

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

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

Date: 1 March 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 Defence Request for Leave to Appeal the 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**

Fatou Bensouda  
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**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**  
Peter Lewis

**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 ('Statute'), issues the following 'Decision on Defence Request for Leave to Appeal the Decision on Request for Disclosure and Related Orders Concerning Mr Ongwen's Family'.

1. On 12 February 2019, the Single Judge rejected a request from the Defence for Mr Ongwen ('Defence') for disclosure of all information touching upon Mr Ongwen's responsibility to his children ('Impugned Decision').<sup>1</sup> The Single Judge found that materials related to the recent or current well-being of Mr Ongwen's family did not fall under the standard disclosure framework.<sup>2</sup> With reference to international human rights law, the Single Judge further found no basis to order disclosure on humanitarian grounds outside the disclosure framework.<sup>3</sup>
2. On 18 February 2019, the defence for Mr Ongwen ('Defence') sought leave to appeal the Impugned Decision with respect to two issues ('Request').<sup>4</sup>
3. On 22 February 2019, the Prosecution and the Office of Public Counsel for Victims ('CLRv') responded that the Request should be rejected in full.<sup>5</sup>
4. The Single Judge recalls the interpretation of Article 82(1)(d) of the Statute as set out in detail previously.<sup>6</sup>

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<sup>1</sup> Decision on Request for Disclosure and Related Orders Concerning Mr Ongwen's Family, ICC-02/04-01/15-1444.

<sup>2</sup> Impugned Decision, ICC-02/04-01/15-1444, paras 13-21.

<sup>3</sup> Impugned Decision, ICC-02/04-01/15-1444, paras 22-36.

<sup>4</sup> 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, ICC-02/04-01/15-1452.

<sup>5</sup> 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), ICC-02/04-01/15-1458; CLRv's Response to "Defence Request for Orders to the Prosecution in Relation to Information Concerning Mr Ongwen's Family", ICC-02/04-01/15-1457.

## A. First Issue

5. The Defence's first proposed issue is: '[w]hether Article 21(3) of the Statute requires that that the Family Information should be disclosed to Mr Ongwen so as not to violate human rights'.<sup>7</sup>
6. The Defence presents lengthy arguments as to why the Impugned Decision is wrong or otherwise unfair. However, all the Defence says as to how its issue would further expeditiousness is that 'whether justified or not, an interference with human rights – especially one such as family life - may easily aggravate any health problems and delay trial'.<sup>8</sup>
7. In other words, the Defence argues that even *justified* interference with the accused's human rights would meet the leave to appeal criteria because of the potentially adverse consequences to the accused's health. The Single Judge considers that, were this argument to be accepted, then every adverse ruling against the accused would meet the leave to appeal criteria. Such a result cannot follow – it would render the judicial assessment under Article 82(1)(d) a foregone conclusion. The Single Judge sees no causal link between the Defence's disclosure request, the accused's health, and the advancement of the trial. The Defence's arguments are speculative and entirely unpersuasive.
8. The human rights discussion in the Impugned Decision stemmed from the fact that the information sought did not directly concern the proceedings. As such, granting leave to appeal could not further the expeditiousness of the trial or

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<sup>6</sup> Decision on Defence Request for Leave to Appeal the Trial Chamber's Oral Decision on the Exclusion of Certain Parts of the CLRV Expert Report, 1 June 2018, ICC-02/04-01/15-1268, para. 8; 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>7</sup> Request, ICC-02/04-01/15-1452, paras 3-25.

<sup>8</sup> Request, ICC-02/04-01/15-1452, para. 24.

affect its outcome.<sup>9</sup> The Single Judge concludes that this first issue does not meet the leave to appeal criteria.

## B. Second Issue

9. The Defence's second proposed issue is: '[w]hether the Single Judge erred in his evaluation of what constitutes exculpatory evidence'.<sup>10</sup> In particular, the Defence contests this consideration in the Impugned Decision:

15. The Defence argues that the Family Information is disclosable because [...] 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. [...]

19. As to [this point], 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.<sup>11</sup>

10. In the Request, the Defence understands this section of the Impugned Decision as foreclosing the Prosecution or CLRV from raising specific aggravating circumstances or arguments concerning the CLRV's clients' children for which disclosure has not been made. The Defence argues that, if this understanding was incorrect, it would be 'extremely unfair to effectively increase Mr Ongwen's sentence by denying him the opportunity to mitigate it now'.<sup>12</sup>

11. The Single Judge considers that the Defence's own argumentation belies the speculative nature of its second issue. The Defence is concerned about some future unfairness that would only occur if the result of the Impugned Decision was used against Mr Ongwen in a future sentencing decision. That any such considerations would be made does not follow from the Impugned

<sup>9</sup> *Contra* Request, ICC-02/04-01/15-1452, paras 24-25.

<sup>10</sup> Request, ICC-02/04-01/15-1452, paras 26-35.

<sup>11</sup> Impugned Decision, ICC-02/04-01/15-1444, paras 15, 19.

<sup>12</sup> Request, ICC-02/04-01/15-1452, paras 31-32 (quote from para. 32).

Decision, and forecasting them is mere conjecture by the Defence (particularly considering that the accused is presumed innocent and no judgment has been rendered).

12. The issue raised by the Defence does not arise from the Impugned Decision, and therefore fails to qualify as an appealable issue under Article 82(1)(d) of the Statute.

**FOR THE FOREGOING REASONS, THE SINGLE JUDGE HEREBY**

**REJECTS** the Request.

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

  
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**Judge Bertram Schmitt, Single Judge**

Dated 1 March 2019

At The Hague, The Netherlands