

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: **5 October 2018**

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

**Defence Request for Leave to Appeal
‘Decision on Defence Request for Disclosure and Remedy for Late Disclosure’
(ICC-02/04-01/15-1351)**

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 Defence Request for Disclosure and Remedy for Late Disclosure".¹ The appellate issue is: whether the Single Judge applied the Court's jurisprudence in respect to disclosure too restrictively.
2. 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. SUBMISSIONS

3. The Single Judge cited the jurisprudence on Rule 77 at paragraph 10. The cited jurisprudence indicates that the standard that the Single Judge applied to evaluating the material was *prima facie* relevance.³
4. The Single Judge found that the Defence "fail[ed] to meet the low *prima facie* standard with respect to all material obtained during investigations into the 13 Commanders and records of those investigations".⁴ The Single Judge dismissed the arguments in the request related to the 13 commanders noting the relevance of the material had not been shown⁵ and that "the argument is not sufficiently connected to the requested material in order to satisfy the 'relevance' requirement under Rule 77".⁶ The Single Judge also dismissed the second limb of the disclosure request – disclosure in relation to the individuals named in the charges⁷ – and third limb – disclosure in relation to the amnesty commission⁸ – based upon the same arguments that it used to dismiss the first limb of the disclosure request.

¹ ICC-02/04-01/15-1351 ('Impugned Decision').

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

³ ICC-02/04-01/15-457, para. 4 cites *Banda and Jerbo* OA4 Decision, ICC-02/05-03/09-501, para. 42.

⁴ Impugned Decision, para. 33.

⁵ *Ibid.*, para. 18.

⁶ *Ibid.*, para. 26.

⁷ *Ibid.*, para. 33.

⁸ *Ibid.*, para. 36.

5. The Single Judge found the Defence Request⁹ insufficiently formulated,¹⁰ unclear,¹¹ incoherent,¹² and unprofessional.¹³ The Single Judge therefore sought to interpret the request. In deciding the Request, the Single Judge inconsistently applied his interpretive approach in identifying its scope. Thus, whether the application of the *prima facie* relevance standard was applied too restrictively is an issue that arises out of the Impugned Decision.
6. The Single Judge examined the Prosecution's submissions to delineate its understanding of the scope of the request. From the Prosecution's claim that it has disclosed all material "related to the co-perpetration of the alleged crimes by other persons or more generally", the Single Judge delineated his understanding of the scope in paragraph 17 as those items in the Uganda situation that "[are] not connected in any way to the alleged crimes." In paragraphs 11 through 13 and 25, the Single Judge outlined what he understood to be the underlying reasons that were put forward justifying disclosure of the requested material in relation to the 13 commanders.
7. In relation to Defence submissions on the 13 commanders the Single Judge interpreted the request restrictively even though the background to the request suggested a wider interpretation. Alternatively, the Single Judge neglected to interpret one of the underlying explanations given. No evaluation was made of the Defence submissions that:

disclosure is necessary to better understand the alleged contribution of Mr Ongwen to the various charges and modes of liability. This is important because numerous charges are premised upon proof of *different types* of contributions.¹⁴

8. An indication of the relevance of this request is found in the first Defence *inter partes* request which stated:

There are also two individuals listed as being within Control Alter (#11 and #13). *The Prosecution has alleged that participation in Control Alter is an indication of status, importance, and knowledge* (see for example paras 26, 91, 111, and 248 of your Pre-Trial Brief).¹⁵

⁹ ICC-02/04-01/15-1329-Conf-Corr ('Request').

¹⁰ Impugned Decision, para. 7.

¹¹ *Ibid.*

¹² *Ibid.*, para. 8.

¹³ *Ibid.*

¹⁴ ICC-02/04-01/15-1329-Conf-Corr, ('Request'), para. 26 (emphasis added).

¹⁵ ICC-02/04-01/15-1329-Conf-AnxA, p. 4.

9. To the extent that the Single Judge considered that the Request was not clear, the Single Judge could have referred to the opening statements to aid its understanding¹⁶ as the Single Judge considered the opening statement in the context of the amnesty records request;¹⁷ however, he failed to consider the contribution issue squarely in relation to the 13 commanders request.
10. Counsel Taku summarised some of the arguments from the Request in his opening statement as:

The Prosecutor's investigation obligations to investigate and procure evidence extends to getting the evidence about these individuals' amnesty, not for the purposes of charging them, but for the purposes of determining their contribution to the crimes for which Ongwen stands charged before this Court. And the reason, your Honours, for this is this: *Without that evidence about those commanders, those individuals mentioned in the charge, your Honours will not be able to ascertain the extent of the contributions of Mr Ongwen.*¹⁸

11. Though the Single Judge may have disagreed with the full-scope of the Defence request in relation to all investigations in Uganda,¹⁹ it was open to him to examine the underlying reasons provided by the Defence and order a more circumscribed or modified disclosure rather than dismissing the request in its entirety. Though he may have considered that the Defence put forward a poorly formulated request, the Trial Chamber is still under a duty to “ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused” pursuant to Article 64(2) and he could have sought clarification.
12. Whether Mr Ongwen can be convicted for his contribution in relation to many of the modes of liability depends upon an assessment of his alleged contribution. Where multiple individuals are alleged to have been involved in a crime and where contributions are premised upon the allegation that, for example, as argued by the Prosecution, “Dominic Ongwen’s conduct and presence expressly encouraged LRA fighters to commit crimes”²⁰ then the underlying organisational context and power dynamics of the LRA, and stature, power, profile, or prior heroic or brutal acts of other individuals is relevant to assessing whether Mr Ongwen’s presence was so definitive or essential. This information is illustrated not just by information “related to the co-perpetration of the alleged crimes” but by information about their

¹⁶ Impugned Decision, para. 36.

¹⁷ *Ibid.*, paras 36 and 37.

¹⁸ ICC-02/04-01/15-T-179-CONF-ENG, p. 52, lines 19 to 16 (emphasis added).

¹⁹ Impugned Decision, para. 22.

²⁰ PTB, para. 267.

participation in other crimes or attacks more generally or simply information about them and their life in the LRA.

13. The Single Judge similarly dismissed the underlying arguments and reasoning put forward by the Defence in relation to the relevance of the material for the duress defence without considering a wider interpretation.²¹ Moreover, where the Defence sought leave to reply²² to a Prosecution substantive argument in relation to the Defence Request²³ the Single Judge rejected leave to reply.²⁴ The Prosecution allegations hang on the allegation that the LRA was an organisation where “orders of its superior officers are automatically carried out by their subordinates”.²⁵ Information that illustrates duress exercised by others against people other than Mr Ongwen or against Mr Ongwen at times other than the specific charged attacks is within the scope of the original Defence request and may be circumstantial evidence for the purpose of duress defence or simply disclosable because it is “otherwise [...] material to the preparation of the defence”²⁶ which is a basis for disclosure acknowledged by the Single Judge.²⁷

Fairness, expeditiousness, the effect on the outcome of the case, and whether the issue will materially advance the proceedings

14. The Defence has asserted that this material is necessary for preparation and/or exculpatory. If the Single Judge’s Decision was incorrect than a failure to order disclosure is a failure to provide material necessary for preparation pursuant to Article 67(1)(b) and may also deny the Defence material that could exculpate Mr Ongwen. These are both matters that go to the heart of a fair-trial.
15. The Single Judge decided to rule on the Request “considering the expeditiousness of the proceedings and in the aim to provide judicial guidance to the parties before the start of the Defence case”.²⁸
16. The Impugned Decision does not make clear whether the Defence requests have been dismissed in their entirety as irrelevant, or instead, whether the Defence failure, in the view of

²¹ Impugned Decision, para. 25.

²² ICC-02/04-01/15-1345-Conf, paras 5 and 6.

²³ ICC-02/04-01/15-1341-Conf, para. 10 and footnote 21.

²⁴ ICC-02/04-01/15-1351, para. 5.

²⁵ ICC-02/04-01/15-533, para. 145.

²⁶ ICC-01/04-01/06-1433, para. 77.

²⁷ Impugned Decision, para. 18.

²⁸ Impugned Decision, para. 8.

the Single Judge, to substantiate the specific relevance in relation to specific material has simply not been made out. This ambiguity, which arises from the issue of the how the scope of disclosure obligations was applied, may un-necessarily burden the trial as further related requests for disclosure are made. The expeditiousness may also be impacted upon by arguments being raised in closing submissions and perhaps upon appeal.

17. Given that the requested material has been asserted to relate to numerous modes of liability and the affirmative defence of duress pursuant to Article 31, if incorrectly decided by the Single Judge, the issue has the potential to impact upon the outcome of the trial.
18. In conclusion, the issue impacts upon the fairness, expeditiousness, and outcome of the trial. Resolution by the Appeals Chamber of an issue that impacts these three things by definition is an issue for which “an immediate resolution by the Appeals Chamber may materially advance the proceedings”.

III. RELIEF SOUGHT

19. For the reasons stated above, the Defence respectfully requests that leave is granted by the Trial Chamber to appeal the following issue: whether the Single Judge applied the Court’s jurisprudence in respect to disclosure too restrictively.

Respectfully submitted,



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Hon. Krispus Ayena Odongo
On behalf of Dominic Ongwen

Dated this 5th day of October, 2018
At The Hague, Netherlands