

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

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

Date: **16 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

Prosecution Response to the “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: The Office of the Prosecutor

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

The Office of the Prosecutor

Ms Fatou Bensouda
Mr James Stewart
Mr Benjamin Gumpert

Counsel for Dominic Ongwen

Mr Krispus Ayena Odongo
Mr Charles Taku
Ms Beth Lyons

Legal Representatives of Victims

Mr Joseph Akwenyu Manoba
Mr Francisco Cox
Ms Paolina Massidda

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

Ms Paolina Massidda
Ms Caroline Walter
Mr Orchlon Narantsetseg

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

Amicus Curiae

States Representatives

REGISTRY

Registrar

Mr Peter Lewis

Counsel Support Section

Victims and Witnesses Section

Detention Section

**Victims Participation and Reparations
Section**

Other

Introduction

1. The Defence request for leave to appeal (“Defence Request”)¹ decision 1506 (“Decision”)² should be denied as it does not meet the criteria of article 82(1)(d) of the Rome Statute (“Statute”). The issue does not arise from the Decision because the Chamber has never ruled that ‘non-standard redactions’ fall within ‘a class of *de minimis* decisions where precluding the possibility of appeals is warranted’.³ Even if the Chamber were to find that the issue arises, the Defence has not demonstrated that it would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, nor that an immediate resolution by the Appeals Chamber would materially advance the proceedings.

Submissions

The issue does not arise

2. The Defence seeks leave to appeal the issue of “whether the Trial Chamber can foreclose the right to seek leave to appeal...decisions requesting non-standard redactions and preclude an appellate remedy.”⁴ It argues that non-standard redactions do not fall within the “class of *de minimis* decisions where precluding the possibility of appeals is warranted.”⁵ The issue does not arise from the Decision. The Defence seeks leave to ask the Appeals Chamber to rule on a ‘procedural threshold issue’⁶ that the Trial Chamber has not engaged with or adopted in the Decision. The Trial Chamber has not had any opportunity to rule on the legal issue for which leave

¹ ICC-02/04-01/15-1509 (“Defence Request”).

² Decision on Defence Request for Authorization to Apply Redactions to Item UGA-D26-0015-1219, ICC-02/04-01/15-1506-Conf

³ Defence Request, para. 9.

⁴ Defence Request, para.1.

⁵ Ibid 2.

⁶ Ibid 2.

to appeal is sought. It has never found that non-standard redactions fall within a class of *de minimis* decisions.

3. The Defence makes no submission with regard to the Trial Chamber's legal and factual findings regarding the grounds of its sought redactions.⁷ The Request is an attempt by the Defence to merely seek means to attack a decision with which it disagrees. However, if the Trial Chamber finds that the issue does arise from the Decision, the Defence Request does not meet the remaining requirements of article 82(1)(d) and for that reason the request should be denied.

The Defence has not demonstrated that its proposed issue would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial and that an immediate resolution may materially advance the proceedings

4. The Defence argues that the fair conduct of the proceedings is significantly affected because it was denied the chance to seek appellate relief. The Defence cannot (and does not seek to) argue that an inability to appeal any ruling is *per se* unfair. They have to demonstrate that in this instance, the provision to the Prosecution of the lesser redacted version of the report, before an opportunity to seek leave to appeal, leads to significant unfairness.

5. The Defence assertion is also incorrect. The provision of the report did not foreclose Defence's chance to first, identify any legal or factual error in the Decision itself and second, to seek leave to appeal it. The Defence could have done so but have chosen not to. Moreover the Defence's one-sentence-reference to the

⁷ Ibid 2.

implication for the fair-trial rights⁸ of the accused fails to recognise that this issue has been thoroughly assessed and determined by the Chamber.⁹

6. The question of whether the proposed issue significantly affects the fair and expeditious conduct of the proceedings has to be seen in the light of the fact that the issue of whether, and to what extent, the Defence is obliged to disclose item UGA-D26-0015-1219 (“the medical report”) has been alive since 8 January 2019. The most specific decision on it was rendered by the Trial Chamber on 6 March 2019. The Single Judge ordered the Defence to disclose the Report *within 10 days*.¹⁰ The Defence submitted a request for leave to appeal that decision too.¹¹ Since that decision, and without taking into account frequent email correspondence on the matter or the several filings prior to that decision, the Trial Chamber has had to deal with at least another three additional separate requests from the Defence regarding the disclosure of this very same medical report.¹²

7. The Trial Chamber has, since at least 21st of February 2017, informed the Defence that no privilege applies to their interactions with the Expert Witnesses as engaging these witnesses to testify with respect to Article 31(1)(a) defences excluded any reasonable expectations of privacy.¹³ Strikingly, as the Decision also emphasized, the reasons provided by the Defence to seek the redactions of significant portions of the report, either did not apply at all or concerned information which had already been made known to the parties and participants by the Defence itself.¹⁴

⁸ See last sentence of paragraph 13 of Defence request.

⁹ See, for example, paras 10-11 and 14 of Decision ICC-02/04-01/15-1506.

¹⁰ Decision ICC-02/04-01/15-1475 (emphasis added).

¹¹ Defence request ICC-02/04-01/15-1478.

¹² Defence requests ICC-02/04-01/15-1478, ICC-02/04-01/15-1485 and ICC-02/04-01/15-1506.

¹³ Decision ICC-02/04-01/15-709, para. 11.

¹⁴ See, for example, paras 10-11 and 14 of Decision ICC-02/04-01/15-1506.

8. The Defence also fails to demonstrate how the issue would significantly affect the outcome of the trial. It provides no information as to what “issues will now arise consequent to the provision of that information” that will “have to be resolved individually through litigation.”¹⁵ In the absence of any reasoning or explanation by the Defence, it is difficult to decipher its assertion that the failure to resolve the issue now “will possibly cloud important factual issues and burden of a future appeal.” Such assertions cannot be the basis to argue that an *immediate* resolution may *materially* advance the proceedings. They are inconcrete or, at best, highly speculative.

9. In fact appellate litigation is more likely to slow the proceedings.

Conclusion

10. For the reasons stated above, the Defence Request should be denied.



Fatou Bensouda, Prosecutor

Dated this 16th day of May 2019
At The Hague, The Netherlands

¹⁵ Defence Request, para 14.