

**Cour
Pénale
Internationale**

**International
Criminal
Court**



Original: **English**

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

Date: **20 May 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 Authorising Redactions

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

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Others

Judge Bertram Schmitt, acting as Single Judge on behalf of Trial Chamber IX 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 (the ‘Statute’) and Regulation 23 *bis* of the Regulations of the Court issues the following ‘Decision on Defence Request for Leave to Appeal a Decision Authorising Redactions’.

I. Procedural history and submissions

1. In January 2019, the Defence requested two of its expert witnesses to assess the health situation of the accused and to determine whether he is capable to participate in the proceedings. On 25 January 2019, the Defence transmitted the report, which the experts produced in response to the Defence request (the ‘Report’), to the Chamber in an *ex parte* e-mail.¹
2. On 6 March 2019, the Single Judge issued a decision ordering the Defence to disclose the Report to the other parties and participants within 10 days (the ‘Disclosure Decision’).² A subsequent request for leave to appeal³ the Disclosure Decision was rejected by the Chamber (the ‘Decision on Leave to Appeal the Disclosure Decision’).⁴
3. On 18 March 2019, the Defence provided the Report to the other parties and participants, but in a heavily redacted form. On the same day, it requested the Chamber for authorisation to apply those redactions (the ‘Redaction Request’).⁵
4. On 3 May 2019, the Single Judge issued a decision on the Redaction Request, granting part of the request (the ‘Impugned Decision’). It attached the Report in its lesser redacted form as a confidential annex so as to provide it to the other parties and participants.⁶

¹ E-mail from the Defence to Trial Chamber IX Communications on 28 January 2019, at 14:05.

² Decision on Prosecution Request for Disclosure of a Report produced by Defence Experts, ICC-02/04-01/15-1475.

³ 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, 12 March 2019, ICC-02/04-01/15-1478-Conf, a public redacted version was filed on 19 March 2019.

⁴ Decision on Defence Request for Leave to Appeal a Decision on Disclosure of a Defence Experts’ Report, 15 March 2019, ICC-02/01-01/15-1482.

⁵ Defence Request for Authorization to Apply Redactions to Item UGA-D26-0015-1219, ICC-02/04-01/15-1485-Conf-Exp, Defence only (with confidential annex A and confidential *ex parte* annexes B and C). A confidential redacted version was filed the same day, ICC-02/04-01/15-1485-Conf-Red. A public redacted version was filed on 10 May, notified on 13 May 2019.

5. On 10 May 2019, the Defence filed a request for leave to appeal the Impugned Decision (the ‘Request’).⁷ It seeks leave on the issue:

‘whether the Trial Chamber can foreclose the right to seek leave to appeal pursuant to Article 82(1)(d) on decisions requesting non-standard redactions and preclude an appellate remedy’ (the ‘Issue’).

6. The Defence argues that by annexing the lesser redacted version of the Report to the Impugned Decision and making it available to the other parties and participants, any possibility for the Defence to seek leave to appeal was foreclosed.⁸ It further submits that the Issue significantly affects the fair conduct of the proceedings because of the lack of possibility to request an appellate relief.⁹
7. The Defence argues that the matter impacts on the expeditiousness of the proceedings since ‘the provision of information means that issues will now arise consequent to the provision of that information’ which will have to be resolved ‘individually through litigation’.¹⁰ Lastly, it argues that the outcome of the trial is also affected by the Issue.¹¹
8. On 16 May 2019, the Office of the Prosecutor (the ‘Prosecution’) filed its response, seeking that the Request be rejected (the ‘Response’).¹² It argues that the Issue does not arise from the Impugned Decision since ‘[t]he Defence seeks leave to ask the Appeals Chamber to rule on a “procedural threshold issue” that the Trial Chamber has not engaged with or adopted in the Decision’.¹³ It further submits that Defence failed to show that the Issue significantly affects the fair and expeditious conduct of the proceedings¹⁴ or the outcome of the trial.¹⁵

⁶ Decision on Defence Request for Authorization to Apply Redactions to Item UGA-D26-0015-1219, ICC-02/04-01/15-1506-Conf with confidential annex, ICC-02/04-01/15-1506-Conf-AnxA. A public redacted version was filed on the same day.

⁷ Defence Request for Leave to Appeal ‘Decision on Defence Request for Authorization to Apply Redactions to Item UGA-D26-0015-1219’ (ICC-02/04-01/15-1506-Conf), filed 3 May 2019, ICC-02/04-01/15-1509.

⁸ Request, ICC-02/04-01/15-1509, paras 4-12.

⁹ Request, ICC-02/04-01/15-1509, para. 13.

¹⁰ Request, ICC-02/04-01/15-1509, para. 14.

¹¹ Request, ICC-02/04-01/15-1509, para. 15.

¹² Prosecution Response to the “Defence Request for Leave to Appeal ‘Decision on Defence Request for Authorization to Apply Redactions to Item UGA-D26-0015-1219’ (ICC-02/04-01/15-1506-Conf), filed 3 May 2019”, ICC-02/04-01/15-1514.

¹³ Response, ICC-02/04-01/15-1514, para. 2.

¹⁴ Response, ICC-02/04-01/15-1514, paras 4-7.

¹⁵ Response, ICC-02/04-01/15-1514, para. 8.

II. Analysis

9. The Single Judge recalls the interpretation of Article 82(1)(d) of the Statute as set out in detail previously.¹⁶
10. The Single Judge considers that the Issue arises out of the Impugned Decision. It does not pertain to a ‘procedural threshold issue’, as suggested by the Prosecution. The Issue concerns the power of the Chamber to foreclose the right to request a leave to appeal under Article 82(1)(d) of the Statute in this specific case. This is a discrete legal question. Since the Impugned Decision provided concurrently the lesser redacted version of the Report to the other parties and participants it, *de facto*, impeded any request for leave to appeal concerning the requested redactions that were not granted. Accordingly, the Single Judge finds that the Issue is an appealable issue pursuant to Article 82(1)(d) of the Statute.
11. However, the Single Judge does not consider that the Issue significantly affects the fair conduct of the proceedings. The Defence submits that the fair trial rights of the Defence, especially Article 67(1)(b) of the Statute, are implicated. Litigation over the Report – and its disclosure – has been going on since January 2019. Taking into account the Disclosure Decision, the Decision on Leave to Appeal the Disclosure Decision and the Impugned Decision, the Single Judge has issued three decisions related to the disclosability of the Report. Additionally, e-mails before and after the production of the Report were exchanged between the Defence and the Chamber.¹⁷
12. The Impugned Decision *de facto* denied the Defence to raise matters related to the disclosure of the Report or parts thereof for the fourth time, as it seemed to have intended to do.¹⁸ The scope of such challenge would only concern a fraction of the information in the Report – only certain passages were requested for redaction in the lead-up to the Impugned Decision, and the Defence would only have an interest in challenging those

¹⁶ 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.

¹⁷ See, E-mail by the Defence to Trial Chamber IX Communication from 8 January 2019, at 9:09 and the response by the Chamber to the Defence on 8 January 2019, at 11:41. E-mail by the Defence to Trial Chamber IX Communication from 28 January 2019, 14:05 and the response by the Chamber to the Defence on 28 January 2019, at 15:31.

¹⁸ Request, ICC-02/04-01/15-1509, para. 9.

redactions which were not accepted. The extensive existing litigation covered also Article 67(1)(b) of the Statute, which was raised by the Defence¹⁹ and rejected as an argument by the Single Judge.²⁰ The inability to request a leave to appeal the latest in this series of decisions does therefore not, in the present circumstances, affect the fairness of the proceedings significantly enough.

13. The Defence arguments as to why the expeditiousness of the proceedings is significantly affected must also be rejected. The Single Judge does not see any litigation arising from the Impugned Decision – or the fact that the lesser redacted version of the Report was provided immediately to the other parties and participants – which must be resolved individually, other than the present decision. The assertion that ‘if the outcome is impacted as described below’²¹ is speculative at best and also seems to assume that a possible request for leave to appeal the Impugned Decision regarding the underlying ruling on the requested redactions would have been automatically granted.
14. Accordingly, the Single Judge finds that the Issue neither affects the fairness nor the expeditiousness of the proceedings significantly.
15. Regarding the effect on the outcome of the trial the Defence makes a tautological submission. It argues that the Issue impacts the outcome of the trial because ‘the Defence was not in a position to seek leave to appeal in respect to the individual decision on the particular redactions’.²² The mere repetition of the content of the Issue is not sufficient to prove any of the criteria of Article 82(1)(d) of the Statute.
16. Accordingly, the Single Judge also finds that the Issue does not significantly affect the outcome of the trial.
17. Consequently, the Single Judge rejects Request.

¹⁹ Public Redacted Version of ‘Defence request for authorization to apply redactions to item UGA-D26-0015-1219’ (ICC-02/04-01/15-1485-Conf-Exp), filed 18 March 2019, 13 May 2019, ICC-02/04-01/15-1485-Red3, paras 13-14.

²⁰ Impugned Decision, ICC-02/04-01/15-1506-Red, paras 10-11.

²¹ Request, ICC-02/04-01/15-1509, para. 14.

²² Request, ICC-02/04-01/15-1509, para. 15.

FOR THE FOREGOING REASONS, THE SINGLE JUDGE HEREBY

REJECTS the Request.

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


Judge Bertram Schmitt, Single Judge

Dated 20 May 2019

At The Hague, The Netherlands