

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

No.: ICC-02/04-01/15  
Date: 6 September 2017

**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 Adding an Updated  
Forensic Report to the List of Evidence**

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 Victims**

Joseph Akwenyu Manoba  
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**Legal Representatives of 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**

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**Registrar**

Herman von Hebel

**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, issues the following 'Decision on Defence Request for Leave to Appeal Decision Adding an Updated Forensic Report to the List of Evidence'.

1. On 22 August 2017, the Single Judge granted a request from the Office of the Prosecutor ('Prosecution') to add an updated forensic report to its list of evidence ('Impugned Decision').<sup>1</sup>
2. On 28 August 2017, the defence for Mr Ongwen ('Defence') sought leave to appeal the Impugned Decision ('Request') on the following issue: '[t]he Chamber did not properly factor prejudice to the Accused when it allowed the addition of the Updated Forensic Report to the Prosecution's List of Evidence' ('Issue').<sup>2</sup> The Defence submits that the Issue affects the outcome of the trial because: (i) the updated forensic report is highly prejudicial to the Defence and (ii) the additional information in the report '*could* potentially lead to an ultimate decision on specific issues defined in the case'.<sup>3</sup>
3. On 4 September 2017, the Prosecution responded to the Request,<sup>4</sup> submitting that it be rejected in full.
4. The Single Judge recalls the applicable criteria for leave to appeal as set out in past decisions.<sup>5</sup>

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<sup>1</sup> Decision on Prosecution's Request to Add Updated Forensic Report to its List of Evidence, ICC-02/04-01/15-956-Corr (corrigendum notified 25 August 2017) (concerning report UGA-OTP-0278-0529, an update of report UGA-OTP-0258-0357).

<sup>2</sup> Defence Request for Leave to Appeal "Decision on Prosecution's Request to Add Updated Forensic Report to its List of Evidence" (ICC-02/04-01/15-956-Corr), ICC-02/04-01/15-960.

<sup>3</sup> Request, ICC-02/04-01/15-960, paras 14-17 (emphasis from para. 15 quotation in original).

<sup>4</sup> Prosecution's Response to Defence Request for Leave to Appeal Decision ICC-02/04-01/15-956-Corr, ICC-02/04-01/15-961.

<sup>5</sup> Decision on the Defence Request for Leave to Appeal the Decision Ordering the Disclosure of Medical Records pertaining to Dominic Ongwen, 10 March 2017, ICC-02/04-01/15-744, para. 4; Decision on

5. The Single Judge does not consider the Impugned Decision to involve an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial.
6. The Defence does not offer any specific arguments that its issue significantly affects the fair and expeditious conduct of the proceedings, so the Single Judge will not consider this part of the leave to appeal criteria any further.
7. As to the outcome of the trial, the Single Judge recalls that the original forensic report on the list of evidence was a nine page DNA analysis concerning Mr Ongwen's paternal link to certain children.<sup>6</sup> The forensic report at issue in the Impugned Decision<sup>7</sup> is a 12 page version of the same report which adds information on the maternal links to these same children.<sup>8</sup>
8. The Single Judge considers it speculative and unreasonable to conclude that this addition would significantly affect the outcome of the trial. The Impugned Decision merely added the updated report to the Prosecution's list of evidence. It was not submitted for consideration as evidence, and no position was taken on its relevance or probative value. Even if this report is later submitted, the Single Judge recalls that its relevance and probative value would not ordinarily be considered until the Chamber's deliberations at the end of the trial. The Defence's own argumentation concedes its unpersuasiveness – the Defence argues that its issue '*could* affect the outcome of the trial',<sup>9</sup> whereas Article

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Prosecution Request for Leave to Appeal the Decision on Witness Preparation, 19 September 2016, Decision on Defence Request for Leave to Appeal the Decision on Article 56 Evidence, 9 September 2016, ICC-02/04-01/15-535; 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.

<sup>6</sup> UGA-OTP-0258-0357.

<sup>7</sup> UGA-OTP-0278-0529.

<sup>8</sup> Impugned Decision, ICC-02/04-01/15-956-Corr, para. 11.

<sup>9</sup> Request, ICC-02/04-01/15-960, page 6 (heading b, emphasis added).

82(1)(d) itself specifies that the Chamber must more categorically conclude that the issue '*would* significantly affect [...] the outcome of the trial'.<sup>10</sup>

**FOR 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 6 September 2017

At The Hague, The Netherlands

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<sup>10</sup> Emphasis added.