

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: **2 October 2018**

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 Prosecution’s Request for non-standard redactions to document UGA-OTP-0284-0102” (ICC-02/04-01/15-1348)

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') "Decision on Prosecution's Request for non-standard redactions to document UGA-OTP-0284-0102"¹ whereby the Single Judge authorised non-standard redactions to a biographic data and security questionnaire ('BSQ').
2. The Defence incorporate by reference the jurisprudence of the Appeals Chamber with respect to seeking leave to appeal as set out in prior requests.²

II. SUBMISSIONS

3. The issue to be determined are:
 - a. whether the Single Judge erred in law by failing to adhere to Appeals Chamber's and Trial Chamber IX's jurisprudence on what constitutes objective risks in respect to disclosure to the Defence; and
 - b. whether the Single Judge's reasoning based on a systemic appraisal is flawed.
4. The Impugned Decision departs from the prior jurisprudence of the Appeals Chamber³ and Trial Chamber⁴ by not requiring demonstration of an objective risk through disclosure of material to the Defence and by taking a systemic approach that departs from a case-by-case analysis. The departure from the jurisprudence is with respect to the assessment of the risk or degree of risk through disclosure to the Defence.
5. The Appeals jurisprudence cited by the Single Judge makes clear that "the risk arises from disclosing the particular information 'to the Defence, as opposed to [...] the public at large'"⁵. The Single Judge also cites the Appeals Chamber jurisprudence at footnote 19 as authority that Rule 81(4) of the Rules must be read to include the words 'persons at risk on account of the activities of the Court' and more generally in paragraph 10 of the Impugned Decision.

¹ ICC-02/04-01/15-1348 ('Impugned Decision').

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

³ ICC-01/04-01/07-475.

⁴ ICC-02/04-01/15-1234, para. 7. *See also* ICC-02/04-01/15-612-Conf, para. 8.

⁵ Impugned Decision, footnote 14.

6. The paragraph from which the assessment of risk criteria is distilled states the following:

the risk must arise from disclosing the particular information to the Defence, as opposed to disclosing the information to the public at large. The Chamber should consider, inter alia whether the danger could be overcome by ruling that the information should be kept confidential between the parties. In making this assessment, the circumstances of the individual suspect should be considered, including, inter alia, whether there are factors indicating that he or she may pass on the information to others or otherwise put an individual at risk by his or her actions.⁶

7. The full citation makes clear that if the redaction is necessary, it must be implemented only after considering all other options.
8. The Single Judge has also previously stated in prior decisions that:

[...] non-disclosure should still be warranted by the existence of an objectively justifiable risk to the safety of the person concerned, as a result of disclosure to the Defence specifically – and not only the public in general – and be *proportionate* to the rights of the accused.⁷

Relatedly, in applying the assessment of objective risk criteria to a request for protective measures by the Prosecution, the Single Judge has required not a possibility⁸ but rather circumstances that in the absence of the protective measure “creates or unduly increases impermissible danger to any of the legitimate interests of witnesses protected under Article 68 of the Statute”⁹

9. The first issue arises because having cited the prior jurisprudence, the Single Judge’s decision appears to depart from the very criteria that are cited. The Prosecution did not explain – in non-redacted form at least – how the professional obligations of Counsel are not sufficient to safeguard the confidentiality of the information. If submissions on this were made by the Prosecution, then the Defence should have been given the opportunity to respond. The Single Judge did not address Counsel’s professional obligations¹⁰ or whether other measures were not

⁶ ICC-01/04-01/07-475, para. 71(b) (emphasis added).

⁷ ICC-02/04-01/15-1234, para. 7 (emphasis added).

⁸ Impugned Decision, para. 11.

⁹ ICC-02/04-01/15-612-Conf, para. 8.

¹⁰ Article 8(1) of the Code of Professional Conduct for Counsel.

sufficient.¹¹ It is not clear that the Prosecution BSQ forms reveal more systemic information than information revealed, for example, by the Victims and Witnesses Unit.

10. The second issue arises because, in the Appeals Chamber jurisprudence cited and the decisions on related matters from the Single Judge, specificity has always been required to justify non-disclosure. The jurisprudence makes clear that the Prosecution must always present specific case-by-case information to justify non-disclosure. The Impugned Decision was predicated upon the impact upon the “‘safety and security of vulnerable witnesses and other persons who are contacted by the Prosecution’ in present and future proceedings ‘beyond the confines of the document at hand’.”¹² The systemic analysis taken by the Single Judge departs from specificity and a case-by-case analysis by considering a non-specified threat to an open-ended category of individuals. In short, what degree of specificity is required to justify non-disclosure is an appealable issue.
11. The issue impacts upon the fairness and expeditiousness of the proceedings and resolution of the issue will materially advance the proceeding. Paragraph 10 of the Impugned Decision states that “Non-standard redactions - that is, redactions not explicitly contained in the regime governing redactions in this case - must be assessed on a case-by-case basis.” Although, paragraph 14 of the Impugned Decision seeks to balance the relevance of the material against prejudice of non-disclosure, the reasoning of the Impugned Decision goes well beyond the specifics of the redaction at issue and would seem to pre-judge those issues.
12. Given that any of the specific arguments by the Prosecution that were redacted from the Defence and have not been made available through the Impugned Decision, the Impugned Decision sets out the broad principle or rule that information can be withheld upon an assertion by the Prosecution of risk if (1) any of the information reveals Prosecution methods of witness protection, or if (2) taking a systemic scale of analysis, the release of information could threaten future witnesses in the abstract. The adoption of such a wide ranging rule of non-disclosure fulfils the criteria of an issue that impacts upon the fairness and expeditiousness of

¹¹ See the Appeals Judgement. ICC-01/04-01/07-475, para. 71(b): “The Chamber should consider, inter alia whether the danger could be overcome by ruling that the information should be kept confidential between the parties. In making this assessment, the circumstances of the individual suspect should be considered, including, inter alia, could be overcome by ruling that the information should be kept confidential between the parties. In making this assessment, the circumstances of the individual suspect should be considered, including, inter alia, whether there are factors indicating that he or she may pass on the information to others or otherwise put an individual at risk by his or her actions”.

¹² ICC-02/04-01/15-1348, para. 12.

proceedings. The proceedings will be materially advanced by appellate review as most confidential evidence would be captured by the rule/principle as given in the Impugned Decision.

13. The impact upon expeditiousness and fairness is clear. In pursuing the Defence case the Defence may necessarily litigate non-disclosure. The principle as enunciated will lead to unnecessary litigation on these matters or simply unjustified non-disclosure and is an issue that arises from the Impugned Decision. For example, following decision 1335,¹³ the Defence had intended to approach the Prosecution concerning 26 extracts disclosed to the Defence on 9 August 2018¹⁴ which, following the reasoning of the Single Judge in decision 1335, should be disclosed in full. The Impugned Decision as stated could easily lead to further litigation in relation to these items. In addition to impacting the expeditiousness of proceedings, as the Defence has argued that those items are material to the duress defence,¹⁵ and it is accepted those items should have been disclosed earlier,¹⁶ the impact upon fairness is also present in that example.
14. The Single Judge applied reasoning based on a systemic analysis. In deciding whether to grant leave to appeal, the wider implications for the present trial and for the rights of the Accused more generally at the International Criminal Court should be considered.
15. Therefore, granting leave to appeal the issue will set the proceedings on a correct path and materially advance the proceedings while significantly affecting the fairness and expeditiousness of the trial in a way that is consistent with the rights of the Accused.

¹³ ICC-02/04-01/15-1335, para. 8.

¹⁴ UGA-OTP-0284-0681, UGA-OTP-0284-0684,UGA-OTP-0284-0685,UGA-OTP-0284-0686, UGA-OTP-0284-0687, UGA-OTP-0284-0689, UGA-OTP-0284-0694, UGA-OTP-0284-0698, UGA-OTP-0284-0699,UGA-OTP-0284-0701,UGA-OTP-0284-0703,UGA-OTP-0284-0704,UGA-OTP-0284-0712,UGA-OTP-0284-0714, UGA-OTP-0284-0715, UGA-OTP-0284-0716, UGA-OTP-0284-0717, UGA-OTP-0284-0719, UGA-OTP-0284-0720,UGA-OTP-0284-0721,UGA-OTP-0284-0723,UGA-OTP-0284-0724,UGA-OTP-0284-0730,UGA-OTP-0284-0732,UGA-OTP-0284-0734,UGA-OTP-0284-0735, and UGA-OTP-0284-0738.

¹⁵ ICC-02/04-01/15-1329-Conf-Corr, paras 75 and 76.

¹⁶ ICC-02/04-01/15-1351, para. 6

III. RELIEF SOUGHT

16. For the reasons stated above, the Defence respectfully requests that leave is granted by the Trial Chamber to appeal the following issue:
- a. whether the Single Judge erred in law by failing to adhere to Trial Chamber IX's and Appeals Chamber's jurisprudence on what constitutes objective risks in respect to disclosure to Defence; and
 - b. whether the Single Judge's reasoning based on a systemic appraisal is flawed.

Respectfully submitted,



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Hon. Krispus Ayena Odongo
On behalf of Dominic Ongwen

Dated this 2nd day of October, 2018
At The Hague, Netherlands