

**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
“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”,
filed 12 March 2019 (ICC-02/04-01/15-1478-Conf)**

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' and 'Trial Chamber' respectively) "Decision on Prosecution Request for Disclosure of a Report produced by Defence Experts" ('Decision').¹
2. The Defence seeks leave to appeal the Decision on the following issue ('Issue'):

Whether the Report, under the present factual circumstances, is exempted from the Defence disclosure obligations.
3. As elaborated below, the Issue arises because Article 64(3)(c) has been relied upon to create disclosure obligation independent of any other legal basis. The use of the legal basis obscured four contextual facts and caused the Issue to impact on the fairness and expeditiousness and outcome of the proceedings. These facts are:
 - a. The report was created [REDACTED];
 - b. The existence of the report was provided by the Trial Chamber to the Prosecution and LRVs in a prejudicial manner without consulting the Defence;
 - c. The characterisation of the report as "supplemental", which was relied upon by the Single Judge to order disclosure, was a semantic error made by the Defence; and
 - d. The Defence has taken no decision yet to use the report at trial therefore the Defence is not obliged at this time to disclose the report pursuant to the Rule 78 disclosure regime.
4. At the request of a party under Rule 7(3) or Rule 132*bis* (3) of the Rules of Procedure and Evidence ('RPE'), the Trial Chamber may decide that the functions of the Single Judge be exercised by the full Chamber. Given the inherent importance of the Issue being litigated, *i.e.* disclosure of a document related to [REDACTED], the Defence requests that the Issue at hand is determined by the full Trial Chamber.

¹ ICC-02/04-01/15-1475 ('Decision').

5. The Defence incorporates by reference the jurisprudence of the Appeals Chamber with respect to seeking leave to appeal as set out in prior requests.²

II. CONFIDENTIALITY

6. Pursuant to Regulations 23bis of the Regulations of the Court ('RoC'), this request is submitted as confidential as [REDACTED].

III. SUBMISSIONS

A. The Issue constitutes an appealable issue pursuant to Article 82(1)(d)

7. The Issue arises from the Decision where the Single Judge rules:

While the Defence's intention to rely on a specific item as evidence for the purposes at trial is therefore relevant for Rule 78 of the Rules, it cannot be the sole factor for the determination whether a disclosure obligation exists.³

8. The Decision cites Article 64(2) and Article 64(3)(c) as its legal basis for placing a disclosure obligation on the Defence.⁴ No other statutory basis is cited. The Issue at its core arises from the Decision because the findings concerning Defence disclosure obligations at **paragraphs 13, 16, and 17** are not consistent with the Court's statutory provisions and jurisprudence.
9. There is no appellate jurisprudence as to whether Article 64(3)(c) constitutes a free-standing, independent basis for disclosure. However, recent Trial Chamber decisions have considered that Article 64(3)(c) is elaborated by the RPE⁵ and that Article 64(3)(c) does not provide for an independent disclosure obligation. In respect to a *Ntaganda* Defence disclosure request to the Prosecution, Trial Chamber VI held:

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

³ Decision, para. 13.

⁴ Decision, p. 1.

⁵ ICC-01/09-01/11-531-Red, para. 25 ('Article 64(3)(c) of the Statute states that, "subject to any other relevant provision", a trial chamber shall "provide for disclosure of documents or information not previously disclosed, sufficiently in advance of the commencement of the trial to enable adequate preparation for trial." *This provision is elaborated upon in Rules 76(1) and 77 of the Rules* which require the Prosecution to provide the Defence with or permit it to inspect, respectively, the names of its witnesses and copies of any prior statements "sufficiently in advance to enable the adequate preparation of the defence" and access to any documents or other objects which are "material to the preparation of the defence or are intended for use by the Prosecutor as evidence for the purposes of the confirmation hearing or at trial."' (italics added).

The Chamber considers the Defence's submissions to be misplaced to the extent it contends that Article 64(3)(c) gives rise to an independent disclosure obligation, separate from Article 67(2) and Rules 76 and 77.⁶

10. Following Trial Chamber VI, it would be prejudicial if the same logic did not apply to the Defence.⁷ The Issue can also be phrased: does Article 64(3)(c) create disclosure obligations independent from those contained in Rules 78, 79, and 84 when Article 64(3)(c) does not create independent obligations for the Prosecution?
11. When ordering Defence disclosure, prior Trial Chamber IX decisions⁸ have cited additional bases to Article 64(3)(c). The Single Judge discussed Decision 709 in the Decision.⁹ Decision 709 was taken pursuant to Article 64(3)(c) and Rules 78, 79, and 84 of the RPE.¹⁰ Similarly Decision 691 also links Article 64(3)(c) with a rule of disclosure in the RPE.¹¹ However, the Decision only cites Article 64(2) and Article 64(3)(c) as its legal basis. Therefore the order for disclosure is only based upon Article 64(3)(c) and the Issue arises for appellate review.
12. The manner by which the Decision is reasoned has also created further uncertainty. The Single Judge considered that the Prosecution triggered a separate basis for disclosure¹² and at same time the reasoning of the Decision also appears to take it as a given that the report should have always been disclosed yet fails to explain that legal basis. Given the citation to only Article 64(2) and 64(3)(c) in the Decision, though the Defence considers its obligations narrow, the Defence is left uncertain as to the implications of the Decision for its disclosure obligations.

⁶ ICC-01/04-02/06-1258-Red, para. 7, 8 April 2016.

⁷ See also, ICC-01/05-01/08-750-Red, para. 29, 9 April 2010.

⁸ ICC-02/04-01/15-691 ('Decision 691'); ICC-02/04-01/15-709 ('Decision 709').

⁹ Decision, para. 12, footnotes 17 and 19.

¹⁰ Decision 709, p. 1 ("having regard to Articles 64(2) and 64(3)(c) of the Rome Statute ('Statute') and Rules 78, 79 and 84 of the Rules of Procedure and Evidence ('Rules'), issues the following [...]").

¹¹ ICC-02/04-01/15-691-Conf, para. 23 ("23. Article 64(3)(c) and (6)(d) of the Statute give the Chamber the authority to order both additional disclosure and the production of additional evidence. Rule 84 of the Rules explicitly provides that 'the Trial Chamber shall [...] make any necessary orders for the disclosure of documents or information not previously disclosed and for the production of additional evidence.' The Chamber considers that *these provisions* give it more than sufficient legal basis to order that reports on an accused's mental health and safety be shared with the other participants." (italics added))

¹² Decision, para. 17 ("The Chamber's e-mail sent in reply to the Defence's informal provision of the Report does not contradict this finding. The Chamber just indicated that, should the Defence have any intention to make use of the Report, it must make a formal request and disclose it to the other parties. This does not mean that the Report is exempted from any disclosure obligation, which is governed by a separate procedure which, *inter alia*, requires an *inter partes* discussion before seizing the Chamber.")

B. The Issue significantly affects the fair and expeditious conduct of proceedings

13. Trial Chamber I in the *Lubanga* case considered defence disclosure obligations as legal limitations on the right against self-incrimination.¹³ However, it began its discussion by noting that:

At all times the Chamber has an absolute duty to ensure that *any discretionary order* it makes regarding defence disclosure does not derogate from the accused's right to a fair and impartial hearing in which his rights are fully safeguarded.¹⁴

14. The Defence submits that the Issue arising from the Decision ordering disclosure of the report significantly affects the fair and expeditious conduct of the proceedings against Mr Ongwen for the following reasons, and the Defence notes that:

[t]he starting-point for consideration of this issue is that the fundamental rights of the accused not to incriminate himself or herself and to remain silent must not be undermined by any obligations imposed on the defence, or in any other way.¹⁵

15. Though the Issue is whether Article 64(3)(c) provides a basis for disclosure, the reasoning pursuant to that legal basis is unfair and prejudicial to Mr Ongwen as it misrepresents the circumstances leading to the order.

i. The report was created as [REDACTED]

16. The Trial Chamber was well informed that the circumstances surrounding the request to have Mr Ongwen be examined [REDACTED] was because of the critical situation that the Defence found itself in January 2019, *i.e.*, [REDACTED]. The Defence brought one of their experts because their expertise, the existing relationship, and their shared language and cultural background. The Trial Chamber recognised this circumstance in the Decision at **page 1**, noting that the Defence “in reaction to a medical incident concerning the accused which occurred on the previous day contacted the Chamber via an *ex parte* e-mail” and that “[i]t requested, *inter alia*, that D-41 and D-42 (‘Expert Witnesses’) be allowed to communicate

¹³ ICC-01/04-01/06-1235-Corr-Anx1, para. 28 (“However, there are important provisions contained in the Rome Statute framework which define the obligations that can be imposed on the defence in order to secure a fair and expeditious trial and to assist the Chamber in its determination of the truth. These obligations, summarised hereafter, do not infringe the rights of the accused.”)

¹⁴ ICC-01/04-01/06-1235-Corr-Anx1, para. 33 (*italics added*).

¹⁵ ICC-01/05-01/13-1820, para. 6; *see also*, ICC-01/04-01/06-1235-Corr-Anx1, para. 27.

with the accused ‘with medical privilege about this recent situation’, in order to make an assessment of the accused with the aim of helping the Registry in the care of the accused”.¹⁶

ii. *The existence of the report was provided by the Trial Chamber to the Prosecution and LRVs in a prejudicial manner without consulting the Defence*

17. The Decision fails to mention that would it not be for the Trial Chamber forwarding the ICC-DC Chief Custody Officer’s (‘CCO’) email to the Prosecution and LRVs,¹⁷ the Prosecution would not have found out that the item existed at that time.¹⁸

18. Though the Defence does not consider the reason for the CCO including the information was an ill-intended act, it was incorrect at that time because the report was provided privately and on an *ex-parte* basis, and no informed consent had been sought to make it available to the parties. The Defence understands that the Trial Chamber would hear arguments if highly personal and/or privileged material were about to be disclosed. Thus the existence of the report entered the proceedings on an irregular and prejudicial basis.

19. The disclosure of this information was unduly prejudicial to Mr Ongwen because, through a chain of events, it led to a compulsory disclosure order. The reason for the disclosure order to the Defence appears to have been because of three potential errors: one by DC Chief Medical Officer, one by the CCO, and one by the Trial Chamber. A series of error is an unfair basis upon which to order disclosure of an item without informed consent that contains private information and which would otherwise not need to be disclosed.

iii. *The characterisation of the report as “supplemental”, which was relied upon by the Single Judge to order disclosure, was a semantic error made by the Defence*

20. The prejudicial context in which the Issue arises includes that at the time the report was provided it was not intended for use at trial.¹⁹ The Trial Chamber’s email response indicates that it understood that the purpose of the Defence expert’s examination of Mr Ongwen and production of the report was to help the Registrar in the care of Mr Ongwen pursuant to

¹⁶ Decision, p.1.

¹⁷ See, email from Trial Chamber IX “Update for TC IX – Mr Ongwen”, sent on 30 January 2019, at 17:23.

¹⁸ ICC-02/04-01/15-1446-Conf, para. 6 (‘On 30 January 2019, the Prosecution learned of the existence of the Third Report. It was referenced in an email update to the Trial Chamber from the Chief Custody Officer of the detention centre; the relevant passage provided as follows: “[REDACTED] and [the DC Chief Medical Officer] do not share the opinions and recommendations in the report of [D-42] and [D-41], as medical expert witnesses for the Defence.”’).

¹⁹ Decision, paras 15 and 16.

Regulation 103. The Trial Chamber's email of 28 January 2019 indicates that there was no disclosure obligation placed on the Defence because the Trial Chamber understood that "the Defence sends this supplemental report for informational purposes".²⁰

21. At that point the Defence was still free to decide whether the report should ultimately be disclosed or not. This is confirmed by Trial Chamber's further instruction that "should the Defence seek to use the information in this report for any future relief sought, it must file a formal request and make this report available to the other participants".²¹

22. Although the Defence made a semantic mistake by referring to the report as "a supplement to previously filed reports",²² it is unfair to cherry-pick such a statement in order for the Single Judge to justify a disclosure order. Rather, as a guarantor of Mr Ongwen's right to a fair trial, the Trial Chamber should consider the situation and relevant facts in light of the circumstances outlined above in **paragraph 3**.

iv. The Defence has taken no decision yet to use the report at trial therefore the Defence is not obliged to disclose the report pursuant to the Rule 78 disclosure regime.

23. In its 28 January email, the position of the Trial Chamber on the Defence disclosure obligation in respect of the report was plainly different from the present Decision. The Trial Chamber had the report and its content in front of it. It was also aware of its own case law on this matter,²³ yet it directed the Defence to make the report available to the Prosecution and LRVs only should the Defence seek to use the information in the report for any future relief sought. This is consistent with the Rule 78 defence disclosure obligation.

24. Following the Trial Chamber's directions, the Defence did not make the report available to the Prosecution and LRVs because it never used the information in it for any relief sought. As stated in the Defence response,²⁴ because it had not yet decided whether to use the item for the purposes at trial, it had not disclosed the item pursuant to Rule 78 of the RPE.

25. The Defence is well aware of its general disclosure obligations, which are different and significantly narrower than the Prosecution's, and as of 11 March 2019 the Defence has not

²⁰ See, Confidential Annex A: ICC-02/04-01/15-1462-Conf-AnxA.

²¹ *Ibid.*

²² ICC-02/04-01/15-1462-Conf-AnxA; see also, Decision, para. 18.

²³ See, Decision, para. 12, fn. 17: ("The Chamber notes its prior jurisprudence regarding the disclosure obligations of the Defence with regard to its witnesses"); see also, Decision 709.

²⁴ ICC-02/04-01/15-1462, para. 2.

decided to use this item at trial. Consequently the Defence is not obliged to disclose it pursuant to Rule 78. As noted above,²⁵ an order to the Defence to disclose material can violate the Accused's fair-trial rights through violation of the right against self-incrimination.

v. The impact of the disclosure order on fairness and expeditiousness

26. A consistently applied legal procedure is essential to legal certainty, which is an element of a fair trial. The Issue for which leave is sought has upset certainty in respect to Defence disclosure obligations. This impacts upon the fairness of proceedings.
27. The Trial Chamber received the report and responded in a manner that suggested no disclosure obligation. Over a month later, upon a request by the Prosecution, the Decision appears to indicate that, departing from its prior email, the item should have always been disclosed. At the same time the Decision bases disclosure upon the fact that the Prosecution triggered a separate procedure by reaching out to the Defence on an *inter partes* basis.²⁶ It cannot both be true that the item should be disclosed only because the Prosecution requested it and that the document did not have to be disclosed at the time when the Trial Chamber received the item. The resolution of the Issue leaves the Defence in an uncertain state in respect to how to assess its limited disclosure obligations.
28. Under a state of uncertainty introduced in the present Decision it is clear that further issues will arise. As discussed below,²⁷ it is conceivable that further disclosure requests will follow from the present order. This will delay the proceedings. Moreover, an uncertain disclosure regime creates uncertainty which in turn generates litigation by the very nature of the uncertainty.

C. The Issue significantly affects the outcome of the trial

29. Owing to the disjunctive nature of this prong of Article 82(1)(d) test, the Defence notes that even if the Trial Chamber determines that the Issue does not significantly affect the fair and expeditious conduct of the proceedings, the Issue significantly affect the outcome of the trial.
30. The Defence has made it clear that the item was not intended to be used at trial and has not yet decided to use the item at trial. Ordering disclosure under those circumstances could

²⁵ See, above, para. 13.

²⁶ Decision, para. 17.

²⁷ See, para. 33 below.

amount to a violation of the right against self-incrimination and this could lead to remedies which could change the outcome of the trial.

31. Moreover, if the item is used to the prejudice of the Accused by the Prosecution, it could be a strong basis for possible re-trial on this matter. In light of the Issue and the context in which it occurred, the Defence submits that the Issue is one in which the outcome of the trial could be impacted.

D. Immediate resolution of the Issue by the Appeals Chamber could materially advance the proceedings

32. The Defence avers that immediate resolution of the Issue by the Appeals Chamber will materially advance the proceedings in the *Ongwen* case for the following reasons.
33. The Defence notes that the trajectory of the present litigation suggests that should the leave to appeal not be granted and should the Prosecution receive the report, the Single Judge may potentially authorize further Prosecution disclosure requests based upon matters discussed in the item. Without prejudice to future Defence arguments in respect to said requests, the Defence notes that if it does not raise this possibility now as part of the importance of the Issue, then it may be dismissed for not raising the Issue at the time it arose.
34. If leave to appeal is denied, it is also possible that the Decision's impact will have some wider impact on legal certainty in respect of the state of disclosure obligations. As the Appeals Chamber has previously stated, the final requirement is satisfied where an authoritative determination on the appeal would "move forward" the proceedings and remove "doubts about the correctness of the decision or [map] a course of action along the right lines"²⁸ and by resolving the Issue, the Appeals Chamber ensures "that the proceedings follow the right course."²⁹
35. Given the impacts upon fairness, expeditiousness, and the outcome of the trial described in sections A and B above, the proceedings could suffer harm. Resolving the Issue now through appellate supervision will remove this.

²⁸ ICC-01/04-168, paras 14-15.

²⁹ ICC-01/04-168, para. 15.

IV. RELIEF

36. For the reasons stated above, the Defence respectfully requests that leave is granted by the Trial Chamber to appeal the following Issue:

Whether the Report, under the present factual circumstances, is exempted from the Defence disclosure obligations.

Respectfully submitted,



.....
Hon. Krispus Ayena Odongo
On behalf of Dominic Ongwen

Dated this 19th day of March, 2019

At The Hague, The Netherlands