

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

No.: ICC-02/04-01/15
Date: **22 February 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's Response to Defence Request for Leave to Appeal Decision
ICC-02/04-01/15-1443**

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 Achaleke 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 Prosecution opposes the Defence Request for Leave to Appeal “Decision on Prosecution Request for Disclosure of Material Provided to Defence Expert” (“Request”)¹ because none of the three issues raised for certification are appealable within the meaning of article 82(1)(d) of the Rome Statute.

2. The proposed issues do not constitute appealable issues because they are premised on a mere disagreement with or a misunderstanding of the Decision on Prosecution Request for Disclosure of Material Provided to Defence Expert (“Impugned Decision”).² In addition, the remaining cumulative criteria for interlocutory appeal under article 82(1)(d) are not met.

Submissions

The proposed issues are premised on a mere disagreement with the Impugned Decision, or otherwise do not arise from it

3. Mr Ongwen seeks leave to appeal the Impugned Decision in relation to three issues proposed for certification:

“(i) Whether the Defence is obliged to disclose material or sources of information that are not contained in the expert report, irrespective of whether the expert ‘used’ the material or was merely ‘relying upon’ them (‘First Issue’).

(ii) Whether the right to remain silent under Article 67(1)(g) of the Statute has any implications in respect of the disclosure of material provided to the expert witness to aid in production of her or his report (‘Second Issue’).

(iii) Whether, or to what extent, the Trial Chamber has a discretionary power to enforce its order, before allowing the accused to exhaust its statutory right to request for leave to appeal the order under Article 82(1)(d), or possibly seek its right to an effective appellate remedy against the order before the Appeals Chamber (‘Third Issue’).”

¹ ICC-02/04-01/15-1453.

² ICC-02/04-01/15-1443.

4. The first issue proposed for certification concerns disclosure obligations in relation to expert witnesses, the second issue concerns the right to remain silent in the context of expert witness disclosure, and the third issue concerns discretionary powers to manage the trial.³ In all three instances, Mr Ongwen either disagrees with the Impugned Decision or misreads it, failing to demonstrate the existence of an appealable issue genuinely arising from it.

5. With respect to the first proposed issue regarding Mr Ongwen's disclosure obligations, the Impugned Decision stated that "the non-calling party must have knowledge of the material which was provided to an expert in the course of writing his or her report".⁴ Given that Mr Ongwen has instructed expert witness D-0133 and provided him with selected materials to aid in the preparation of his expert report, as stated in the terms of reference, it is immaterial for the purpose of disclosure if these materials were specifically referenced in D-0133's report. Rather, the materials provided to the expert witness D-0133 constitute sources for his expert report,⁵ irrespective of whether these sources are referenced in the expert report or not.⁶ In this context, the Single Judge correctly found that knowledge of these sources was required as a "prerequisite for meaningful questioning by the non-calling party".⁷ Mr Ongwen merely disagrees with the effect of the Impugned Decision in rectifying his incomplete disclosure,⁸ to which the particular use of that material by the instructed expert is immaterial.

6. Furthermore, Mr Ongwen's disagreement is actually focused not on the Impugned Decision but on a previous decision, which ruled that "sources used in

³ ICC-02/04-01/15-1453, para. 11(i)-(iii).

⁴ ICC-02/04-01/15-1443, para. 8.

⁵ The Cambridge Dictionary defines source as "the place something comes from or starts at, or the cause of something" and "someone or something that supplies information".

⁶ *Contra* ICC-02/04-01/15-1453, para. 15.

⁷ ICC-02/04-01/15-1443, para. 8.

⁸ See also Rome Statute, article 64(3)(c), which states that the Chamber shall "provide for disclosure of documents or information not previously disclosed [...] to enable adequate preparation for trial".

support of the production of Defence expert reports must be indicated and easily accessible” and “a disclosure obligation regarding these sources existed”.⁹ Consequently, the first proposed issue is not only a mere disagreement with the Single Judge’s ruling, but does not even arise from the Impugned Decision since it really challenges a prior decision.

7. With respect to the second proposed issue regarding the right to remain silent, the Impugned Decision explains that disclosure of material, which Mr Ongwen had provided to expert witness D-0133 for the preparation of his report, does not implicate article 67(1)(g) of the Statute because Mr Ongwen has voluntarily provided the materials to D-0133 “with the intention to aid him in the production of his report”.¹⁰ In other words, Mr Ongwen cannot invoke the right to remain silent where he himself, voluntarily, provided the material in question to the expert to produce the expert report intended to be used in the proceedings. Accordingly, the second proposed issue is, again, no more than a disagreement with the Single Judge’s explanation that the right to remain silent is not engaged in the Impugned Decision.

8. With respect to the third proposed issue regarding discretionary powers, and unlike stated in the Request,¹¹ the Single Judge is vested with statutory powers to manage the trial, including interlocutory matters, at his discretion, taking into account various competing interests. The Impugned Decision was rendered on 11 February 2019, just one week prior to a hearing session scheduled to resume on 18 February 2019, in which expert witness D-0133 is scheduled to testify as number three in the witness order. Indeed, the Impugned Decision ordered Mr Ongwen to provide the material to the Prosecution and LRVs within three days, having regard to judicial powers to “provide for disclosure of documents or information not

⁹ ICC-02/04-01/15-1453, para. 7.

¹⁰ ICC-02/04-01/15-1443, para. 11.

¹¹ ICC-02/04-01/15-1453, para. 11(iii).

previously disclosed, sufficiently in advance of the commencement of the trial to enable adequate preparation for trial”.¹² Hence, the third proposed issue is procedurally misconceived since it merely disputes the statutory power of the Trial Chamber and consequently does not arise from the Impugned Decision.

9. In sum, none of the proposed issues qualify as appealable issues within the meaning of article 82(1)(d) of the Statute. 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,¹³ the Request should be rejected on that basis alone.

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

10. In any event, and even assuming for the sake of argument, that one or more of the proposed issues do constitute appealable issues within the meaning of article 82(1)(d), neither of the remaining two cumulative criteria for an interlocutory appeal are met.

11. First, the issues proposed for certification would not “significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial”.¹⁴ The Impugned Decision concerns seven items, one of which is the Decision on the Confirmation of Charges against Dominic Ongwen,¹⁵ a public court document, with the other six being public reports and articles on child soldiers.¹⁶ Even if erroneous, the impact of this disclosure in the context of the proceedings is negligible. Therefore, the proposed issues have no bearing on the fair and expeditious conduct of proceedings or the outcome of the trial against Mr Ongwen. Likewise, the

¹² ICC-02/04-01/15-1443, preamble and para. 12; Rome Statute, article 64(3)(c).

¹³ ICC-01/05-01/08-3273, para. 8; ICC-02/11-01/15-117, para. 26; ICC-02/11-01/15-132, para. 5.

¹⁴ Rome Statute, article 82(1)(d).

¹⁵ ICC-02/04-01/15-422.

¹⁶ ICC-02/04-01/15-1453-Conf-AnxA.

Defence's submission that the "judgment will be based, in part, on the testimony of the Defence expert witness D-0133"¹⁷ is speculative at this stage.

12. Second, an immediate resolution of the issues proposed for certification by the Appeals Chamber would not "materially advance the proceedings"¹⁸ in the case. The Appeals Chamber's immediate resolution of the issues proposed for certification would not advance the proceedings at all, because Mr Ongwen has already disclosed the materials to the Prosecution and LRVs. In fact, expert witness D-0133 is scheduled to commence his testimony in the week of 26 February 2019.

Conclusion

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



Fatou Bensouda, Prosecutor

Dated this 22nd day of February 2019
At The Hague, the Netherlands

¹⁷ ICC-02/04-01/15-1453, para. 31.

¹⁸ Rome Statute, article 82(1)(d).