

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 22 February 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

**CLRV's Response to "Defence Request for Orders to the Prosecution in Relation to
Information Concerning Mr Ongwen's Family"**

Source: Office of Public Counsel for Victims

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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I. INTRODUCTION

1. The Common Legal Representative of Victims¹ (the “CLRv”) submits that the Defence’s “Request for Leave to Appeal ‘Decision on Request for Disclosure and Related Orders Concerning Mr Ongwen’s Family’ (ICC-02/04-01/15-1444), filed 12 February 2019” (the “Request”) should be rejected.²

2. In particular, the CLRv contends that two purported issues identified in the Request either do not properly arise from the “Decision on Request for Disclosure and Related Orders Concerning Mr Ongwen’s Family (the “Impugned Decision”)³ or fail to properly constitute appealable issues. In any case, and should the Trial Chamber (the “Chamber”) deem otherwise, the Request further fails to meet the remaining criteria for granting interlocutory appeals under Article 82(1)(d) of the Rome Statute (the “Statute”).

II. PROCEDURAL BACKGROUND

3. On 18 January 2019, the Defence filed its “Request for Orders to the Prosecution in Relation to Information Concerning Mr Ongwen’s Family” (the

¹ See the “Decision on contested victims’ applications for participation, legal representation of victims and their procedural rights” (Pre-Trial Chamber II, Single Judge), No. ICC-02/04-01/15-350, 27 November 2015, p.19; the “Decision on issues concerning victims’ participation” (Pre-Trial Chamber II, Single Judge), No. ICC-02/04-01/15-369, 15 December 2015, pp. 10-11; the “Second decision on contested victims’ applications for participation and legal representation of victims” (Pre-Trial Chamber II, Single Judge), No. ICC-02/04-01/15-384, 24 December 2015, pp. 20-22; and the “Decision on the ‘Request for a determination concerning legal aid’ submitted by the legal representatives of victims” (Trial Chamber IX, Single Judge), No. ICC-02/04-01/15-445, 26 May 2016, para. 13.

² See the “Defence Request for Leave to Appeal ‘Decision on Request for Disclosure and Related Orders Concerning Mr Ongwen’s Family’ (ICC-02/04-01/15-1444), filed 12 February 2019”, No. ICC-02/04-01/15-1452, 18 February 2019 (the “Request”).

³ See the “Decision on Request for Disclosure and Related Orders Concerning Mr Ongwen’s Family” (Trial Chamber IX, Single Judge), No. ICC-02/04-01/15-1444, 12 February 2019 (the “Impugned Decision”).

“Initial Request”).⁴ On 30 and 31 January 2019, the Prosecution⁵ and the CLRV⁶ filed their respective responses to the Initial Request.

4. On 12 February 2019, the Single Judge rendered the Impugned Decision.⁷ On 18 February 2019, the Defence filed the Request.⁸

III. SUBMISSIONS

A. Applicable law

5. Article 82(l)(d) of the Statute sets out the criteria for granting a request for leave to appeal as follows: (a) the decision shall involve an issue that would significantly affect: (i) the fair and expeditious conduct of proceedings; or (ii) the outcome of the trial; and (b) for which, in the opinion of the relevant Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

6. For the purposes of the first prong of the above mentioned test, the Appeals Chamber defined an “issue” as “*an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion*”.⁹

⁴ See the “Public Redacted Version of ‘Defence Request for Orders to the Prosecution in Relation to Information Concerning Mr Ongwen’s Family’, No. ICC-02/04-01/15-1414-Red (with confidential annex), 18 January 2019 (the “Initial Request”).

⁵ See the “Prosecution Response to the ‘Defence Request for Orders to the Prosecution in Relation to Information Concerning Mr Ongwen’s Family’”, No. ICC-02/04-01/15-1425-Conf, 30 January 2019. A public redacted version of the document was filed on 13 February 2019. See No. ICC-02/04-01/15-1425-Red.

⁶ See the CLRV’s Response to “Defence Request for Orders to the Prosecution in Relation to Information Concerning Mr Ongwen’s Family”, No. ICC-02/04-01/15-1427-Conf, 31 January 2019. (Pursuant to Trial Chamber IX’s instruction, dated 18 February 2019, this document is reclassified as “Public”.)

⁷ See the Impugned Decision, *supra* note 3.

⁸ See the Request, *supra* note 2.

⁹ See the “Judgement on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal” (Appeals Chamber), No. ICC-01/04-168 OA3, 13 July 2006, para. 9.

Moreover, the Appeals Chamber ruled that *“the Pre-Trial or Trial Chamber is vested with power to state, or more accurately still, to certify the existence of an appealable issue”*.¹⁰

7. Consequently, it must first be determined whether the purported “issues” in the Request are “*appealable issues*” within the meaning of Article 82(l)(d) of the Statute as interpreted by the jurisprudence of the Court. Indeed, *“while an application for leave to appeal should not contain in detail the arguments which the party intends to raise before the Appeals Chamber, it must still identify clearly the appealable issue, including by way of indicating a specific factual and/or legal error. Only in this case can the Chamber assess whether the issue, provided it was wrongly decided, may have implications on the fairness and expeditiousness of the proceedings or outcome of the trial”*.¹¹

B. Merits of the Purported “Issues”

8. The Defence identifies two purported issues in the Request. At the outset, the CLRV underlines that the Defence does not clearly indicate whether these matters constitute legal, factual or procedural error(s).

9. The first purported issue is framed as follows:

*Whether Article 21(3) of the Statute requires that the Family Information should be disclosed to Mr Ongwen so as not to violate human rights*¹²

10. The CLRV recalls that, in the Impugned Decision, the Single Judge first analysed whether the Prosecution and the CLRV have any legal obligation to disclose the information concerning Mr Ongwen’s family sought in the Initial Request (the “Family Information”) under the statutory provisions of the Court and found that they do not have any. Next, the Single Judge stated that “[a] conclusion that information does not fall under the other participants’ disclosure obligations normally suffices

¹⁰ *Idem*, para. 20.

¹¹ See the “Decision on three applications for leave to appeal” (Pre-Trial Chamber I), No. ICC-02/11-01/11-307, 29 November 2012, para. 70.

¹² See the Request, *supra* note 2, para. 1(a).

*to resolve disclosure litigation. However, in [the Initial Request] the Defence presents an array of arguments arguing for disclosure based on international human rights law and on the basis of 'humanitarian and compassionate concerns'. This requires consideration of the further question of whether the Defence has justified disclosure of the Family Information even if it does not fall within the standard disclosure framework."*¹³

11. In this respect, the Single Judge ruled that "[u]nder international human rights law, all people – including the incarcerated - have a right to family life [which is] not absolute, and may be interfered with in certain circumstances. It must be determined whether any interference is: (i) in accordance with the law; (ii) necessary and (iii) proportionate. [Thus] the primary issue raised by the Request can be summarised as follows: does withholding the Family Information from Mr Ongwen violate human rights so as to require the Chamber to order its disclosure in a manner consistent with Article 21(3) of the Statute? Whether a kind of 'humanitarian disclosure' obligation exists depends [also on] whether there is a justifiable interference with the exercise of these rights."¹⁴ With this framework in mind, the Single Judge proceeded to analyse whether withholding the Family Information was in accordance with the law, necessary, proportionate and justified in the circumstances at hand.¹⁵

12. Consequently, the Single Judge did agree with the premise of the Defence's arguments raised in the Initial Request. The Defence also admits this fact.¹⁶ So the purported ruling that the Defence presently challenges is exactly what the Defence itself had requested the Chamber to do via the Initial Request. In particular, when stress is put on the explicit wording of the reasoning and the concluding parts of the Impugned Decision, it is clear that the Single Judge not only made his assessment of the Initial Request against the statutory provisions but also with reference to internationally recognized human rights, in accordance with Article 21(3) of the

¹³ See the Impugned Decision, *supra* note 3, para. 21.

¹⁴ *Idem*, paras. 22-26.

¹⁵ *Ibidem*, paras. 27-35.

¹⁶ See the Request, *supra* note 2, para. 4.

Statute. Consequently, the CLRV submits that the first purported issue is ultimately moot and does not arise from the Impugned Decision.

13. Nonetheless, the Defence argues that “[...] *in deciding that the interference in Mr Ongwen’s family life is justified, the Single Judge made errors in his analysis of the necessity and proportionality of the measures which led to him concluding that the measures were justified.*”¹⁷ Yet, the Defence fails to convincingly explain exactly how these errors were allegedly committed and how another reasonable Chamber would have reached a completely different conclusion in the circumstances. In fact, these arguments express nothing more than a mere disagreement¹⁸ with the Single Judge’s analysis and conclusions reached in accordance with Article 21(3) of the Statute. Indeed, when a party challenges judicial decisions, more is needed than simply expressing a difference of opinion regarding the question *sub judice*.¹⁹ Since “*mere disagreement*” or “*conflict of opinion*” do not constitute an “*appealable issue*” within the meaning of Article 82(1)(d) of the Statute,²⁰ the first purported issue fails to arise from the Impugned Decision.

14. *Arguendo*, even if the first purported issue arises from the Impugned Decision, the CLRV submits that it still fails to constitute a proper appealable issue. As it stands, the first purported issue is framed in an overly broad manner without pointing to specific legal or factual error(s) that the Single Judge would have allegedly committed. As a result, the Defence seems to challenge the entirety of the Impugned Decision via this issue. Yet, in accordance with the established

¹⁷ *Idem*, para. 6.

¹⁸ See the “Decision on the ‘Request for Leave to Appeal against the ‘Decision on the Request for an order for the commencement of the pre-confirmation phase by the Defence of Saif Al-Islam Gaddafi’” (Pre-Trial Chamber I), No. ICC-01/11-01/11-490, 11 December 2013, para. 31 and the “Decision on Defence requests for leave to appeal the ‘Order setting the commencement date for trial’” (Trial Chamber I), No. ICC-02/11-01/15-117, 02 July 2015, para. 22.

¹⁹ See the “Decision on the ‘Requête de la Défense sollicitant l’autorisation d’interjeter appel de la Décision sur la confirmation des charges datée du 9 juin 2014’”, (Pre-Trial Chamber II), No. ICC-01/04-02/06-322, 4 July 2014, para. 33.

²⁰ See the “Judgement on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal”, *supra* note 9, para. 9.

jurisprudence of the Court, Article 82(l)(d) of the Statute “requires the parties to articulate discrete issues for Appeals Chamber’s resolution and [...] it is generally insufficient to argue that the entirety of the Chamber’s reasoning is erroneous when requesting leave to appeal”.²¹

15. Moreover, the issues for which a party seeks leave to appeal must not be “generic assertions”.²² In other words, issues whose formulation is exceedingly broad or so general, essentially challenging the entirety of the Chamber’s reasoning, are not sufficiently discrete to qualify as appealable issues.²³ Indeed, “[i]t is not the Chamber’s duty to decompose broadly formulated issues in order to identify potential issues for certification.”²⁴ A party seeking leave to appeal a decision must “identify clearly the appealable issue, including by way of indicating a specific factual and/or legal error” and “[l]eave to appeal cannot be granted if the party seeking to appeal, instead of identifying appealable issues, seeks leave to litigate *ex novo* before the Appeals Chamber the entire decision”.²⁵

16. Consequently, the CLRV posits that the first purported issue fails to properly constitute an appealable issue since it is, not only formulated in an overly broad

²¹ See the “Decision on the joint defence request for leave to appeal the decision on witness preparation” (Trial Chamber V), No. ICC-01/09-01/11-596, 11 February 2013, para. 11; and the “Decision on Defence Request for Reconsideration of or Leave to Appeal/Decision on ‘Defence Request for Disclosure and Judicial Assistance’” (Trial Chamber VII), No. ICC-01/05-01/13-1282, 22 September 2015, para. 10.

²² See the “Decision on Defence Request for Leave to Appeal Decision on the Request to strike two witnesses from the Prosecution’s Witness List” (Trial Chamber VII), No. ICC-01/05-01/13-1307, 28 September 2015, para. 14.

²³ See the “Decision on the joint defence request for leave to appeal the decision on witness preparation”, *supra* note 21, para. 17; the “Decision on the ‘Defence Application for Leave to Appeal the ‘Decision on the defence request for a temporary stay of proceedings’” (Trial Chamber IV), No. ICC-02/05-03/09-428, 13 December 2012, para. 28; and the “Decision on Babala Defence request for leave to appeal ICC-01/05-01/13-800” (Trial Chamber VII), No. ICC-01/05-01/13-877, 27 March 2015, para. 7.

²⁴ See the “Decision on the Prosecutor’s and Defence requests for leave to appeal the decision adjourning the hearing on the confirmation of charges” (Pre-Trial Chamber I), No. ICC-02/11-01/11-464, 31 July 2013, para. 70.

²⁵ See the “Decision on three applications for leave to appeal”, *supra* note 11, para. 70 (Emphasis added).

manner, but also is a challenge to the entirety of the Impugned Decision. As a result, the first purported issue must be rejected.

17. The second purported issue is phrased as follows:

*Whether the Single Judge erred in his evaluation of what constitutes exculpatory evidence*²⁶

18. The Defence argues that “[t]he legal and factual correctness of the Single Judge’s assessment of the requested family information material as not concerning exculpatory material is an issue that arises from the Impugned Decision.”²⁷ However, the Single Judge noted that the Defence made no submission on how the Family Information mitigates the Accused’s guilt as such but only argued hypothetically that mitigating conducts could result from receiving the information.²⁸ Thus, the Single Judge concluded that the Defence did not make a sufficient showing to warrant disclosure under Article 67(2) of the Statute.²⁹

19. Consequently, the Single Judge did not render any ruling on what constitutes exculpatory evidence under the statutory provisions. Neither did the latter make any legal or factual assessment as to the nature of the Family Information in the way the Defence suggests. In fact, as explained explicitly in the terms of the Impugned Decision, the Single Judge could not possibly make such assessment in a *vacuum* since the Defence made only theoretical arguments to the effect that the Family Information could be exculpatory in the future.

20. Indeed, as held by the Appeals Chamber, a properly constituted appealable issue must first and foremost arise from the Impugned Decision.³⁰ In other words, the issue identified by the appellant must be a “specific issue” which has been dealt

²⁶ See the Request, *supra* note 2, para. 11.

²⁷ *Idem*, para. 26.

²⁸ See the Impugned Decision, *supra* note 3, para. 19.

²⁹ *Idem*.

³⁰ See the “Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal”, *supra* note 9, para. 9.

within³¹ or must “emanate” from the Impugned Decision and “cannot represent a hypothetical concern or abstract legal question”.³² Yet, as shown above, the purported ruling that the Defence presently challenges is extraneous to the Impugned Decision.

21. Moreover, the CLRV submits that the second purported issue eventually calls for a purely academic exercise before the Appeals Chamber. As stressed earlier, an appealable “issue” must be a “subject or topic requiring a decision for its resolution”,³³ identifying “a specific factual and/or legal error.”³⁴ On the contrary, the Request raises a hypothetical issue which did not form a part of the Impugned Decision and thus is unavailable for the Appeals Chamber’s review. As a result, the second purported issue must be equally dismissed.

22. Even if the Chamber considers that the two purported issues properly arise from the Impugned Decision and constitute appealable issues, the CLRV further contends that the remaining requirements of Article 82(1)(d) of the Statute have not been fulfilled.

23. Firstly, these purported issues would not significantly affect the fair and expeditious conduct of the proceedings. Indeed, the Single Judge had ruled that, within the contact restrictions regime, Mr Ongwen is already entitled to have telephone contact with his children and add people to his contact list without any further ruling from the Chamber and thus, he enjoys a reasonable flexibility to speak with his family members.³⁵ The Single Judge also recalled that the parties had already

³¹ See the “Decision on the ‘Defence Application for Leave to Appeal the ‘Decision on the defence request for a temporary stay of proceedings’” (Trial Chamber IV), No. ICC-02/05-03/09-428, 13 December 2012, para. 7.

³² See the “Decision on the Prosecutor’s and Defence requests for leave to appeal the decision adjourning the hearing on the confirmation of charges”, *supra* note 24, para. 8 and the “Decision on the Defence Request for Leave to Appeal” (Pre-Trial Chamber II), No. ICC-01/04-02/06-207, 13 January 2014, para. 11.

³³ See the “Judgement on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal”, *supra* note 9, para. 9

³⁴ See “Decision on three applications for leave to appeal”, *supra* note 11, para. 70.

³⁵ See the Impugned Decision, *supra* note 3, para. 33.

made an agreement in order to allow the Accused to contribute to the welfare of his children while mitigating the risk of witness interference.³⁶ Therefore, it solely depends on the Accused and his Defence how to benefit from these established venues for making contact with his family members and providing for child support. In addition, the Defence's arguments related to the alleged adverse effects of the Impugned Decision on the health of Mr Ongwen³⁷ are purely speculative and unsubstantiated.

24. Moreover, the two purported issues would not significantly affect the outcome of the trial. In particular, the Defence's arguments that the Accused has been denied his right to mitigate his sentence³⁸ are without merit. As recalled above, the Single Judge never made any ruling that prevented Mr Ongwen and his Defence from presenting exculpatory evidence or any other form of material eventually destined for mitigation of sentence. In fact, the Single Judge simply noted that the Defence's arguments in this regard appear hypothetical at the time of the issuance of the Impugned Decision.³⁹

25. Moreover, an immediate resolution of the purported issues by the Appeals Chamber would not materially advance the proceedings. Indeed, it must be stressed that the Appeals Chamber's review is "*corrective in nature*".⁴⁰ Yet, the purported issues either do not arise from the Impugned Decision or fail to properly constitute appealable issue(s). Consequently, the Appeals Chamber cannot be asked to engage in an academic exercise, supported by speculative arguments. Therefore, the CLRV posits that none of the issues identified by the Request constitutes an appealable

³⁶ *Idem*, para. 34.

³⁷ See the Request, *supra* note 2, para. 24.

³⁸ *Idem*, para. 32.

³⁹ See the Impugned Decision, *supra* note 3, para. 19.

⁴⁰ See the "Judgment on the appeal of the Prosecutor against the decision of Trial Chamber IV of 12 September 2011 entitled 'Reasons for the Order on translation of witness statements (ICC-02/05-03/09-199) and additional instructions on translation'" (Appeals Chamber), No. ICC-02/05-03/09-295 OA2, 17 February 2012, para. 20.

issue nor do they meet the stringent requirements for granting interlocutory appeal under Article 82(1)(d) of the Statute.

IV. CONCLUSION

26. For the foregoing reasons, the Common Legal Representative of the Victims respectfully requests the Chamber to reject the Request.

A handwritten signature in black ink, reading "Paolina Massidda", with a horizontal line underneath the name.

Paolina Massidda
Principal Counsel

Dated this 22nd day of February 2019

At Genoa, Italy