



Original: English

No.: ICC-02/04-01/15
Date: 2 September 2016

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 Decision ICC-02/04-01/15-521

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

The Office of the Prosecutor

Fatou Bensouda
James Stewart
Benjamin Gumpert

Counsel for the Defence

Krispus Ayena Odongo

Legal Representatives of the Victims

Joseph Akwenyu Manoba
and Francisco Cox
Paolina Massidda

Legal Representatives of the Applicants

Unrepresented Victims

**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

Registrar

Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

Judge Bertram Schmitt, acting as Single Judge on behalf of Trial Chamber IX ('Single Judge' and 'Chamber', respectively) of the International Criminal Court ('Court'), in the case of *The Prosecutor v. Dominic Ongwen* ('Ongwen case'), having regard to Article 82(1)(d) of the Rome Statute ('Statute'), issues the following 'Decision on Defence Request for Leave to Appeal Decision ICC-02/04-01/15-521'.

1. On 10 August 2016, the Single Judge issued the Decision on Prosecution 'Request for an order that Mr Ongwen cease and disclose payments to witnesses and that the Registry disclose certain calls made by Mr Ongwen' ('Impugned Decision'),¹ which ordered, *inter alia*, the defence for Dominic Ongwen ('Defence') to disclose all financial or in-kind payments or promises of money made to persons identified as potential witnesses in the *Ongwen* case.²
2. On 16 August 2016, the Defence filed its request for leave to appeal the Impugned Decision ('Request').³ The Defence asserts that the order to disclose financial transactions to Mr Ongwen's family members who are potential witnesses violates Mr Ongwen's right to remain silent pursuant to Articles 55(1)(a) and 67(1)(g) of the Statute ('Issue').⁴
3. On 17 August 2016, the Office of the Prosecutor ('Prosecution') submitted its response to the Defence's Request ('Response'),⁵ in which it argues that the Request be dismissed.⁶
4. In order for a request for leave to appeal to be granted, the party seeking leave to appeal should identify specific 'issues' which were dealt with in the relevant decision and which constitute the appealable issue.⁷

¹ Decision on Prosecution 'Request for an order that Mr Ongwen cease and disclose payments to witnesses and that the Registry disclose certain calls made by Mr Ongwen', 10 August 2016, ICC-02/04-01/15-521.

² Impugned Decision, ICC-02/04-01/15-521, page 10.

³ Defence Request for Leave to Appeal Decision ICC-02/04-01/15-521, 16 August 2016, ICC-02/04-01/15-524.

⁴ Request, ICC-02/04-01/15-524, paras 2 and 16.

⁵ Prosecution's response to request for leave to appeal decision ICC-02/04-01/15-521 (order to disclose witness payments), 17 August 2016, ICC-02/04-01/15-525.

⁶ Response, ICC-02/04-01/15-525, para. 19.

5. With respect to the meaning of an appealable 'issue', the Appeals Chamber has stated:

An issue is an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion. [...] An issue is constituted by a subject the resolution of which is essential for the determination of matters arising in the judicial cause under examination.⁸

6. Accordingly, a mere disagreement or conflicting opinion cannot form an appealable issue.⁹ Further, the definition of an appealable issue requires the parties to articulate discrete issues for Appeals Chamber resolution - it is generally insufficient to argue that the entirety of the Chamber's reasoning is erroneous when requesting leave to appeal.¹⁰
7. Accordingly, and in light of Article 82(1)(d) of the Statute, the following requirements apply for the granting of a request for leave to appeal:
- i. Whether the matter is an 'appealable issue';
 - ii. Whether the issue at hand would significantly affect:
 - (i) The fair and expeditious conduct of the proceedings or
 - (ii) The outcome of the trial; and
 - iii. Whether, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

⁷ Appeals Chamber, *Situation in the Democratic Republic of the Congo*, Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006, ICC-01/04-168, para. 9.

⁸ ICC-01/04-168, para. 9.

⁹ ICC-01/04-168, para. 9.

¹⁰ Trial Chamber V(A), *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Decision on the joint defence request for leave to appeal the decision on witness preparation, 11 February 2013, ICC-01/09-01/11-596, para. 11; Pre-Trial Chamber I, *The Prosecutor v. Laurent Gbagbo*, Decision on three applications for leave to appeal, 29 November 2012, ICC-02/11-01/11-307, para. 70 (the parties cannot 'seek[] leave to litigate *ex novo* before the Appeals Chamber the entire decision').

8. It is not sufficient for the purposes of granting leave to appeal that the issue for which leave to appeal is sought is of general interest or that it may arise in future pre-trial or trial proceedings.¹¹ Further, it is insufficient that an appeal may be legitimate or even necessary at some future stage, as opposed to requiring immediate resolution by the Appeals Chamber in order to materially advance the proceedings.¹²
9. The Single Judge considers that the Issue raised by the Defence does not significantly affect the fair and expeditious conduct of the trial or the outcome of the trial. As the leave to appeal criteria are cumulative, the failure to fulfil one of the criteria is fatal to the Defence's Request.
10. In the Impugned Decision, the Single Judge noted that Mr Ongwen transferred monies to potential Prosecution witnesses without notifying the Chamber or the other participants and held that, at the very least, this behaviour 'violates the spirit of the existing protocol' governing contact between a party or participant and witnesses of the opposing party or participants.¹³ The Single Judge further noted a concern about the possible impact Mr Ongwen's payments may have on the testimony of potential witnesses in *Ongwen* case.¹⁴ The Single Judge's order to the Defence was a remedy deemed necessary to ameliorate concerns in the present case and indeed to ensure the fair and expeditious conduct of the present proceedings.¹⁵

¹¹ See Pre-Trial Chamber II, *Situation in Uganda*, Decision on Prosecutor's Application for Leave to Appeal in Part Pre-Trial Chamber II's Decision on the Prosecutor's Applications for Warrants of Arrest under Article 58, 19 August 2005, ICC-02/04-01/05-20-US-Exp (unsealed pursuant to Decision ICC-02/04-01/05-52), para. 21; Trial Chamber I, *The Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Defence and Prosecution Requests for Leave to Appeal the Decision on Victims' Participation of 18 January 2008, 26 February 2008, ICC-01/04-01/06-1191, para. 11; Trial Chamber III, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on the prosecution and defence applications for leave to appeal the 'Decision on the admission into evidence of materials contained in the prosecution's list of evidence', 26 January 2011, ICC-01/05-01/08-1169, para. 25.

¹² See ICC-01/05-01/08-1169, para. 25.

¹³ Impugned Decision, ICC-02/04-01/15-521, para. 14.

¹⁴ Impugned Decision, ICC-02/04-01/15-521, para. 15.

¹⁵ See Impugned Decision, ICC-02/04-01/15-521, paras 13 to 17.

11. In its Request, the Defence alludes to potential future proceedings but fails to articulate how the Issue affects the fair and expeditious conduct of the *present proceedings*, particularly given the nature of the remedy as described above. The Impugned Decision cannot reasonably be understood to compel Mr Ongwen 'to testify or to confess guilt', the two concerns explicitly raised in the Statute in relation to the right to remain silent.¹⁶ Rather, the Defence was only ordered to disclose its financial assistance payments to potential witnesses. Not every defence disclosure ordered by a Chamber is a violation of the defendant's 'right to silence', and the Single Judge fails to see how revealing financial information of this kind significantly affects the fair and expeditious conduct of the proceedings. Further, the Defence does not offer an explanation of how the Issue affects the outcome of the trial. The Request does not satisfy Article 82(d)(1) of the Statute.

**FORE 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 2 September 2016

At The Hague, The Netherlands

¹⁶ Article 67(1)(g) of the Statute.