

**Cour
Pénale
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**International
Criminal
Court**

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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

**Prosecution Response to the “Defence Request for Leave to Appeal ‘Decision on Request for Disclosure and Related Orders Concerning Mr Ongwen’s Family’
(ICC-02/04-01/15-1452)”**

Source: The Office of the Prosecutor

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

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Introduction

1. The Defence Request for Leave to Appeal¹ (“Request”) the ‘Decision on Request for Disclosure and Related Orders Concerning Mr Ongwen’s Family’² (“Decision”) should be dismissed because it does not meet the requirements for leave to appeal under article 82(1)(d) of the Rome Statute (“Statute”).

2. The issues framed in the Request are not appealable because they merely reflect the Defence’s disagreement with the reasoning of the Single Judge. These issues do not significantly affect the fair and expeditious conduct of the proceedings or the outcome of this trial and neither would their immediate resolution by the Appeals Chamber materially advance the proceedings.

Submissions

3. The Defence seeks leave to appeal the Impugned Decision in relation to two issues proposed for certification:

- i) 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; and
- ii) Whether the Single Judge erred in his evaluation of what constitutes exculpatory evidence.

4. Article 82(1)(d) criteria are cumulative: a failure to fulfil any one of the criteria is fatal to any application for leave to appeal.³ As neither of the proposed Issues arises from the Decision, the Request should be dismissed without further consideration.

¹ ICC-02/04-01/15-1452 (“Request”).

² ICC-02/04-01/15-1444 (“Decision”).

³ ICC-01/05-01/08-3273, para 8.

The First issue does not arise from the Decision

5. As its first issue, the Defence asks whether article 21(3) of the Statute requires that the certain information related to Mr Ongwen’s children (“Family Information”) should be disclosed to Mr Ongwen so as not to violate human rights. The Defence criticises the Single Judge for considering the contacts restrictions regime and the nature of the charges against the Accused as factors justifying the restriction of his access to the Family Information.⁴ According to the Defence, the Single Judge misrepresented the contacts restrictions regime’s basis and mischaracterised the Request.⁵ However, these arguments are without merit, and illustrate that it is the Defence which misinterprets the Decision, or otherwise simply disagrees with it. Nothing shows that the proposed first issue constitutes an identifiable subject or topic requiring a decision by the Appeals Chamber for its resolution.⁶

6. First, the Defence misreads the Impugned Decision as suggesting that the contacts restriction regime was based merely on expeditiousness or the nature of the charges alone.⁷ To the contrary, and rightly so, the Single Judge considered it necessary to restrict the Accused’s access to the Family Information given that: i) the Accused’s contacts were restricted following litigation of witness interference—this being the essence of the contacts restriction regime; ii) any such witness interference would threaten the fair and expeditious conduct of the proceedings; and iii) the actions which the Accused sought to take on the basis of the family information

⁴ Request, para. 7.

⁵ *Ibid*, paras. 8-13.

⁶ *Situation in the DRC*, Judgment on Extraordinary Review, ICC-01/04-168 OA3, 13 July 2006, para 9; *Prosecutor v Kony et al.*, Dissenting Opinion of Judge Pikis in the Judgment on Victim Application for Participation, ICC-02/04 OA and ICC-02/04-01/05-371 OA2, 23 February 2009, para. 7. Diss. Op.

⁷ *Ibid*, para. 8.

directly concerned prosecution witnesses who are the alleged victims of the sexual and gender based violence crimes with which he is charged.⁸

7. Second, the Defence further misconstrues the Impugned Decision by averring that the Single Judge, having relied in part on the nature of the crimes alleged by the Prosecution, reversed the burden of proof in violation of article 67(1)(i) of the Statute.⁹ This argument lacks logic and further illustrates that the proposed issue is merely a disagreement with the assessment of the Single Judge. Indeed, it verges on the absurd to suggest that this court must first convict Mr Ongwen before it may take into account the nature of his alleged crimes in considering whether restricting his access to Family Information is necessary and proportionate. Nor is there any basis to suggest that the Single Judge was unaware that the charges against Mr Ongwen have not yet been proved. The Defence misreads article 67(1)(i), which relates to the Prosecution's burden of proving an accused's guilt beyond reasonable doubt, "in the determination of any charge", and does not extend to the matter at issue here.

8. Third, the Defence is similarly dissatisfied that the Single Judge found, contrary to the Defence Request for Orders to the Prosecution in Relation to Information Concerning Mr Ongwen's Family ("Initial Request"),¹⁰ that unfettered access to the Family Information is not necessary to ensure the Accused's children's right to health.¹¹ This argument lacks merit given that, for over two years now, there is in place a functioning contacts restriction regime that allows the Accused to contribute to the welfare of his children while safeguarding against potential witness

⁸ Decision, paras. 28-31.

⁹ Request, para. 9.

¹⁰ ICC-02/04-01/15-1414-Red ("Initial Request"), paras. 36-42.

¹¹ Request, para. 10-13; Decision, para. 30.

interference.¹² Furthermore, the Defence have made no showing of any actual impact on the health of the children.

9. Finally, by contesting that the risk of witness interference is mitigated through the contacts restrictions regime, the Defence again merely disagrees with the Single Judge's finding that it is proportionate to restrict the Accused's access to the Family Information. The Single Judge explained that the contacts restrictions regime enables the Accused to speak with his family members when they want to speak with him while ensuring the fairness of the proceeding.¹³ While the Defence may disagree, this is an entirely reasonable balancing of the interests at stake. Moreover, by questioning what the mothers' consent actually is, the Defence simply seeks to re-litigate matters that the Single Judge has already ruled are devoid of any merit.¹⁴

10. None of the criticisms or misinterpretations highlighted above is an identifiable subject or topic requiring a decision by the Appeals Chamber for their resolution.¹⁵ They constitute mere disagreements with the Single Judge's assessment in the Impugned Decision.

The second issue does not arise from the Decision

11. The Defence also alleges that the Single Judge erred in his evaluation of what constitutes exculpatory evidence. This is not an appealable issue. While it is true that the Single Judge referred to article 67(2) of the Statute, he found that "the Defence makes no submission that the Family Information might tend to mitigate his guilt as such", and that the Defence only argued "hypothetically" that mitigating conduct

¹² ICC-02/04-01/15-521, para. 18.

¹³ Decision, paras. 32-35.

¹⁴ *Ibid*, para. 4.

¹⁵ *Situation in the DRC*, Judgment on Extraordinary Review, ICC-01/04-168 OA3, 13 July 2006, para 9; *Prosecutor v Kony et al.*, Dissenting Opinion of Judge Pikis in the Judgment on Victim Application for Participation, ICC-02/04 OA and ICC-02/04-01/05-371 OA2, 23 February 2009, para 7. Diss. Op.

might result from receiving this information.¹⁶ In these circumstances, the Defence's challenge amounts to nothing more than mere disagreement with that conclusion. Nor can the proposed issue be said to properly arise from the Impugned Decision, when the reasoning in question was precisely based on the Defence's failure to raise this very question in the first place.

The Two Issues do not meet the remaining criteria of article 82(1)(d)

12. In addition, the Defence has not substantiated how either of the issues significantly affects the fairness and expeditiousness of the proceedings, or may require immediate resolution by the Appeals Chamber.¹⁷

13. Regarding fairness, the Defence suggests the possibility that the Trial Chamber might, at some potential future sentencing hearing, accept information or arguments concerning harm to the Accused's children, and increase the sentence on that basis. The Defence complains that it would be unfair to deny Mr Ongwen the "opportunity" to mitigate his possible future sentence by taking actions to protect his children's health now.¹⁸ This portion of the Request is based solely and entirely on a speculative possibility, and cannot meet the threshold of article 82(1)(d). In addition, the arrangements negotiated by the Parties at the Chamber's direction effectively allow the Accused to send money for his children's health costs, regardless of any information provided, or not, by the Prosecution or LRVs. In other words, the facts demonstrate that no actual unfairness has occurred.

14. Similarly, the Defence does no more than speculate that the Issues may *potentially* affect the expeditiousness of proceedings (which must be demonstrated

¹⁶ Decision, para. 19.

¹⁷ Request, para. 20, 31-32.

¹⁸ *Ibid*, para. 32.

cumulatively with any significant effect on their conduct),¹⁹ on the outcome of the trial.²⁰ This is insufficient. For example, the Defence suggests that an unjustified interference with the Accused's right to family life may aggravate his health and consequently impact upon the expeditiousness and outcome of the trial.²¹ Wholly unsupported suppositions like these cannot establish that the two issues raised significantly affect the expeditious conduct of the proceedings or the outcome of the trial for purposes of article 82(1)(d). Indeed, it is much more likely that interlocutory appellate litigation of these matters would serve primarily as a distraction from the speedy resolution of this trial.

15. Finally, the Defence makes no more than a desultory attempt to show, as required by article 82(1)(d), that *immediate* resolution of the proposed issues by the Appeals Chamber may materially advance the proceedings.²² This question is necessarily distinct from the other criteria of article 82(1)(d), since it is concerned specifically with the Pre-Trial or Trial Chamber's opinion whether an *interlocutory* appeal is appropriate. In the circumstances of the Request, this condition cannot be met. Not only are the Defence arguments speculative, but the Trial Chamber's ongoing role in ensuring that this trial is fair and expeditious and conducted with full respect for Mr Ongwen's rights—and due regard for the protection of victims and witnesses—ensures that he has adequate recourse if circumstances change.²³

¹⁹ *Ibid*, para. 33.

²⁰ *Ibid*, para. 34.

²¹ *Ibid*, paras. 24-25.

²² *Ibid*, para. 35.

²³ Statute, art. 64(2).

Conclusion

16. For the reasons set out above, the Defence request should be rejected.



Fatou Bensouda, Prosecutor

Dated this 22nd day of February 2019
At The Hague, The Netherlands