

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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Date: 12 February 2019

TRIAL CHAMBER IX

Before: Judge Bertram Schmitt, Single Judge

SITUATION IN UGANDA

IN THE CASE OF *THE PROSECUTOR v. DOMINIC ONGWEN*

Public

**Decision on Request for Disclosure and Related Orders Concerning Mr
Ongwen's Family**

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

The Office of the Prosecutor

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Legal Representatives of Victims

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Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
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REGISTRY

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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 Articles 21(3), 54(3)(f), 64(2), 64(6)(e), 67(2) and 68(1) of the Rome Statute ('Statute'), Rules 77 and 87(1) of the Rules of Procedure and Evidence ('Rules'), Regulations 23 *bis*, 29, 33 and 34 of the Regulations of the Court ('Regulations') and Regulation 163(3) of the Regulations of the Registry, issues the following 'Decision on Request for Disclosure and Related Orders Concerning Mr Ongwen's Family'.

I. Procedural history and relief sought

1. On 18 January 2019, the Defence for Mr Ongwen ('Defence') filed a submission ('Request')¹ requesting that the Chamber:
 - a. Find that the disclosure of item UGA-OTP-0282-0522-R01 ('Investigative Note') was late and untimely;
 - b. Order the Office of the Prosecutor ('Prosecution') to disclose any: (i) record describing further follow-up, actions taken, or responses provided in relation to the Investigative Note; (ii) information received concerning the well-being of Mr Ongwen's children and family members whose lives may impact upon Mr Ongwen's children's welfare; and (iii) other communications from the mothers or family of Mr Ongwen's children that relate to their well-being.
 - c. Order the Prosecution and Office of Public Counsel for Victims (in its role as the Common Legal Representative of Victims, or 'CLR') to: (i) promptly communicate all information concerning the well-being of Mr Ongwen's family upon receiving it and (ii) disclose any further information received concerning negative impacts upon the well-being of Mr Ongwen's children and information concerning family members whose lives may impact upon Mr Ongwen's children's welfare.

¹ Public Redacted Version of 'Defence Request for Orders to the Prosecution in Relation to Information Concerning Mr Ongwen's Family', filed 18 January 2019, ICC-02/04-01/15-1414-Red (with confidential annex).

- d. If either of remedy (b) or (c) above are rejected, alternatively order the Prosecution to provide for all costs associated with the health, well-being and education of Mr Ongwen's children.
2. On 30 January 2019, the Prosecution responded ('Prosecution Response'),² submitting that the Request should be denied.
3. On 31 January 2019, the CLRV responded ('CLRV Response'),³ also submitting that the Chamber reject the Request.
4. On 5 February 2019, the Defence attempted to seek leave to reply to the Prosecution Response and CLRV Response outside the three day time limit specified in Regulation 34(c) of the Regulations.⁴ The Single Judge dismisses this request *in limine*.

II. Submissions, analysis and conclusions

5. The core facts underlying the Request appear to be uncontested, and the Single Judge will briefly summarise them.
6. In August 2018, the Prosecution disclosed the Investigative Note.⁵ This note is dated seven months prior to the actual disclosure. The note recounts a conversation the Prosecution had with P-227. P-227 is a dual status Prosecution witness represented by the CLRV.⁶ She is one of Mr Ongwen's former 'wives' who are named in the charges and testified prior to the confirmation hearing

² Prosecution Response to "Defence Request for Orders to the Prosecution in Relation to Information Concerning Mr Ongwen's family", ICC-02/04-01/15-1425-Conf (with confidential annex).

³ CLRV's Response to "Defence Request for Orders to the Prosecution in Relation to Information Concerning Mr Ongwen's Family", ICC-02/04-01/15-1427-Conf.

⁴ Defence Request for Leave to Reply to Prosecution and CLRV Responses to 'Defence Request for Orders to the Prosecution in Relation to Information Concerning Mr Ongwen's Family' (ICC-02/04-01/15-1425-Conf and ICC-02/04-01/15-1427-Conf), filed 30 and 31 January 2019, ICC-02/04-01/15-1435-Conf, *responded to in* CLRV's Response to "Defence Request for Leave to Reply to Prosecution and CLRV Responses to 'Defence Request for Orders to the Prosecution in Relation to Information Concerning Mr Ongwen's Family', 7 February 2019, ICC-02/04-01/15-1440-Conf.

⁵ Annex A to the Prosecution's Communication of the Disclosure of Evidence, 15 August 2018, ICC-02/04-01/15-1320-Conf-AnxA (line 23).

⁶ *Consistent with* Request, ICC-02/04-01/15-1414-Red, para. 34 (challenging a Prosecution characterisation of P-227 as a 'trial witness', but only because she testified during the confirmation phase).

pursuant to Article 56 of the Statute ('Article 56 Witnesses').⁷ By virtue of contact restrictions ordered against him, Mr Ongwen is not presently permitted to contact P-227.⁸

7. P-227 explains in the Investigative Note that one of the children she had with Mr Ongwen had suffered an injury and inquired if it was possible for the Court to provide money for medical assistance.⁹
8. In November 2018, the Defence initiated *inter partes* discussions with the Prosecution and CLRV asking for any information that describes 'any form of hard-ship experienced by Mr Ongwen's children or alleged children following his detention'.¹⁰ The Defence also requested information regarding follow-up measures taken in relation to P-227's injured child and what mechanisms were in place to assist Mr Ongwen's children should they come to future harm.¹¹
9. In response, the Prosecution informed the Defence that it would not commit to bringing future information of this kind which falls outside its disclosure obligations. It stated that the Investigative Note was only disclosed because it considers that requests for financial assistance from Prosecution witnesses are material to the preparation of the defence.¹² The CLRV responded with an update on P-227's child, but provided no further information.¹³

⁷ Decision on the confirmation of charges against Dominic Ongwen, 23 March 2016, ICC-02/04-01/15-422-Red (with annex; confidential version notified same day) ('Confirmation Decision'), pp. 95-96.

⁸ Decision on Mr Ongwen's Request to Add New Persons to his Non-Privileged Telephone Contact List, 4 October 2016, ICC-02/04-01/15-553; Decision on issues related to the restriction of communications of Dominic Ongwen, 30 May 2016, ICC-02/04-01/15-450-Red, para. 4; Decision concerning the restriction of communications of Dominic Ongwen, 3 August 2015, ICC-02/04-01/15-283; Order concerning a request by the Prosecutor under regulation 101(2) of the Regulations of the Court, 8 June 2015, ICC-02/04-01/15-242.

⁹ Investigative Note, UGA-OTP-0282-0522-R01.

¹⁰ Annex A of the Request, ICC-02/04-01/15-1414-Conf-AnxA, p. 3.

¹¹ Annex A of the Request, ICC-02/04-01/15-1414-Conf-AnxA, p. 3.

¹² Annex A of the Request, ICC-02/04-01/15-1414-Conf-AnxA, p. 2.

¹³ Annex A of the Request, ICC-02/04-01/15-1414-Conf-AnxA, p. 2.

10. Following these consultations, and with reference to other examples where Mr Ongwen made inquiries or took action in relation to requests from his family members,¹⁴ the Defence filed the Request.

A. Investigative Note

11. In relation to the Investigative Note (item (a) of the relief sought), all the Defence requests is a finding that its disclosure was late.¹⁵
12. The Prosecution clearly considered the note to be disclosable¹⁶ and gives no explanation for its late disclosure. The Single Judge therefore does find there to have been a late disclosure of this note, and reminds the Prosecution to be more expeditious in effecting future disclosure. It is noted that the Defence seeks no remedy beyond a lateness finding and, noting the marginal relevance of the Investigative Note to the contested issues at trial, the Single Judge does not consider any further measures to be warranted.

B. Standard disclosure framework

13. In this sub-section, the Single Judge will consider whether the relief sought in items (b)-(c) of the Request – which generally can be described as requests for the provision of all information touching upon Mr Ongwen’s responsibility to his children (‘Family Information’)¹⁷ – falls under the standard disclosure framework applicable to the Prosecution and CLRV.
14. The Single Judge recalls the applicable jurisprudence regarding Prosecution disclosure, as previously cited by the Chamber.¹⁸ The CLRV has no express disclosure obligations in the statutory scheme, but – after receiving Chamber

¹⁴ Request, ICC-02/04-01/15-1414-Conf, paras 11-12, 19.

¹⁵ Request, ICC-02/04-01/15-1414-Red, para. 56.

¹⁶ Annex A of the Request, ICC-02/04-01/15-1414-Conf-AnxA, p. 2.

¹⁷ See Request, ICC-02/04-01/15-1414-Red, para. 55.

¹⁸ Decision on Disclosure Issues Arising Out of First Status Conference, 7 June 2016, ICC-02/04-01/15-457, para. 4.

permission to present evidence – was required to disclose the evidence it intended to use at trial.¹⁹

15. The Defence argues that the Family Information is disclosable because: (i) it may clarify the nature of the conjugal relations between Mr Ongwen and the Article 56 Witnesses; (ii) even non-monetary assistance may impact upon the motives or credibility of the Article 56 Witnesses; and (iii) Mr Ongwen helping his children may be a mitigating factor during sentencing, and failure to provide him with the information necessary for sentencing mitigation is effectively a denial of an opportunity to mitigate one's sentence.²⁰
16. The Single Judge is not persuaded that the Family Information is potentially exculpatory or material to the preparation of the defence.²¹
17. As to point (i) above, the Single Judge considers that the asserted link between the conjugal relations at issue in the charges and the recent or future well-being of Mr Ongwen's family is so attenuated as to be considered irrelevant.
18. As to point (ii), the Single Judge notes that the Prosecution has already stated that it discloses witness requests for financial assistance as a matter of course.²² This demonstrates that the Prosecution already recognises that witness requests for assistance, financial or otherwise, may implicate witness credibility or be otherwise material to the preparation of the defence. In the absence of information suggesting that the Prosecution is withholding any genuine

¹⁹ Public Redacted Version of Decision on the Legal Representatives for Victims Requests to Present Evidence and Views and Concerns and related requests, 6 March 2018, ICC-02/04-01/15-1199-Red (confidential version notified same day), paras 15, 21; Preliminary Directions for any LRV or Defence Evidence Presentation, 13 October 2017, ICC-02/04-01/15-1021, paras 2(iii), 6, *citing to* Appeals Chamber, *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Judgment on the Appeal of Mr Katanga Against the Decision of Trial Chamber II of 22 January 2010 Entitled "Decision on the Modalities of Victim Participation at Trial", 16 July 2010, ICC-01/04-01/07-2288, OA 11, para. 55.

²⁰ Request, ICC-02/04-01/15-1414-Red, paras 58-61.

²¹ Article 67(2) of the Statute; Rule 77 of the Rules.

²² Annex A of the Request, ICC-02/04-01/15-1414-Conf-AnxA, p. 2.

witness requests for assistance²³ – and considering that the Family Information sought goes far beyond requests for assistance to the point of being overbroad – the Single Judge is not persuaded that a disclosure order is necessary on this point.

19. As to point (iii), the Defence makes no submission that the Family Information might tend to mitigate his guilt as such. The Defence only argues that hypothetically mitigating conduct could result from receiving this information. The Single Judge considers this to be an insufficient showing to warrant disclosure under Article 67(2) of the Statute.
20. Noting finally that the CLRV never states any intention of using the Family Information at trial, the Single Judge determines that neither the Prosecution nor CLRV have any obligation within the standard disclosure framework as regards the Family Information. The Single Judge rejects the Defence arguments in this respect.
21. A conclusion that information does not fall under the other participants' disclosure obligations normally suffices to resolve disclosure litigation. However, in this 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'.²⁴ 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.

²³ To the contrary, *see* Prosecution Response, ICC-02/04-01/15-1425-Conf, para. 29.

²⁴ Request, ICC-02/04-01/15-1414-Red, paras 3-4.

C. Human rights law and ‘humanitarian disclosure’

22. Trial chambers have the authority to make orders for the production of information when necessary to protect the human rights of the accused.²⁵ Detainees also have a general entitlement to transfer earnings for the work they do at the Detention Centre to his/her family.²⁶ Article 21(3) of the Statute provides that the application and interpretation of the law at the Court must be consistent with internationally recognised human rights.²⁷
23. Under international human rights law, all people – including the incarcerated – have a right to family life.²⁸ Human rights law requires that, for all decisions concerning children, their best interests must be paramount.²⁹ A parent cannot be entitled to have such measures taken as would harm the child’s health and development.³⁰
24. The right to family life 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.³¹

²⁵ Article 64(6)(e) of the Statute.

²⁶ Regulation 163(3) of the Regulations of the Registry.

²⁷ Article 21(3) of the Statute.

²⁸ Art. 17 of the International Convention of Civil and Political Rights; art. 8(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms; art. 11(2) of the Inter-American Convention on Human Rights. *See also* UN General Assembly, United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules), 17 December 2015, A/RES/70/175 (annex), rule 106 (‘Special attention shall be paid to the maintenance and improvement of such relations between a prisoner and his or her family as are desirable in the best interests of both.’).

²⁹ Art. 3(1) of the Convention on the Rights of the Child; European Court of Human Rights, Grand Chamber, *X v. Latvia*, 26 November 2013, app. no. 27853/09, para. 96; European Court of Human Rights, Grand Chamber, *Neulinger and Shuruk v. Switzerland*, 6 July 2010, app. no. 41615/07, para. 135.

³⁰ European Court of Human Rights, Grand Chamber, *Elsholz v. Germany*, 13 July 2000, app. no. 25735/94, para. 50.

³¹ Art. 8(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (‘There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society [...]’); art. 11(2) of the Inter-American Convention on Human Rights (prohibiting ‘arbitrary or abusive’ interference). *See also* European Court of Human Rights, Grand Chamber, *Paradiso and Campanelli v. Italy*, 24 January 2017, app. no. 25358/12, para. 181 (‘According to the Court’s established case-law, the notion of necessity implies that the interference corresponds to a pressing social need and, in particular, that it is proportionate to the legitimate aim pursued, regard being had to the fair balance which has to be struck between the relevant competing interests’).

25. With this framework in mind, 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 not only on whether withholding the Family Information implicates human rights. It must also be considered whether there is a justifiable interference with the exercise of these rights.

26. The Defence argues at length that failure to disclose the Family Information implicates the accused’s international human rights.³² The Single Judge agrees that the right to family life is implicated, noting that neither the Prosecution nor CLRV contests this proposition. The Single Judge will now consider the question of justifiable interference.

1. *In accordance with the law*

27. The Single Judge notes the various decisions establishing the contact restrictions regime which prevents Mr Ongwen from soliciting the Family Information directly from the family members in question.³³ The Defence does not dispute the legal basis for these decisions in the Request, and the Single Judge considers them to be ‘in accordance with the law’ for purposes of assessing interference with the right to family life.

2. *Necessity*

28. As to the necessity of the measures, the Single Judge considers both the reasons for the contact restrictions regime and the nature of the charges in this case to be relevant.

³² Request, ICC-02/04-01/15-1414-Red, paras 43-52, 62.

³³ Footnote 8 above.

29. Mr Ongwen's contacts have been restricted following litigation raising indications of witness interference. Any such interference threatens the fair and expeditious conduct of the proceedings which the Chamber must ensure at all times.³⁴ The Defence arguments that disclosing the information sought to the accused will 'reduce litigation' and 'improve the fairness of the trial'³⁵ fail to appreciate that Mr Ongwen's contact restrictions remain in place for these very reasons. Further, arguments that ordering disclosure will reduce future litigation are speculative at best and an invitation for abusive litigation at worst. A party cannot argue that, should its motion not be granted, it will make similar requests in the future as if to prove the motion should have been granted.³⁶
30. Mr Ongwen is also charged with sexual and gender based violence crimes in relation to seven alleged 'forced wives',³⁷ meaning that the actions the accused seeks to take based off the Family Information directly concern Prosecution witnesses who are his alleged victims. With this in mind, the Single Judge is not persuaded by the Defence's arguments that unfettered access to the Family Information is necessary to ensure his children's right to health.³⁸ To the contrary, unwanted involvement by the accused in the lives of these alleged victims and their children risks further victimisation and harm to the health and development of the children concerned.
31. In these circumstances, the Single Judge considers it necessary that the accused's access to the Family Information be restricted.

³⁴ Article 64(2) of the Statute.

³⁵ Request, ICC-02/04-01/15-1414-Red, para. 65.

³⁶ *See the rejection of a similar argument in* Decision on Defence Request for Reconsideration of or Leave to Appeal the Directions on Closing Briefs and Closing Statements, 11 May 2018, ICC-02/04-01/15-1259, para. 19.

³⁷ Confirmation Decision, ICC-02/04-01/15-422-Red, pp. 90-99.

³⁸ Request, ICC-02/04-01/15-1414-Red, paras 36-42.

3. *Proportionality*

32. The Single Judge also considers the limitations on Mr Ongwen's access to the Family Information to be proportionate when considered in their full context.
33. Within the contact restrictions regime, Mr Ongwen is entitled to: (i) have telephone contact with his children, in so far as the ordinary procedures within the detention centre are met and communication is facilitated through a neutral third party³⁹ and (ii) add people to his contact list without any further ruling from the Chamber so long as the Prosecution does not object.⁴⁰ These procedures give Mr Ongwen reasonable flexibility to speak with his family members when they want to speak with him and there are no concerns about compromising the fairness of the proceedings.
34. Further, the Single Judge notes that it previously directed the parties to consult with the Victims and Witnesses Unit 'in order to reach an agreement as to how Mr Ongwen can contribute to the welfare of his children while mitigating the risk of witness interference'.⁴¹ The parties subsequently filed such an agreement in the case record on 24 November 2016.⁴² This demonstrates that Mr Ongwen is afforded a negotiated framework with which he can make child support payments, and nothing suggests that the Prosecution or CLRV will obstruct the accused's ability to make support payments when the concerned family members consent to receive them.⁴³

³⁹ ICC-02/04-01/15-553, para. 10.

⁴⁰ ICC-02/04-01/15-450-Red, para. 4.

⁴¹ 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, para. 18.

⁴² Joint Defence and Prosecution Observations Pursuant to ICC-02/04-01/15-521, Paragraph 18, 25 November 2016, ICC-02/04-01/15-606-Conf-Exp.

⁴³ CLRV Response, ICC-02/04-01/15-1427-Conf, para. 7; Prosecution Response, ICC-02/04-01/15-1425-Conf, para. 29 ('Where a genuine request for assistance has been established concerning the welfare of the children, in the spirit of *inter partes* cooperation, Prosecution, OPCV and the Defence have worked together to ensure that funds and assistance to the children is provided in a timely manner without the risk of direct contact between Mr Ongwen and a Prosecution witness'). *Contra* Request, ICC-02/04-01/15-1414-Red, para. 71.

35. The Single Judge considers such consent to be particularly significant, noting that both the Prosecution and CLRV emphasise that they would not give the Family Information in the absence of any disclosure obligations and ‘without the consent of the mothers who are the primary caregivers and bear primary responsibility for the children and the field’.⁴⁴ These statements suggest that the Prosecution and CLRV generally *would* disclose information like that sought by the Defence when the children’s mothers wish or agree to provide it to the accused. Any disclosure order would therefore principally relate to information the children’s mothers do not want Mr Ongwen to receive. The Single Judge does not consider it compatible with the best interests of the children in question to issue a general order providing the Family Information to the accused over such objections.

4. Conclusion

36. On the basis of this assessment, the Single Judge considers that the failure to provide the Family Information sought by the Defence is in accordance with the law, necessary and proportionate. It is therefore a justifiable interference with Mr Ongwen’s rights, meaning that human rights law does not require its disclosure. Noting the reasons above and considering the support framework already in place to ensure that appropriate funds and assistance get to the children concerned,⁴⁵ the Single Judge likewise sees no unjustifiable interference with Mr Ongwen’s children’s rights to health and family. For these same reasons, the Single Judge considers there to be no further humanitarian, compassionate or ‘interests of justice’ grounds justifying disclosure outside the standard framework.⁴⁶

⁴⁴ Prosecution Response, ICC-02/04-01/15-1425-Conf, paras 20, 30. *See also* CLRV Response, ICC-02/04-01/15-1427-Conf, paras 13, 15.

⁴⁵ Paragraph 34 above.

⁴⁶ *Contra* Request, ICC-02/04-01/15-1414-Red, paras 80-81.

37. The conclusions reached in this section and the previous one lead the Single Judge to conclude that the relief sought in items (b) and (c) of the Request are rejected.

D. Alternative request

38. Finally, in part (d) of the relief sought, the Defence seeks an order that the Prosecution 'provide for all costs associated with the health, well-being, and education of Mr Ongwen's children'. The Single Judge notes that the Defence presents no legal basis for such an order above and beyond the arguments rejected above.

39. The Single Judge considers that the Prosecution (and Court more generally) does not have any obligation to provide all support costs for the accused's children, even when the parents of these children are Prosecution witnesses. The Prosecution's responsibilities in this regard are limited only to taking 'appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy' of victims, witnesses and persons at risk on account of the activities of the Court.⁴⁷ There is no indication that the Prosecution has failed to discharge its statutory responsibilities in relation to Mr Ongwen's children, meaning that the Defence fails to substantiate that any judicial intervention is warranted.

40. For these reasons, the alternative request is rejected.

⁴⁷ Article 68(1) of the Statute. *See also* Article 54(3)(f) of the Statute (which speaks of taking necessary measures to ensure, amongst other things, the 'protection of any person').

FOR THE FOREGOING REASONS, THE SINGLE JUDGE HEREBY

DISMISSES the Defence request for leave to reply (ICC-02/04-01/15-1435-Conf);

REJECTS the Request, save for concluding that the Investigative Note was disclosed late as specified at paragraph 12 above; and

ORDERS the Defence, Prosecution and CLRV, respectively, to file a public redacted version or request reclassification of the Defence request for leave to reply (ICC-02/04-01/15-1435-Conf), the Prosecution Response (ICC-02/04-01/15-1425-Conf) and the CLRV's two filings (ICC-02/04-01/15-1427-Conf and ICC-02/04-01/15-1440-Conf) within 10 days of notification of the present decision.

Done in both English and French, the English version being authoritative.



Judge Bertram Schmitt, Single Judge

Dated 12 February 2019

At The Hague, The Netherlands