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**International
Criminal
Court**

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Date: **18 February 2019**

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

**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**

Source: Defence for Dominic Ongwen

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

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I. INTRODUCTION

1. Pursuant to Article 82(1)(d) of the Rome Statute ('Statute'), the Defence for Dominic Ongwen ('Defence') seeks leave to appeal the Single Judge of Trial Chamber IX's ('Single Judge' and 'Trial Chamber' respectively) "Decision on Request for Disclosure and Related Orders Concerning Mr Ongwen's Family".¹ The appellate issues are:
 - a. Whether 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; and
 - b. Whether the Single Judge erred in his evaluation of what constitutes exculpatory evidence.
2. The Defence incorporates by reference the jurisprudence of the Appeals Chamber with respect to seeking leave to appeal as set out in prior requests.²

II. SUBMISSIONS

A. **Whether 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**

i. *The issue*

3. According to the Single Judge, the primary issue raised by the Request is: "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?"³
4. The Single Judge agreed that the right to family life is implicated by the Defence request⁴ and noted that neither the Prosecution nor Common Legal Representative for Victims ('CLRV') contest that proposition. The key issue according to the Single Judge was whether the interference with family life was justified.⁵
5. The Defence raised multiple issues for reply concerning fairness in respect to the Prosecution and CLRV responses; however, this request for leave to reply was dismissed *in limine* for

¹ ICC-02/04-01/15-1444 ('Impugned Decision').

² ICC-02/04-01/15-1334-Red, paras 4 to 10.

³ Impugned Decision, para. 25.

⁴ ICC-02/04-01/15-1414-Conf ('Request').

⁵ Impugned Decision, para. 26.

being late.⁶ As the Single Judge did not entertain the possible issues contained therein, factors were not weighed in the disposition of the issue.

6. Further, in deciding that the interference in Mr Ongwen's family life is justified, the Single Judge made errors in his analysis of the necessity and proportionality of the measures which led to him concluding that the measures were justified. Those errors led the Single Judge to a conclusion which will impact upon the fairness, expeditiousness, and outcome of the case.⁷ Therefore this issue is one for which immediate resolution by the Appeals Chamber would materially advance the proceedings.

ii. *Errors in the analysis of necessity*

7. A restriction on a human right is not necessary when a less intrusive measure could have been used without unacceptably compromising the achievement of the objective.⁸ In assessing the necessity of the measures impacting upon Mr Ongwen's right to family life, the Single Judge examined (1) the basis of the communication restrictions and (2) the nature of the crimes alleged.
8. Both reasons for justifying the restrictions on Mr Ongwen's right to family life are flawed. This is because the Single Judge misrepresents the background reasons for the restrictions regime. The stated basis for the restrictions regime at pre-trial and trial was the avoidance of witness interference and not for expeditiousness or because of the nature of the charges.⁹

⁶ The Defence notes its erroneous interpretation of Regulation 33(1)(d) of the Regulations of the Court for the counting of the leave to reply deadline which would have been considered correct for a due-date falling on any "working day of the Court". The Defence notes that the issues could have been considered in the interests of justice.

⁷ See paras 20-25 below.

⁸ See for example *Bank Mellat v HM Treasury* [2013] UKSC 39, para. 74 for a discussion of the principle in the context of the UK Supreme Court applying the law of the European Convention on Human Rights in a domestic context, available at: <http://www.bailii.org/uk/cases/UKSC/2013/39.html>.

⁹ ICC-02/04-01/15-254, para. 8 ("guaranteeing the fairness of the present proceedings"); ICC-02/04-01/15-283, para. 9 ("the imposition of restrictions on Dominic Ongwen's communications was based on a reasonable suspicion that there had been attempts to exercise some form of influence on persons who possess information relevant to the case"); para. 14 ("intervene without undue delay in case of any future information which may lead to a reasonable suspicion concerning attempts to exercise some form of influence on persons who possess information relevant to the case"); ICC-02/04-01/15-450-Red; ICC-02/04-01/15-553, para. 1 ("This measure was taken on the basis of 'a reasonable suspicion that there had been attempts to exercise some form of influence on persons who possess information relevant to the case'") and para. 9 ("the Chamber has an obligation to ensure that the trial is fair, free from the taint of witness interference and undue coercion. In light of this obligation, the Single Judge cannot authorise Mr Ongwen to have telephone contact with these persons, all of whom are either Prosecution witnesses or persons previously removed from his contact list as a result of the PTC Single Judge's 'reasonable suspicion that there had been attempts to exercise some form of influence on persons who possess information relevant to the case'").

9. Additionally, as was noted in the Defence Request for leave to reply,¹⁰ Mr Ongwen continues to benefit from the basic principle of the presumption of innocence pursuant to Article 66. The Single Judge's reliance upon the nature of the crimes alleged by the Prosecution reversed the burden upon Mr Ongwen in violation of Article 67(1)(i).
10. The Single Judge's analysis of the necessity borne out of the nature of the alleged crimes also contains errors as it mischaracterises the Defence request and mistakes the necessity of the measures for interfering with Mr Ongwen's human rights with whether Mr Ongwen's request is necessary to safeguard the welfare of his children.
11. The Single Judge considered that the necessity of providing "unfettered access" to the family information was not made out by the Defence to ensure Mr Ongwen's children's rights to health.¹¹ Yet the Defence did not seek unfettered access but rather only information upon which Mr Ongwen could act to assist his children.¹² The Defence Request as framed by the Single Judge was unduly restrictive as it considered that the only possible outcomes were granting all of the Request or none of it. It was also open to the Single Judge to consider whether parts of the Defence request could have been granted.
12. Having accepted that the right to family life was engaged, in reaching the Impugned Decision, the onus was on the Single Judge is to justify the interference with Mr Ongwen's rights.¹³
13. As the Single Judge also considered that the children's right to health was implicated,¹⁴ it appears that the Single Judge confused his analysis of whether the infringements were justifiable in light of the nature of the charged crimes with whether the provision of family information was necessary to ensure Mr Ongwen's children's right to health. Having accepted that the children's right to health was engaged, the Single Judge should have assessed whether this separate interference could be justified.

¹⁰ ICC-02/04-01/15-1435-Conf, para. 6.

¹¹ Impugned Decision, para. 30.

¹² Request, paras 57 and 82(c).

¹³ At the European Court of Human Rights, in procedural terms, it is for the respondent state to justify the objective pursued with the interferences. See 'Protecting the right to respect for private and family life under the European Convention on Human Rights' (Council of Europe human rights handbooks, 2012), p. 42, available at: https://www.echr.coe.int/LibraryDocs/Roagna2012_EN.pdf. For example see the case cited by the Single Judge at footnote 30 of the Impugned Decision: *Elsholz v. Germany*, 13 July 2000, app. no. 25735/94, para. 48, available at <http://hudoc.echr.coe.int/eng?i=001-58763>.

¹⁴ Impugned Decision, paras 30 and 36.

iii. *The flawed proportionality assessment*

14. Whether interference is acceptably proportionate follows from how necessary the interference is in the first place. Given the errors in assessing necessity addressed above, the Defence submits that the Single Judge's proportionality's assessment was flawed because the necessity for interference was perceived as too high.
15. The Impugned Decision considered that the restrictive measures were proportionate in the context of (1) Mr Ongwen's entitlement to have contact with his children;¹⁵ (2) Mr Ongwen's entitlement to add people to his contact list where the Prosecution does not object;¹⁶ and (3) the existence of the negotiated framework for a way to contribute to the welfare of his children.¹⁷ The Single Judge considered that these factors lessened the interference with Mr Ongwen's family rights.
16. That Mr Ongwen can contact the children where the mother consents does not mitigate the inference as suggested by the Impugned Decision. There is no guarantee that his children will communicate information necessary for their best interests to Mr Ongwen nor is it their responsibility. The very existence of the requirement under Article 3 of the Convention on the Rights of the Children¹⁸ is underpinned by the fact that children will not always be in a position to articulate or know what is in their best interests.
17. Secondly, in respect to having contact with other family members, should Mr Ongwen inquire as to matters impacting upon or about the mothers this could be interpreted as an attempt to interfere with them.¹⁹ That in turn could jeopardise Mr Ongwen's right to communicate with his children or family. Thus the fact that he can have family members added to his list does not mitigate the harm of the interference.
18. More broadly, the existence of communication does not guarantee the flow of information necessary for Mr Ongwen to provide for the welfare of his children or anticipate all their needs.

¹⁵ Impugned Decision para. 33.

¹⁶ *Ibid.*

¹⁷ *Ibid.*, para. 34.

¹⁸ UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3, Article 3(1), available at: <https://www.refworld.org/docid/3ae6b38f0.html>.

¹⁹ ICC-02/04-01/15-553, para. 11.

19. With regards to the negotiated settlement and consent, the Defence submits that the reasoning of the Impugned Decision is flawed. As referred to in the Defence request for leave to reply,²⁰ there are fundamental problems concerning what the mothers consent actually is. In respect to the Impugned Decision, the most relevant arguments in respect of proportionality are:
- a. The CLRV response to the Defence Request indicated²¹ that the CLRV will respect her client's consent²² and at the same time appeared to question whether that consent should be considered voluntary.²³ It is not clear that the CLRV would communicate the information. Therefore the Single Judge's suggestion²⁴ that the CLRV will raise all matters if the mother consents is misplaced;
 - b. The CLRV has a conflict of interest which the CLRV acknowledges is a professional ethical dilemma.²⁵ The CLRV is not the children's lawyer and it is not inconceivable that the mother and children's interests may diverge. Similarly, the Prosecution is not a neutral party in these proceedings. These conflicting interests were not considered in the Impugned Decision's discussion of the consent of the mothers;
 - c. If the mothers consent is informed through the lens of one party to proceedings that have an adversarial character it may not be fully informed. This is an acute issue impacting upon the Single Judge's analysis because it is unclear whether the mothers of the children are fully informed as to the procedure and therefore it is unclear whether their consent is meaningful in the circumstances. As previously raised,²⁶ the Defence has previously made an email request to the Trial Chamber²⁷ with respect to an issue apparently raised by P-214 whereby it appears that she was not aware that her testimony would be used to harm Mr Ongwen;
 - d. Finally, there is a contradiction in the reasoning of the Impugned Decision whereby it states that a parent cannot be entitled to have such measures taken that would harm the child's health and development²⁸ and yet at the same time relies solely upon the consent

²⁰ ICC-02/04-01/15-1435-Conf, paras 21-26, and 29.

²¹ ICC-02/04-01/15-1427-Conf('CLRV Response').

²² CLRV Response, para. 19.

²³ *Ibid.*, para. 17.

²⁴ Impugned Decision, paras 36 and 37.

²⁵ CLRV Response, para. 14.

²⁶ ICC-02/04-01/15-1435-Conf, para 24.

²⁷ Email, sent 11 January 2019 at 15h03, subject line 'Information and request for order to Registry'.

²⁸ Impugned Decision, para. 24.

of the mothers in respect to the well-being of the children.²⁹ The Sing Judge uses human rights jurisprudence to dismiss Mr Ongwen's right yet affirms the mother's without qualification.

iv. Fairness, expeditiousness, and outcome of trial

20. The Appeals Chamber has previously defined the term "fair" as being associated with the norms of a fair trial and corresponding human rights, as per Article 64(2) and 67(1) of the Statute.³⁰ As noted above,³¹ the assessment of necessity has imposed a reverse burden upon Mr Ongwen which is contrary to the fair-trial rules at the ICC. Thus the issue implicates the fairness of the trial.
21. The definition of fairness specified by the Appeals Chamber in respect to Article 82(1)(d) does not explicitly include other ways in which a decision of a Pre-Trial Chamber or Trial Chamber could impact upon the human rights of the Accused. However, a decision violating the human rights of the Accused could be conceived as not affecting the fairness of the trial if trial fairness is narrowly understood as only the explicit rights in Article 67(1). The Defence submits that the Trial Chamber must evaluate the impact of the issue taking a broader human-rights centric approach.
22. 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.³² The Appeals Chamber has held that a Trial Chamber ought to "exercise its discretion to broadly interpret the two prongs of [A]rticle 82(1)(d) of the Statute if it considers it necessary due to human rights considerations under [...] [A]rticle 21(3) of the Statute".³³ The Appeals Chamber also states that "the concept of fairness of proceedings under article 82(1)(d) of the Statute requires looking into the broad concept of a fair trial enshrined in human rights instruments. This is consistent with the essence of the Statute, which requires that the application of its provisions be consonant with internationally recognised human rights".³⁴
23. Conditions of detention that have a major impact on the capacity of an accused to exercise the right of effective participation, accordingly, is a matter that affects the fair conduct of

²⁹ Impugned Decision, para. 35.

³⁰ ICC-01/04-168 OA03, para. 11.

³¹ See para. 9 above.

³² Impugned Decision, para. 22 *citing* Article 21(3) of the Statute.

³³ ICC01/05-01/13-1533 (OA12), para. 16.

³⁴ Situation in Uganda, ICC-02/04-112, para. 26.

proceedings under Article 82(1)(d). Notwithstanding that suffering an unjustified human rights violation for an extended period of a trial will impact upon the ability of an Accused to make use of such rights as *inter alia* contained in Article 67(1)(b), (d), and (e), it is simply unfair to force an Accused through an extended trial while imposing an unjustified interference in his human rights.

24. The Trial Chamber is aware of some of the issues concerning Mr Ongwen's health.³⁵ Whether justified or not, an interference with human rights – especially one such as family life – may easily aggravate any health problems and delay trial.³⁶ If such interference is not justified, then the appealable issue is unjustifiably impacting upon the expeditiousness of trial.
25. An unjustified human rights violation running until any future appeal against conviction and sentence is serious and will impact upon the fairness and expeditiousness of the trial in such a way that even a nullification of the trial or at least a reduction of sentence could be considered. Thus the issue is one which could impact upon the outcome of the trial.

B. Whether the Single Judge erred in his evaluation of what constitutes exculpatory evidence

26. The legal and factual correctness of the Single Judge's assessment of the requested family information material as not concerning exculpatory material is an issue that arises from the Impugned Decision.
27. The Single Judge rejected the Defence argument concerning the family information as possibly exculpatory for the purposes of sentence mitigation on the basis that the "Defence only argues that hypothetically mitigating conduct could result from receiving this information."³⁷ This was "an insufficient showing to warrant disclosure under Article 67(2) of the Statute."³⁸
28. In doing so, the Single Judge drew a distinction between material which would mitigate guilt and information which if available could enable conduct that would mitigate guilt. No legal basis was cited for this distinction.

³⁵ See, for example, ICC-02/04-01/15-1449-Conf-AnxI, ICC-02/04-01/15-1449-Conf-AnxII, and ICC-02/04-01/15-1416-Conf-AnxI-Corr.

³⁶ The Defence notes that trial was scheduled to start on 14 January 2019 (Email, subject line "Revised Early 2019 Hearing Dates", sent 19 November 2018 at 14h05) and has as of the time of filing sat for one day on 31 January 2019 (ICC-02/04-01/15-T-198-CONF-ENG).

³⁷ Impugned Decision, para. 19.

³⁸ *Ibid.*

29. ICC jurisprudence has taken a generous view of what constitutes exculpatory evidence.³⁹ All but the most plainly exonerative evidence requires some action from the Defence to be deployed in an exculpatory way during a trial. Despite being characterised as “overbroad”⁴⁰ and a request for “unfettered access”⁴¹ the Defence request⁴² was restricted to information upon which Mr Ongwen could take action upon. It is therefore an error to dismiss the request on the basis that since the actions of Mr Ongwen are hypothetical, the exculpatory nature of the information simply does not exist.

i. Fairness, expeditiousness, and outcome of trial

30. Pursuant to Article 76(2), any future sentencing hearing is part of the trial.⁴³
31. The Defence understands the Single Judge rejection of disclosure under the standard criteria⁴⁴ to foreclose the Prosecution or CLRV from raising specific aggravating circumstances or arguments concerning the CLRV’s clients’ children for which disclosure has not been made at a point in time when Mr Ongwen can re-allocate his limited resources and mitigate said specific harm.
32. If the Defence is wrong, and new information at a potential sentencing hearing is accepted concerning harms to Mr Ongwen’s children, then it is extremely unfair to effectively increase Mr Ongwen’s sentence by denying him the opportunity to mitigate it now.
33. The Defence notes the Single Judge’s caution concerning arguments threatening future litigation;⁴⁵ however, the Defence emphasises that under the condition contemplated in the prior paragraph it would be failing to protect Mr Ongwen’s rights not to strenuously object. Thus, the issue has the potential to impact upon the expeditiousness of proceedings.
34. Where material is introduced into proceedings which could not be mitigated, it could impact upon any future sentence and thus the outcome of the trial. Thus, the identified issues may impact upon the fairness, expeditiousness, and outcome of the trial.

³⁹ See *inter alia*, ICC-01/04-01/06-1311-Anx2, para. 24 (“if the prosecution has in its possession *potentially* exculpatory evidence which in accordance with Article 67(2) of the Statute may have a real, as opposed to minimal, impact on the trial in favour of the accused, he has an absolute entitlement to receive it, albeit in an appropriate form.” – emphasis added).

⁴⁰ Impugned Decision, para. 18.

⁴¹ *Ibid.*, para. 30.

⁴² ICC-02/04-01/15-1414-Conf, para. 57.

⁴³ ICC-01/05-01/08-3384, para. 20.

⁴⁴ Impugned Decision, para. 20.

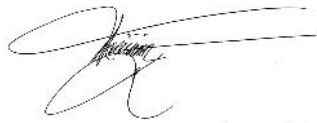
⁴⁵ *Ibid.*, para. 29.

35. An issue such as the above is one that will benefit from examination by the Appeals Chamber. Where an issue impacts upon all three criteria, resolution by the Appeals Chamber will clearly materially advance the proceedings.

III. RELIEF

36. For the reasons stated above, the Defence respectfully requests that leave is granted pursuant to Article 82(1)(d) by the Trial Chamber to appeal the following issue:
- a. Whether Article 21(3) of the Statute requires that the Family Information should be disclosed to Mr Ongwen so as not to violate human rights; and
 - b. Whether the Single Judge erred in his evaluation of what constitutes exculpatory evidence.

Respectfully submitted,



.....
Hon. Krispus Ayena Odongo
On behalf of Dominic Ongwen

Dated this 18th day of February, 2019
At The Hague, The Netherlands