

**Cour
Pénale
Internationale**

**International
Criminal
Court**



Original: English

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

Date: 6 March 2019

TRIAL CHAMBER IX

Before: Judge Bertram Schmitt, Single Judge

SITUATION IN UGANDA

IN THE CASE OF *THE PROSECUTOR v. DOMINIC ONGWEN*

Public

**Decision on Defence Request for Leave to Appeal a Decision on Suspensive
Effect**

To be notified, in accordance with Regulation 31 of the *Regulations of the Court*, to:

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Judge Bertram Schmitt, acting as Single Judge on behalf of Trial Chamber IX ('Single Judge' and 'Chamber', respectively) of the International Criminal Court, in the case of *The Prosecutor v. Dominic Ongwen*, having regard to Article 82(1)(d) of the Rome Statute ('Statute') and Regulation 23 *bis* of the Regulation of the Court issues the following 'Decision on Defence Request for Leave to Appeal a Decision on Suspensive Effect'.

A. Procedural History and Submissions

1. On 31 January 2019, the Office of the Prosecutor ('Prosecution') requested that the Defence for Mr Ongwen ('Defence') be ordered to disclose the material it provided to assist one of its experts, D-133, in the preparation of his expert report ('Material').¹
2. On 11 February 2019, the Single Judge granted the Prosecution request, ordering the Defence to disclose the Material within three days of the reception of the decision ('Disclosure Decision').²
3. On the same day, the Defence announced via e-mail its intention to request leave to appeal the Disclosure Decision and requested that the obligation to disclose the Material be suspended until a decision on this future request for leave to appeal is issued ('Request').³
4. On 12 February 2019, the Chamber rejected the Request ('Impugned Decision').⁴ It noted that the Defence provided neither the legal basis for its request nor a proper motivation to justify 'this extraordinary step'. The Chamber further noted that the Disclosure Decision 'is of limited scope, no issues of security or question

¹ Prosecution's Request for Disclosure of Material Provided to D-0133, ICC-02/04-01/15-1428, with confidential annex, ICC-02/04-01/15-1428-Conf-AnxA.

² Decision on Prosecution Request for Disclosure of Material Provided to Defence Expert, ICC-02/04-01/15-1443.

³ Email by the Defence to Trial Chamber IX Communications, 11 February 2019, at 19:53.

⁴ Email from Trial Chamber IX Communications, 12 February, at 10:25.

of central consequence are concerned’ and that it ‘is not of the nature to warrant such an exceptional step’.

5. On 18 February 2019, the Defence requested leave to appeal the Impugned Decision (‘Request for Leave to Appeal’).⁵ It seeks leave to appeal on two issues: (i) ‘[w]hether the standard of “exceptional basis” applied by the Trial Chamber in rejecting the Defence request to suspend the disclosure order is correct’ (‘First Issue’) and (ii) ‘[w]hether, 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’ (‘Second Issue’).⁶
6. In respect of the First Issue, the Defence submits that the Chamber applied the ‘exceptional circumstances’ standard of Article 81(3)(c)(i) of the Statute which was the incorrect standard for the issue at hand.⁷
7. With regard to the Second Issue, the Defence argues that it arises from the Impugned Decision since it clearly announced that it intended to appeal the Disclosure Decision. It then repeats its submissions made in the Request.⁸
8. On 22 February 2019, the Prosecution filed its response, submitting that the Request for Leave should be rejected.⁹

⁵ Defence Request for Leave to Appeal Decision on ‘Ongwen Defence request in light of Decision 1443’, ICC-02/04-01/15-1451, with two confidential annexes, ICC-02/04-01/15-1451-Conf-AnxA and ICC-02/04-01/15-1451-Conf-AnxB.

⁶ Request for Leave to Appeal, ICC-02/04-01/15-1451, para. 10.

⁷ Request for Leave to Appeal, ICC-02/04-01/15-1451, para. 13.

⁸ Request for Leave to Appeal, ICC-02/04-01/15-1451, para. 14.

⁹ Prosecution’s Response to “Defence Request for Leave to Appeal Decision on Ongwen Defence request in light of Decision 1443”, ICC-02/04-01/15-1460.

B. Analysis

9. As a preliminary matter, the Single Judge notes that the two annexes of the Request for Leave to Appeal have no public-redacted versions. The Defence is ordered to provide public-redacted versions within 5 days of the reception of this decision.
10. The Single Judge recalls the interpretation of Article 82(1)(d) of the Statute as set out in detail previously.¹⁰
11. Regarding the First Issue, the Defence misinterprets the Impugned Decision. It did not apply the concept of 'exceptional circumstances' contained in Article 81(3)(c)(i) of the Statute in order to decide whether to suspend the effect of the Disclosure Decision. Rather, the wording 'exceptional basis' used in the Impugned Decision implied that in order to grant such request special circumstances must exist.¹¹
12. Accordingly, the First Issue as described by the Defence does not arise from the Impugned Decision.
13. In respect of the Second Issue the Defence seems to argue that it arises from the Impugned Decision since the Chamber found that the Defence did 'not properly motivate its request' despite the Defence clearly announcing that it wanted to appeal the Impugned Decision.¹²
14. The Defence misunderstands the Impugned Decision in the sense that the Chamber was aware *why* it filed the Request for Leave to Appeal (the motivation of the request) but did not find that it was properly *reasoned* (the justification of

¹⁰ Decision on Defence Request for Leave to Appeal Decision ICC-02/04-01/15-521, 2 September 2016, ICC-02/04-01/15-529, paras 4-8; Decision on Defence Request for Leave to Appeal the Decision on Prosecution Request to Introduce Evidence of Defence Witnesses via Rule 68(2)(b), ICC-02/04-01/15-1331, para. 8.

¹¹ The Chamber further used 'exceptional step' and 'extraordinary step' in the Impugned Decision to describe that granting such a request required a specific constellation in order to be justified.

¹² Request for Leave to Appeal, ICC-02/04-01/15-1451, para. 14.

the request). The Chamber understood that the Defence wanted to appeal the Disclosure Decision. It just found that this fact alone – without any further argumentation – did not warrant granting suspensive effect.

15. Additionally, the Single Judge must note the Defence's argument that the denial of suspensive effect 'would render the procedure of Article 82(1)(d) moot'¹³ and violated the Defence's 'statutory right to seek leave to appeal under Article 82(1)(d)'.¹⁴ This assertion is somewhat contradicted by the fact that the Defence still filed a request under Article 82(1)(d) of the Statute regarding the Disclosure Decision.¹⁵
16. Accordingly, the Second issue does also not arise from the Impugned Decision.
17. As a further clarification, the Defence seems to be under the impression that the fact it provided no legal basis for its Disclosure Decision was part of the reason to reject the request.¹⁶ While it is true that the Defence has an obligation to provide the 'articles, rules, regulations or other applicable law relied upon'¹⁷ the rejection of the request is not based on this shortcoming. The Impugned Decision states that 'irrespective of the possibility to grant such request' the Chamber found that in the specific circumstances it would not do so.
18. Accordingly, the Single Judge rejects the Request for Leave to Appeal.

¹³ Request for Leave to Appeal, ICC-02/04-01/15-1451, para. 14.

¹⁴ Request for Leave to Appeal, ICC-02/04-01/15-1451, para. 20.

¹⁵ Defence Request for Leave to Appeal 'Decision on Prosecution Request for Disclosure of Material Provided to Defence Expert', 18 February 2019, ICC-02/04-01/15-1453 (with confidential annex A).

¹⁶ Request for Leave to Appeal, ICC-02/04-01/15-1451, para. 21 and footnote 23.

¹⁷ See, Regulation 23(1)(d) of Regulations of the Court.

FOR THE FOREGOING REASONS, THE SINGLE JUDGE HEREBY

ORDERS the Defence to file public-redacted versions of the annexes of its Request for Leave to Appeal under the conditions specified in paragraph 9; and

REJECTS the Request for Leave to Appeal.

Done in both English and French, the English version being authoritative.



Judge Bertram Schmitt, Single Judge

Dated 6 March 2019

At The Hague, The Netherlands