

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

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

Date: **5 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

**Prosecution's Response to Defence Request for Leave to Appeal Decision
ICC-02/04-01/15-1348**

Source: The Office of the Prosecutor

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

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Introduction

1. The Prosecution opposes the Defence's Request¹ for leave to appeal the decision allowing non-standard redactions to D-0100's BSQ² because neither of the issues raised for certification are appealable within the meaning of article 82(1)(d) of the Rome Statute. The proposed issues are premised on a mere disagreement with or a misunderstanding of the Impugned Decision.³ In addition, the remaining cumulative criteria under article 82(1)(d) are not met.

Submissions

The proposed issues do not arise from the Impugned Decision

2. The Defence misreads the Impugned Decision, failing to demonstrate the existence of an appealable issue genuinely arising from it. The first issue proposed for certification concerns an alleged departure from established jurisprudence regarding the requirement of an objectively justifiable risk, while the second issue concerns an alleged flaw in the Impugned Decision's reasoning for being based on a "systemic appraisal".⁴

3. Although the Defence alleges that the Impugned Decision "appears to depart from the very criteria that are cited"⁵ for restrictions on disclosure, in fact, the Impugned Decision outlines in clear terms the relevant law and its application to the facts under consideration in paragraphs 8-15.⁶ Each of the four cumulative criteria⁷ for restrictions on disclosure under rule 81(4) is considered in turn, in the context of the specific circumstances of disclosure of D-0100's BSQ.

4. With respect to the first proposed issue, the Impugned Decision establishes the presence of an objectively justifiable risk arising from disclosure of the

¹ ICC-02/04-01/15-1355 ("Request").

² UGA-OTP-0284-0102 ("D-0100's BSQ").

³ ICC-02/04-01/15-1348 ("Impugned Decision").

⁴ ICC-02/04-01/15-1348, para. 3.

⁵ ICC-02/04-01/15-1355, para. 9.

⁶ ICC-02/04-01/15-1348.

⁷ ICC-02/04-01/15-1348, para. 10.

Prosecution's system of witness protection to the Defence via D-0100's BSQ.⁸ The Defence's arguments about counsel's professional obligations⁹ are irrelevant, because information about the Prosecution's system of witness protection is not disclosable under rule 77 or article 67(2). If one were to follow the Defence's logic, the Defence would be entitled to all confidential information about the Court's witness management and protection systems, which would create a risk for witnesses and third parties completely unrelated to this case, with no identifiable benefit or advantage to Mr Ongwen. The risk thus arises from disclosing this particular information "to the Defence, as opposed to [...] the public at large".¹⁰

5. With respect to the second proposed issue alleging a "systemic appraisal" as opposed to a case-by-case analysis, the Impugned Decision explains that the risk arises from disclosing specific details about the Prosecution's system of witness protection contained in D-0100's BSQ in this particular case.¹¹ The Single Judge therefore did conduct the appropriate case-by-case analysis.

6. Given that article 82(1)(d) criteria are cumulative, and that failure to fulfill one of the criteria is fatal to an application for leave to appeal,¹² the Request should be rejected on that basis alone.

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

7. Assuming, for the sake of the argument, that one or both questions raised for certification constitute appealable issues within the meaning of article 82(1)(d), neither of the remaining two cumulative criteria for an interlocutory appeal are met.

8. First, the issues proposed for certification would not "significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial".¹³ As the

⁸ ICC-02/04-01/15-1348, paras. 11-13. *Contra* ICC-02/04-01/15-1355, para. 4 (suggesting that the Single Judge did not require the demonstration of an objectively justifiable risk through disclosure to the Defence).

⁹ ICC-02/04-01/15-1355, para. 3.

¹⁰ ICC-02/04-01/15-1348, paras. 10, 11, 13.

¹¹ ICC-02/04-01/15-1348, paras. 11-13.

¹² ICC-01/05-01/08-3273, para. 8; ICC-02/11-01/15-117, para. 26; ICC-02/11-01/15-132, para. 5.

¹³ Rome Statute, article 82(1)(d). The Defence does not specifically address the effect on the outcome of the trial in the Request.

Single Judge has found, redacted portions in D-0100's BSQ contain no case relevant information¹⁴ because they concern the Prosecution's system of witness protection applicable in all cases. The Defence conflates two discrete matters related to D-0100's BSQ, namely the Prosecution's system of witness protection applied across cases and rule 77 material related to Defence Witness D-0100. The Prosecution's protection system *per se* is not material to the preparation of the defence under rule 77. The former information has no bearing on the fair and expeditious conduct of proceedings or the outcome of the trial against Mr Ongwen. Likewise, the Defence's comment that "[it] may necessarily litigate non-disclosure"¹⁵ is speculative at this stage.

9. Second, an immediate resolution of the issues proposed for certification by the Appeals Chamber would not "materially advance the proceedings"¹⁶ in the case. The Appeals Chamber's immediate resolution of the issues proposed for certification would not advance the proceedings at all, because redactions in D-0100's BSQ protect information irrelevant to the case against Mr Ongwen. Likewise, since the Defence incorrectly assumes that the Decision is based on a "systemic analysis",¹⁷ the Appeals Chamber's intervention is not required to correct this misreading.

Conclusion

10. For the reasons set out above, the Request should be rejected.



Fatou Bensouda, Prosecutor

Dated this 5th day of October 2018
At The Hague, the Netherlands

¹⁴ ICC-02/04-01/15-1348, para. 14.

¹⁵ ICC-02/04-01/15-1355, para. 13.

¹⁶ Rome Statute, article 82(1)(d).

¹⁷ ICC-02/04-01/15-1355, paras. 12-14.