

**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 Disclosure of  
Material Concerning Defence Witnesses**

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

**The Office of the Prosecutor**

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**Legal Representatives of Applicants**

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**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**

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**Registrar**  
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**Counsel Support Section**

**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section**

**Others**

**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 Regulations of the Court issues the following 'Decision on Defence Request for Leave to Appeal a Decision on Disclosure of Material Concerning a Defence Witness'.

### **A. Procedural History**

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 expert, D-133, in the preparation of his expert report ('Material').<sup>1</sup>
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 ('Impugned Decision').<sup>2</sup>
3. On the same day, the Defence announced via e-mail its intention to seek 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.<sup>3</sup>
4. On 12 February 2019, the Chamber rejected, via e-mail, the Defence's request for suspensive effect.<sup>4</sup>
5. On 18 February 2019, the Defence requested leave to appeal the Impugned Decision ('Request').<sup>5</sup> It seeks leave to appeal on three issues: (i) '[w]hether the

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<sup>1</sup> 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-AnxA.

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

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

<sup>4</sup> Email from Trial Chamber IX Communications, 12 February, at 10:25.

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) ‘[w]hether 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 the production of his report’ (‘Second Issue’); and (iii) ‘[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’ (‘Third Issue’).<sup>6</sup>

6. On 22 February 2019, the Prosecution filed its response, submitting that the Request should be rejected.<sup>7</sup>

## **B. Submissions and Analysis**

7. As a preliminary matter, the Single Judge notes that the annex of the Request has no public-redacted version. The Defence is ordered to provide a public-redacted version within 5 days of the reception of this decision.
8. The Single Judge recalls the interpretation of Article 82(1)(d) of the Statute as set out in detail previously.<sup>8</sup>
9. In relation to the First Issue, the Defence submits that the Material was not used in the production of D-133’s report. It asserts ‘that the Trial Chamber erred by failing to adhere to its prior case law on related disclosure matters’.<sup>9</sup>

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<sup>5</sup> Defence Request for Leave to Appeal ‘Decision on Prosecution Request for Disclosure of Material Provided to Defence Expert’, ICC-02/04-01/15-1453 with confidential annex A, ICC-02/0-01/15-1453-Conf-AnxA.

<sup>6</sup> Request, ICC-02/04-01/15-1453, para. 11.

<sup>7</sup> Prosecution’s Response to Defence Request for Leave to Appeal Decision ICC-02/04-01/15-1443, ICC-02/04-01/15-1459.

<sup>8</sup> 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.

10. The Single Judge notes that the Defence misinterprets the prior jurisprudence of the Chamber. The decision relied upon by the Defence<sup>10</sup> does not indicate that an item or document must be referenced or otherwise contained in an expert report in order to be disclosable. Rather, the Chamber ruled that for the purposes of disclosure there is no meaningful difference between an expert 'using' and 'relying upon' a source.<sup>11</sup>
11. Accordingly, the Impugned Decision does not depart from the Chamber's prior jurisprudence on disclosure, and therefore the First Issue does not arise from the Impugned Decision. Furthermore, the First Issue is a mere repetition of the Defence's response to the Prosecution's request for the Material and therefore amounts to an attempt to simply re-litigate the Impugned Decision.
12. In respect of the Second Issue, the Defence argues that the Impugned Decision acknowledged that the disclosure of the Material implicated Article 67(1)(g) of the Statute.<sup>12</sup>
13. The Single Judge fails to understand how the Impugned Decision acknowledged that Article 67(1)(g) of the Statute is concerned. It expressly explicated the contrary by finding that 'disclosure of the Material does not implicate Article 67(1)(g) of the Statute' as '[t]he Defence ha[d] voluntarily provided the Material to D-133 with the intention to aid him in the production of his report'.<sup>13</sup> Again, the Defence attempts to re-litigate the issue, by simply repeating arguments, irrespective of what has been said in the Impugned Decision. Accordingly, the Single Judge finds that the Second Issue amounts to a mere disagreement with the Impugned Decision.

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<sup>9</sup> Request, ICC-02/04-01/15-1453, para. 15.

<sup>10</sup> Decision on the 'Prosecution Request for Disclosure of Material Underlying the Defence Psychiatric Expert Report', 21 February 2017, ICC-02/04-01/15-709.

<sup>11</sup> ICC-02/04-01/15-709, para. 13.

<sup>12</sup> Request, ICC-02/04-01/15-1453, para. 17.

<sup>13</sup> Impugned Decision, ICC-02/04-01/15-1443, para. 11.

14. Regarding the Third Issue, the Defence submits that the Impugned Decision ‘rendered Mr Ongwen’s right to file a leave to appeal under Article 82(1)(d) within five days moot’.<sup>14</sup> The Single Judge notes that the Defence filed this Request, a request for leave to appeal, within this timeframe. On the Defence’s own argumentation is this Request either moot or, if it isn’t, the Third Issue does not arise from the Impugned Decision.
15. Further, the Single Judge notes that the Defence had the possibility to file a request to appeal the Impugned Decision before the three-day deadline for disclosure expired. Therefore, the Impugned Decision did not render the Defence’s general right to seek an effective remedy or request leave to appeal moot.
16. Additionally, the Single Judge notes that the Impugned Decision stated that the Prosecution was also allowed to question D-133 about the Material, regardless of whether the Material was disclosed, the disclosure simply enabled the non-calling party to do so on an informed basis.<sup>15</sup> Through such questioning the Prosecution could have obtained the Material, which is not disputed by the Defence, and the Impugned Decision merely expedited this process. Accordingly, the Single Judge finds that none of the issues identified by the Defence can affect the fair and expeditious conduct of the proceedings or the outcome of the trial.
17. Accordingly, the Single Judge rejects the Request.

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<sup>14</sup> Request, ICC-02/04-01/15-1453, para. 18.

<sup>15</sup> Impugned Decision, ICC-02/04-01/15-1443, para. 10.

**FOR THE FOREGOING REASONS, THE SINGLE JUDGE HEREBY**

**ORDERS** the Defence to file a public-redacted version of the annex of its Request under the conditions specified in paragraph 7; and

**REJECTS** the Request;

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

  
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**Judge Bertram Schmitt, Single Judge**

Dated 6 March 2019

At The Hague, The Netherlands