

**Cour  
Pénale  
Internationale**

**International  
Criminal  
Court**



Original: **English**

No.: **ICC-02/04-01/15**  
Date: **17 August 2016**

**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's response to request for leave to appeal decision  
ICC-02/04-01/15-521 (order to disclose witness payments)**

**Source:** Office of the Prosecutor

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

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**Victims Participation and Reparations Other  
Section**

## Introduction

1. The request for leave to appeal the Single Judge’s decision, ordering the Defence to disclose “all financial or in-kind payments or promises of money made to persons identified as potential witnesses in this case”,<sup>1</sup> should be dismissed.<sup>2</sup> The Motion mistakes the legal foundation of the Decision, and hence the issue proposed for certification does not genuinely arise from it. To the contrary, the Decision reflects nothing more than a routine procedural measure to safeguard the integrity of the ongoing trial.

2. Indeed, it is undisputed that any payments made to potential witnesses should have no connection with the substantive content of any future testimony. It follows, therefore, that the protection against self-incrimination under the Rome Statute—which is essentially a *substantive* protection—cannot be engaged by disclosure of any such payments.

## Submissions

3. Interlocutory appeals are “exceptional”,<sup>3</sup> and should not be a device “to express mere disagreement with any of the Chamber[’s] decisions”.<sup>4</sup> Hence, as the Defence acknowledges,<sup>5</sup> the issue presented for certification must be “an identifiable subject or topic requiring a decision for its resolution”,<sup>6</sup> which is “essential for the determination of matters arising in the judicial cause under examination”,<sup>7</sup> and which *genuinely* arises from the impugned decision.<sup>8</sup> By definition, leave to appeal should not be granted for an issue which was not dispositive of the Trial Chamber’s

<sup>1</sup> ICC-02/04-01/15-521 (“Decision”).

<sup>2</sup> *Contra* ICC-02/04-01/15-524 (“Motion”).

<sup>3</sup> *See e.g.* ICC-02/05-03/09-109, para. 2; ICC-02/04-01/15-428, para. 4.

<sup>4</sup> *See e.g.* ICC-01/12-01/15-T-1-ENG, p. 12 (lns. 11-12); ICC-01/05-01/13-T-10-Red-ENG, p. 11 (lns. 4-8).

<sup>5</sup> Motion, para. 5.

<sup>6</sup> *See e.g.* ICC-01/04-168 (“DRC Appeal Decision”), para. 9.

<sup>7</sup> *See e.g.* DRC Appeal Decision, para. 9.

<sup>8</sup> *See e.g.* ICC-01/05-01/13-1278, paras. 9-10.

original decision. Nor can leave to appeal be granted on the basis that the Appeals Chamber should determine whether the proposed issue arises from the decision—this would abdicate the responsibility vested in the first instance chamber.

4. The Motion fails to present an issue which is ‘appealable’ in this sense, and therefore must be dismissed. Moreover, and in any event, the proposed issue fails to meet the further requirements of article 82(1)(d) of the Statute, necessary to justify appellate intervention in an ongoing trial.

#### **A. The proposed issue does not genuinely arise from the Decision**

5. Although the general thrust of the Defence complaint is clear, the Motion fails to define the issue presented for certification concretely or consistently.<sup>9</sup> The Prosecution understands the issue in general terms to be:

Whether the order to disclose payments to persons identified as potential witnesses in this case impermissibly violates Mr Ongwen’s “right to silence” under articles 55(1)(a) and 67(1)(g).

6. This issue is thus conditioned on the premise that the disclosure order in the Decision has any effect upon Mr Ongwen’s right to silence, and consequently seeks appellate guidance on its legality. Yet it does not. For this reason, the issue cannot genuinely arise from the Decision.<sup>10</sup>

7. Articles 55(1)(a) and 67(1)(g) of the Statute guarantee, without qualification, that a suspect or accused person shall not be “compelled to incriminate himself or herself” or “to testify” or “to confess guilt”. The essence of this right is that suspects

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<sup>9</sup> See e.g. Motion, paras. 2 (“the order to disclose financial transactions to Mr Ongwen’s family which are potential witnesses violates Mr Ongwen’s right to remain silent pursuant to Articles 55(1)(a) and 67(1)(g)”), 12 (“forcing Mr Ongwen to disclose any alleged payments of monies or promises of cash-or-kind violates Mr Ongwen’s rights, and is an appealable issue”), 16 (requesting certification “on the issue that requiring Mr Ongwen to disclose the records violates his right to remain silent pursuant to Articles 55(1)(a) and 67(1)(g)”).

<sup>10</sup> *Contra* Motion, para. 12.

and accused persons may not be compelled to make utterances which are admissible in evidence in criminal proceedings against them. It is both *personal* to the suspect or accused person (in that it relates to the privacy of their own thoughts and recollections, and their physical integrity and autonomy), and it is *testimonial* (in that it protects information going to the merits of the case against them). Correspondingly, it is *not*:

- a protection for material which is *already recorded* and which does not require the suspect or accused person to participate in its retrieval (even if it is in their possession), or for material which is *already known* to another person who may (absent any relevant privilege) separately be compelled to provide it;<sup>11</sup> or
- a protection against the *procedural* requirements necessary to ensure a fair trial, such as Defence disclosure when the accused elects to present an affirmative defence,<sup>12</sup> Defence disclosure to enable reasonable preparation,<sup>13</sup> or the Defence's capacity to cross-examine witnesses in article 56 proceedings.<sup>14</sup>

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<sup>11</sup> See e.g. Alamuddin, A., "Collection of evidence," in Khan et al (eds.), *Principles of Evidence in International Criminal Justice* (Oxford: OUP, 2010), pp. 263, 285, 292-293 ("Under international human rights law, the privilege [against self-incrimination] does not generally prevent a person from being compelled to produce documents, even those that contain incriminating statements, if the person is required to do so pursuant to a judicial order. If, however, a person facing criminal charges is ordered to *create* the documents, or to identify and provide documents that the authorities do not know exist, this may be a violation of the privilege against self-incrimination. [...] Conversely, where compelled acts are not testimonial—*i.e.*, where the act does not imply a fact or belief—one might expect that the privilege should not apply, even if performing the act has the effect of providing incriminating evidence"). Given the facts of the present application, the Prosecution does not address the legal framework where recorded material may potentially *only* be accessed by means of a key which is solely in the possession of a suspect or accused person (so-called 'key disclosure' cases).

<sup>12</sup> See e.g. ICC-02/04-01/15-460, paras. 10 ("[T]he Single Judge notes the Defence contention that requiring disclosure under Article 31(1) of the Statute at the present time would violate Mr Ongwen's right to remain silent. The Single Judge notes that, while the accused's right to remain silent and not to incriminate himself is inviolable, the Statute's framework also imposes certain obligations on the Defence in order to ensure a fair and expeditious trial. Rules 79 and 80 of the Rules are two such obligations and do not infringe the rights of the accused"), 19 ("the Court's statutory framework carefully protects the accused's rights while ensuring the fairness and expeditiousness of the trial. Thus, Rules 79 and 80 of the Rules require the Defence to provide disclosures which enable the Prosecution to adequately prepare and to respond but do not require the Defence to fully articulate its case before the completion of the Prosecution's case").

<sup>13</sup> See e.g. Rules of Procedure and Evidence, rule 78.

<sup>14</sup> See e.g. ICC-02/04-01/15-520, para. 12.

8. The Motion overlooks these basic characteristics of the rights in articles 55(1)(a) and 67(1)(g), precluding their relevance to the disclosure ordered by the Decision. Faced with a decision concerning apples, the Defence invites this Chamber to certify an issue concerning oranges. This is apparent from the content of the Decision itself.

9. First, the Single Judge's order is not addressed exclusively to Mr Ongwen but to his *defence team*. Unlike the order to cease making payments (which is expressly directed to "Mr Ongwen"), the disclosure order is directed generally to "the Defence".<sup>15</sup> Indeed, it appears that members of Mr Ongwen's defence team may have assisted in any disbursement of funds by Mr Ongwen<sup>16</sup>—which would not be unexpected for *bona fide* payments.

10. Second, even if Mr Ongwen is required to disclose information known only to him, the material ordered to be disclosed—"all financial or in-kind payments or promises of money made to persons identified as potential witnesses"—is *not testimonial* for the purpose of this trial, and therefore lies outside the scope of article 67(1)(g). Details of such payments offer no clue as to the evidence which these persons may provide, nor indeed do any of the charges confirmed against Mr Ongwen in this trial relate to the payment of potential witnesses. To the contrary, such information is relevant only to the procedural fairness of this trial—and thus is similar in kind to other forms of disclosure which have been recognised to fall outside the scope of article 67(1)(g).

11. Furthermore, the Single Judge was careful in the Decision to stress that the disclosure order applies to "persons *currently identified* as potential Prosecution or Defence witnesses in this case".<sup>17</sup> This means those who presently "appear on a

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<sup>15</sup> Decision, Disposition, p. 10.

<sup>16</sup> See e.g. Decision, para. 4 ("The Defence submitted that Mr Ongwen gave his counsel 1,000 Euros from his savings, which he earned at the Detention Centre, to give to his family and that he was providing advice on how to disperse the monies amongst his family during one of the terminated conversations").

<sup>17</sup> Decision, para. 16 (emphasis added).

provisional or final witness list”, and does not include potential witnesses that the Defence has not independently been required to identify.<sup>18</sup> As such, the disclosure order does not even require the Defence to give any additional warning of its intentions concerning other witnesses it may choose to call.

12. Third, the Decision emphasises that this Chamber is not presently seised of the question of any violation of article 70 of the Statute, directing the Prosecution to address any motions concerning investigative measures for that purpose to the Pre-Trial Chamber.<sup>19</sup> It follows that the disclosure which has been ordered is not for the purpose of any separate article 70 investigation, but is no more than a measure “to ensure that the trial is fair, free from the taint of witness interference.”<sup>20</sup> Correspondingly, the protection of Mr Ongwen’s article 55(1)(a) right for the purpose of any article 70 investigation is wholly irrelevant to the Decision.<sup>21</sup> Conversely, while this Chamber continues to protect Mr Ongwen’s article 67(1)(g) right in the context of the charges confirmed against him, nothing in these circumstances show that right even to be engaged.

13. In the context of these facts, the clarity or otherwise of “the Prosecution’s intentions” concerning any article 70 investigation is irrelevant.<sup>22</sup>

**B. The proposed issue does not significantly affect the fair and expeditious conduct of these proceedings**

14. In any event, the Motion fails to show that the proposed issue affects the fair and expeditious conduct of the proceedings at all, let alone does so “significantly” as required by article 82(1)(d) of the Statute. As such, the proposed issue does not have

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<sup>18</sup> See Decision, para. 16, fn. 37.

<sup>19</sup> Decision, para. 20. See also Motion, para. 10.

<sup>20</sup> Decision, para. 17. See also para. 15 (“the Single Judge is concerned about the possible impact Mr Ongwen’s payments may have on the testimony of potential witnesses in this case”).

<sup>21</sup> *Contra* Motion, para. 11.

<sup>22</sup> *Contra* Motion, para. 12.

the necessary impact on the proceedings to justify appellate intervention at this stage.

15. In particular, the Motion mischaracterises the Decision when it implies that disclosure was ordered “to determine if there was a violation of Article 70 of the Statute.”<sup>23</sup> To the contrary, disclosure was ordered to protect the integrity of these proceedings and the fairness of this trial,<sup>24</sup> consistent with the fundamental requirements of the Statute. It can thus hardly be said that such measures are in principle a “waste[]” of “time and resources” with “little bearing on the case at hand”.<sup>25</sup> And the Defence makes no effort concretely to explain, in practice, how this measure to protect the fairness of the proceedings may significantly affect them to his detriment. The reference to a “taint” of “the entire proceedings” is unexplained and wholly speculative.<sup>26</sup>

16. Moreover, on the assumption that any payments made to potential witnesses in this case must be modest and easily accounted for, the disclosure ordered cannot be so very onerous. Any impact on the expeditious conduct of the proceedings must therefore be very limited.

17. The Defence does not attempt to argue, in the alternative, that the proposed issue will significant affect the outcome of the trial.

### **C. Appellate intervention will not materially advance these proceedings**

18. Likewise, the Motion fails to satisfy the final condition of article 82(1)(d)—that immediate resolution of the proposed issue by the Appeals Chamber may materially advance the proceedings.<sup>27</sup> Again, the Defence merely refers to “a real and serious

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<sup>23</sup> See Motion, para. 13.

<sup>24</sup> See above para. 12.

<sup>25</sup> *Contra* Motion, para. 14.

<sup>26</sup> *Contra* Motion, para. 14.

<sup>27</sup> *Contra* Motion, para. 15.



possibility” that the disclosure ordered may “taint the entire proceedings”, but does not substantiate how this might be so. Indeed, by stressing its view that the disclosure order requires Mr Ongwen “to give any alleged evidence”, and raising the concern that the order “could taint an entirely different proceeding”, the Motion again betrays the fundamental misconceptions by which it is vitiated.

### **Conclusion**

19. For all the reasons above, the Chamber should dismiss the Motion.



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Fatou Bensouda, Prosecutor

Dated this 17<sup>th</sup> day of August 2016

At The Hague, The Netherlands