this issue by the Appeals Chamber will therefore materially advance the proceedings.

III. RELIEF

17. For the reasons stated above, the Defence respectfully requests that leave is granted by the Trial Chamber to appeal the following issue:

whether the Trial Chamber can foreclose the right to seek leave to appeal pursuant to Article 82(1)(d) on decisions requesting non-standard redactions and preclude an appellate remedy

Respectfully submitted,



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Hon. Krispus Ayena Odongo
On behalf of Dominic Ongwen

Dated this 10th day of May, 2019

At The Hague, The Netherlands