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DISSENTING OPINION OF JUDGE KIMBERLY PROST

1. I am unable to join the Majority's decision to grant the Defence request¹ seeking that the Chamber recognise the applicability of Rule 75 of the Rules to D-0605's upcoming testimony. In my view, the precedent set by the Single Judge of Trial Chamber IX in the *Ongwen* case ('*Ongwen* Decision'),² referenced by the Majority, should not be followed because a significantly different interpretation of Rule 75 is warranted.
2. First, I note that, on a plain reading of Rule 75 of the Rules, this provision only applies where the family member in question is 'an accused'. There is nothing in the language of this rule which supports an interpretation extending its application to a broader category of individuals, such as potential suspects. It was clearly open to the drafters to reflect the policy considerations referenced in the *Ongwen* decision by making specific reference to suspects, persons under investigation or those subject to a warrant of arrest. Instead, the deliberate choice was made to refer only to an 'accused', a term with a specific meaning in the context of the Statute and Rules.
3. Moreover, in my view, Rule 75 of the Rules was never intended to accord a witness a right to not provide incriminating evidence regarding a spouse, parent or a child generally in the course of testimony, because of the difficult position it creates for the witness. On this point I respectfully disagree with the reasoning in the *Ongwen* decision which identifies this as one of the important aims of Rule 75.³ I note that witnesses are often placed in difficult circumstances, including those which have the potential to strain close relationships. This, however, does not preclude the witness from being compelled to answer the question. What the rule addresses is a situation where a witness is compelled to give evidence in a context where it may incriminate a close relative who is the accused. What triggers the right is the fact that the incriminating evidence can

¹ Email from the Defence on 1 August 2022 at 10:31. *See also*, email from the Prosecution on 3 August 2022 at 22:09.

² Trial Chamber IX, *The Prosecutor v. Dominic Ongwen*, Decision on Defence Request for Protective and Special Measures and Rule 75 Assurances, 5 July 2018, ICC-02/04-01/15-1301-Red.

³ *Ongwen* Decision, ICC-02/04-01/15-1301-Red, paras 51-52.

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have direct and immediate consequences because it is provided as testimony against the relative in question in their trial. Unlike in the case of self-incrimination, which I note is also of relevance to D-0605,⁴ this is evidence which cannot be compelled at all meaning the Chamber will be deprived of potentially highly relevant evidence in the case. Given this, the rule should be strictly interpreted to maintain the balance the drafters struck between the competing interests at stake.

4. The drafting history of Rule 75 illustrates that it was one of the most controversial provisions discussed in the negotiation process related to the Rules of Procedure and Evidence. It was an issue that was raised in every discussion which related to incrimination of any form and there were strongly divided views as to what, if any, exception should be included with respect to family members.⁵ Underlying the debate was the differing societal perspectives on the appropriate balance to be struck between safeguarding family relationships by preventing compelled testimony against a close relation and ensuring the availability of relevant evidence for a trial.⁶ Ultimately a compromise was achieved which recognized that a witness could be compelled to testify even though she or he was a parent, child or spouse of an accused in that trial but the witness could not be required by the Chamber to make any statement which might tend to incriminate that accused. Viewed in the context of its drafting history, it is clear that the intention was to limit the scope of the rule to protecting a witness from being compelled to make incriminating statements against a close relation who is one of the accused in the trial for which the testimony is to be given. The fact that the reference is to 'an' accused as opposed to 'the' accused is, in my view, intended to recognize only that there may be more than one accused in a single trial.
5. Given this context, the case of D-0605 and his relative goes well beyond the situation envisaged by the drafters when the compromise of Rule 75 of the Rules, in its current form, was reached. The provision strikes a balance between, on one

⁴ Decision on assurances pursuant to Rule 74 of the Rules for D-0605, 15 August 2022, ICC-01/12-01/18-2294.

⁵ D. K. Piragoff, 'Evidence' in R. S. Lee (Ed.) *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (2001) ('Lee'), p. 396.

⁶ Lee, pp 398-399.

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hand, the need for evidence in support of the truth-finding function and, on the other hand, protecting a witness from being forced to incriminate a close family member in a very specific way, i.e. in a trial proceeding against that person. This compromise and balance was achieved taking into account the differing views of States, including those arising from different legal traditions, respecting that the ICC system is a hybrid one. In light of this drafting history I believe the intention of the Rule is clear and its application should be consistent with that legislative intent.

6. Finally, I am of the opinion that the Chamber's responsibility in the search for the truth strongly militates in favour of hearing the totality of D-0605's evidence. In extending the application of Rule 75 in these circumstances the Chamber is precluding receipt of potentially important and relevant evidence solely on the basis of a possible future issue of incrimination. In my view that approach fails to give sufficient weight to the fact finding responsibility of the Chamber.
7. In sum, I am of the view that Rule 75 should be strictly interpreted in accordance with its plain reading and the legislative intent behind it. Thus, I am unable to join with the Majority in according the rights under Rule 75 with respect to a witness whose close relation is not an accused before the Court let alone an accused in the trial in which the witness is testifying.
8. I would have rejected the Defence's request and required D-0605 to answer any and all questions put to him.

Done in both English and French, the English authoritative.



Judge Kimberly Prost

Dated this Monday, 22 August 2022

At The Hague, The Netherlands