

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

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

Date: **19 March 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

**Public Redacted Version of the Prosecution's Response to "Defence Request for
Leave to Appeal 'Decision on Prosecution Request for Disclosure of a Report
produced by Defence Experts'
(ICC-02/04-01/15-1475), notified 6 March 2019", ICC-02/04-01/15-1481-Conf**

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**

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

States Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Peter Lewis

Counsel Support Section

Victims and Witnesses Section

Mr Nigel Verrill

Detention Section

**Victims Participation and Reparations
Section**

Other

Introduction

1. The Defence Request for Leave to Appeal (“Defence Request”)¹ the Decision on Prosecution Request for Disclosure of a Report produced by Defence Experts (“Impugned Decision”)² should be denied because it is not appealable within the meaning of article 82(1)(d) of the Rome Statute (“Statute”). The issue proposed for certification derives from the Defence’s mischaracterisation of the Impugned Decision. Furthermore, the Defence Request does not meet the two remaining cumulative requirements under article 82(1)(d) of the Statute.

Confidentiality

2. The Prosecution files this response confidentially pursuant to regulation 23*bis* of the Regulations of the Court, because it responds to a confidential filing and makes references to confidential information. A public redacted version (“PRV”) will be filed as soon as a PRV of the Defence Request becomes available.

Submissions

No appealable issue is identified

3. The proposed issue - “whether the Report, under the present factual circumstances, is exempted from the Defence disclosure obligation”³ - is premised on a mischaracterisation of the Impugned Decision and therefore does not constitute an appealable issue.

4. The Defence Request argues that the Trial Chamber’s findings concerning Defence disclosure obligations are not consistent with the Court’s statutory

¹ ICC-02/04-01/15-1478-Conf.

² ICC-02/04-01/15-1475.

³ Defence Request, para. 2.

provisions and jurisprudence and that the Single Judge erred when only citing to articles 64(2) and 64(3)(c) of the Statute as the legal basis of the Impugned Decision. In fact, this reliance on articles 64(2) and 64(3)(c) is correct and sufficient.

5. Article 64(2) creates an obligation on the Trial Chamber to ensure that the trial is fair. The Trial Chamber has consistently⁴ ruled that this obligation includes the making of orders for the disclosure of material necessary for parties to evaluate reports relied upon by another party. The Trial Chamber gives effect to that obligation by exercising the power given to it by virtue of article 64(3)(c) of the Statute.

6. Thus the Defence mischaracterises the Impugned Decision as asserting that article 64(3) “constitutes a free-standing, independent basis for disclosure”.⁵ On the contrary, the Impugned Decision specifically cites article 64(2) in its preamble and refers to the rulings referred to above.⁶

7. The Defence’s reliance upon Trial Chamber VI’s analysis in the *Ntaganda* case⁷ and suggestion that it is in contradiction to the analysis in the Impugned Decision is misplaced. In any event, in *Ntaganda* the issue was quite different. The material for which disclosure was being sought there was the sound recording of an interview of which a transcript had already been disclosed. The Chamber observed that the Defence needed to develop persuasive arguments (under rule 77 of the Rules of Procedure and Evidence) going to the materiality of the sound recordings in order to be successful.⁸

⁴ See: ICC-02/04-01/15-709 and ICC-02/04-01/15-1443.

⁵ Defence Request, para. 9.

⁶ At footnote 17 of the Impugned Decision.

⁷ Defence Request, para. 9.

⁸ ICC-01/04-02/06-1258-Red, para. 8.

8. In the Impugned Decision, the Single Judge found that the “Defence’s intention to rely on a specific item as evidence for the purposes at trial cannot be the sole factor for determining whether a disclosure obligation exists.”⁹ The Single Judge concluded that the Report in question must be disclosed in order to allow other parties to meaningfully question the Expert Witnesses.¹⁰ This is consistent with the previous decisions cited above; the Single Judge is exercising his powers under article 64(3)(c) of the Statute in order to ensure that the trial is fair and expeditious as outlined in article 64(2) of the Statute.

9. The Defence’s proposed issue does not arise out of the Impugned Decision because it is premised on a mischaracterisation of that decision. Given that the Article 82(1)(d) requirements are cumulative, and since failure to fulfil one of the requirements is fatal to an application for leave to appeal,¹¹ the Defence Request should be rejected on this basis alone.

The remaining article 82(1)(d) criteria are not met

10. Even if the Defence’s proposed issue did arise from the Impugned Decision, it does not meet the remaining two cumulative requirements for an interlocutory appeal under article 82(1)(d) of the Statute. First, the issue proposed for certification would not “significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial”.¹² Second, immediate resolution by the Appeals Chamber of the issue would not “materially advance the proceedings”.¹³

11. In an attempt to demonstrate that the proposed issue significantly affects the fair and expeditious conduct of proceedings, the Defence raises five arguments that

⁹ Impugned Decision, para. 13.

¹⁰ Impugned Decision, para. 19.

¹¹ ICC-01/05-01/08-3273, para. 8; ICC-02/11-01/15-117, para. 26; ICC-02/11-01/15-132, para. 5.

¹² Rome Statute, article 82(1)(d).

¹³ Rome Statute, article 82(1)(d).

largely reflect the Defence's disagreement with and complaint about the manner in which the Trial Chamber dealt with the Prosecution's disclosure request.

12. Firstly, the Defence argues that the Report, one of the purposes of which was '[t]o determine if Mr. Ongwen is able to participate in the proceedings of his trial',¹⁴ was created in response to [REDACTED].¹⁵ This argument is irrelevant to the Defence's disclosure obligation. As the Single Judge pointed out, the Report in question is clearly linked to the Experts' previous reports. It contains a section concerning the Accused's state of mind during the proceedings and numerous sections on his current state of health, both related to the Defence's original terms of reference for the Experts.¹⁶

13. Secondly, the Defence's complaint about how the Prosecution became aware of the existence of the Report is also inapposite. The Defence unreasonably blames the Chamber and the ICC-DC Chief Custody Officer for revealing the existence of the Report to the Prosecution and the LRVs,¹⁷ and appears to assert that it was incumbent on the Chamber to keep the existence of the report secret from the other parties and participants. This argument contradicts the Defence's previous concession that a medical report related to Mr Ongwen's fitness to stand trial would be disclosable.¹⁸ Moreover, the Chamber has made clear to Mr Ongwen that "any interaction between him and the Defence Experts was not covered by any privilege".¹⁹ In any case, the Defence is wrong to the extent that it suggests that the present disclosure issue would not have arisen in the absence of the email forwarded

¹⁴ Impugned Decision, para. 5.

¹⁵ Defence Request, para. 16.

¹⁶ Impugned Decision, para. 15.

¹⁷ Defence Request, para. 17.

¹⁸ ICC-02/04-01/15-658-Conf, para. 30.

¹⁹ ICC-02/04-01/15-709, para. 11.

to the Prosecution on 30 January 2019.²⁰ On 22 January 2019, the Defence indicated that its experts were currently examining Mr. Ongwen in relation to his potential fitness to stand trial;²¹ even if it had not received the 30 January 2019 email, the Prosecution would have made inquiries with the Defence, requesting disclosure of any written report arising out of the 22 January 2019 examination.

14. Thirdly, the Defence's argument that it made a "semantic mistake" by referring to the report as "a supplement to previously filed report" should also be rejected.²² In the Defence's email, a native English speaker of the Defence team used the term "supplement" not once but twice.²³ This is a strong indication that the term was used intentionally and not accidentally. The Defence cannot now claim that the Single Judge cherry-picked such clear statements to justify his order.

15. Fourthly, the Defence's assertion that "it has taken no decision yet to use the report at trial"²⁴ is repetitive and another mere disagreement with the Single Judge's reasoning. The Single Judge has already stated that the Defence's intention to rely on a specific item of evidence for the purposes of trial cannot be the sole factor for determining whether a disclosure obligation exists. The Defence has decided to rely on its expert witnesses and they have featured on its witness list since 14 December 2017.²⁵ As long as they remain witnesses in the case,²⁶ the reports they produce along with other materials are disclosable. Moreover, as the Single Judge emphasized, the

²⁰ See Defence Request, paras. 3(b), 17-18 (arguing that "the existence of the report" was made known to the Prosecution "in a prejudicial manner").

²¹ See ICC-02/04-01/15-1415-Red2, para. 25 ("Should the Defence Experts interview, which is being conducted simultaneous with this pleading, state that Mr Ongwen is not fit to stand trial, the remainder of the proceedings will be irreparably tainted.").

²² Defence Request, para. 22.

²³ ICC-02/04-01/15-1462-Conf-AnxA. In the E-mail the Defence sent to the Trial Chamber on 28 January 2019 at 14:05, Mr Obhof stated that "the Defence communicates to Trial Chamber IX the Supplementary Report of 25 January 2019, which the Defence Experts provided to us". Further, he requested the Chamber to "consider this report as a supplement to previously filed reports from these Defence Experts".

²⁴ Defence Request, paras. 23-25.

²⁵ ICC-02/04-01/15-1107-Conf-Exp-AnxA: Defence Provisional List of Witness as of 14 December 2017.

²⁶ Currently scheduled as witnesses number 59 and 60 in Defence List of Witnesses (Defence's email of 1 March 2019 at 17:09).

Defence cannot instruct its Experts to produce a report on a topic which is essential to their testimony and then argue that “it has taken no decision yet to use the report at trial”.²⁷

16. Fifthly, the Defence incorrectly asserts that the Impugned Decision has upset the certainty of Defence’s disclosure obligations.²⁸ This assertion is premised on the Defence’s misinterpretation and misapplication of the Trial Chamber’s email of 28 January 2019. The Chamber merely pointed out to the Defence that, should it seek to use the information in the Report for any future relief sought, it must make the Report available to the other participants.²⁹ The email did not in any way purport to state that this is the only factor for disclosure, as the Defence appears to suggest, or that it could be kept secret until any such attempt was made. As the Impugned Decision makes clear, rule 78 is not the sole factor for the determination of a disclosure obligation.

17. Immediate resolution by the Appeals Chamber of the issue proposed for appeal would not “materially advance the proceedings”. The Defence Request fails to put forward any argument at all, except apparently to incorporate by reference its speculative arguments that the Single Judge *may* potentially authorize further Prosecution disclosure requests.³⁰ This assertion should be rejected *in limine*.

18. Finally, the Impugned Decision also does not create uncertainty in disclosure obligations, as alleged by the Defence. The Trial Chamber’s approach in ordering disclosure in this case has been consistent from the very beginning and firmly rooted in the provisions of the Statute and the RPE. The fact that the Defence may disagree

²⁷ Impugned Decision, para. 18.

²⁸ Defence Request, para. 26.

²⁹ ICC-02/04-01/15-1462-Conf-AnxA.

³⁰ Defence Request, para. 33.

with the Trial Chamber's decisions does not make the approach uncertain or incorrect.

19. In fact, there is no basis for believing that immediate appellate review of the Decision would have any impact on this case, much less cause the proceedings to move forward more rapidly or efficiently.

Conclusion

20. For the reasons set out above, the Defence Request for Leave to Appeal Decision 1475 should be rejected.



Fatou Bensouda, Prosecutor

Dated this 19th day of March 2019
At The Hague, the Netherlands