

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

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

Date: **28 June 2021**

**APPEALS CHAMBER**

**Before:**

**Judge Luz del Carmen Ibáñez Carranza, Presiding Judge  
Judge Piotr Hofmański  
Judge Solomy Balungi Bossa  
Judge Reine Alapini-Gansou  
Judge Gocha Lordkipanidze**

**SITUATION IN UGANDA**

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

**PUBLIC**

**Defence Notice of Appeal of the Sentencing Decision**

**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**

Karim A.A. Khan, QC, Prosecutor  
James Stewart, Deputy Prosecutor  
Helen Brady

**Counsel for the Defence**

Krispus Ayena Odongo  
Chief Charles Achaleke Taku  
Beth Lyons

**Legal Representatives of the Victims**

Joseph Akwenyu Manoda  
Francisco Cox

**Common Legal Representative for Victims**

Paolina Massidda  
Orchlon Narantsetseg  
Caroline Walter

**Unrepresented Victims****Unrepresented Applicants  
(Participation/Reparation)****The Office of Public Counsel for Victims**

Paolina Massidda

**The Office of Public Counsel for the  
Defence**

Xavier-Jean Keïta

**States' Representatives****Amicus Curiae****REGISTRY****Registrar**

Peter Lewis, Registrar

**Counsel Support Section****Victims and Witnesses Unit****Detention Section****Victims Participation and Reparations  
Section****Other**

## I. INTRODUCTION

1. Pursuant to Article 82(1)(a) of the Rome Statute and Rule 150(1) of the Rules of Procedure and Evidence, the Defence for Dominic Ongwen ('Defence') hereby gives notice of its intent to appeal Trial Chamber IX's "**Sentencing**" ('Impugned Decision'),<sup>1</sup> Trial Chamber IX's "**Decision scheduling a hearing on sentence and setting the related procedural calendar**"<sup>2</sup> ('Impugned Order') and Trial Chamber IX's "**Decision on Defence request for leave to appeal the 'Decision scheduling a hearing on sentence and setting the related procedural calendar'**" ('Impugned Decision 2').<sup>3</sup>
2. The Defence asserts that the decisions and orders set out in the Impugned Order and in Impugned Decision 2 materially affected the outcome of the individual sentences, joint sentence and the fair trial rights of Mr Dominic Ongwen ('Appellant') in the Impugned Decision.

## II. PROCEDURAL HISTORY

3. On 4 February 2021, Trial Chamber IX ('Chamber') issued its Trial Judgment, convicting the Appellant on 61 counts of war crimes and crimes against humanity.<sup>4</sup> On the same day, the Chamber issued the Impugned Order.<sup>5</sup>
4. On 10 February 2021, the Defence requested leave to appeal the Impugned Order as it violated the Appellant's fair trial rights under Articles 67(1)(a), (b), (e) and (f) of the Rome Statute and Rule 144(2)(b) of the Rules of Procedure and Evidence ('Rules').<sup>6</sup>
5. On 22 February 2021, the Chamber rejected the Defence's 10 February 2021 request for leave to appeal the Impugned Order.<sup>7</sup>

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<sup>1</sup> Trial Chamber IX, *Sentence*, [ICC-02/04-01/15-1819](#) and *Partially Dissenting Opinion of Judge Raul C. Pangalangan*, [ICC-02/04-01/15-1819-Anx.](#)

<sup>2</sup> Trial Chamber IX, *Decision scheduling a hearing on sentence and setting the related procedural calendar*, [ICC-02/04-01/15-1763](#).

<sup>3</sup> Trial Chamber IX, *Decision on Defence request for leave to appeal the 'Decision scheduling a hearing on sentence and setting the related procedural calendar'*, [ICC-02/04-01/15-1777](#).

<sup>4</sup> Trial Chamber IX, *Trial Judgment*, ICC-02/04-01/15-1762-Conf (PRV available [here](#)).

<sup>5</sup> See Impugned Order.

<sup>6</sup> Trial Chamber IX, *Defence Request for Leave to Appeal 'Decision scheduling a hearing on sentence and setting the related procedural calendar'*, ICC-02/04-01/15-1766-Conf (PRV available [here](#)).

<sup>7</sup> See Impugned Decision 2.

6. On 23, 24 and 25 February 2021, the Prosecution, Common Legal Representative for Victims and Legal Representatives for Victims ('CLRV' and 'LRV'; and jointly 'Legal Representatives') submitted notifications that none of them would be submitting new evidence for the sentencing proceedings.<sup>8</sup>
7. On 26 February 2021, the Defence requested the submission of 17 items into evidence for the purpose of the sentencing hearing and notified the Chamber, the Prosecution and Legal Representatives of one more possible piece of evidence for submission.<sup>9</sup> The Defence requested for three persons testify during the sentencing hearing, D-0133,<sup>10</sup> D-0114<sup>11</sup> and D-0160.<sup>12</sup> The Defence filed that request for the eighteenth piece of evidence on 12 March 2021.<sup>13</sup>
8. On 10 March 2021, the Legal Representatives opposed the written testimony and requested live testimony of D-0160.<sup>14</sup> The Prosecution did not object to calling D-0160 as a live witness so long as it had a chance to question the witness.<sup>15</sup>
9. On 19 March 2021, the Chamber accepted the submission into evidence all 18 pieces of evidence, but denied the Defence from calling any of its proposed live witnesses.<sup>16</sup>
10. On 1 April 2021, the Defence,<sup>17</sup> Prosecution<sup>18</sup> and Legal Representatives<sup>19</sup> submitted briefs on sentencing.

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<sup>8</sup> Trial Chamber IX, *Prosecution's Notification regarding Presentation of Additional Evidence in the Sentencing Stage of the Proceedings*, [ICC-02/04-01/15-1779](#); Trial Chamber IX, *CLRV's Notification Regarding Presentation of Additional Evidence On [sic] Sentencing*, [ICC-02/04-01/15-1780](#); and Trial Chamber IX, *Victims' Notification regarding Presentation of Additional Evidence at the Sentencing Stage of [sic] Proceedings*, [ICC-02/04-01/15-1782](#).

<sup>9</sup> Trial Chamber IX, *Second Public Redacted Version of "Defence request to submit additional evidence for Trial Chamber IX's determination of the sentence"*, filed on 26 February 2021, [ICC-02/04-01/15-1783-Red2](#) and *Defence Addendum to "Defence request to submit additional evidence for Trial Chamber IX's determination of the sentence"*, filed on 26 February 2021 as ICC-02/04-01/15-1783-Conf, [ICC-02/04-01/15-1785](#).

<sup>10</sup> Trial Chamber IX, *Second Public Redacted Version of "Defence request to submit additional evidence for Trial Chamber IX's determination of the sentence"*, filed on 26 February 2021, [ICC-02/04-01/15-1783-Red2](#), para. 20.

<sup>11</sup> *Ibid*, para. 24.

<sup>12</sup> *Ibid*, para. 27.

<sup>13</sup> Trial Chamber IX, *Defence Filing in the Record of the Case the Expert Report of UGA-D26-P-0114*, [ICC-02/04-01/15-1792](#) and [annex](#).

<sup>14</sup> Trial Chamber IX, *CLRV Response to the "Defence request to submit additional evidence for Trial Chamber IX's determination of the sentence"*, ICC-02/04-01/15-1787-Conf, para. 28 and *Victims' Response to the "Defence request to submit additional evidence for Trial Chamber IX's determination of the sentence"*, ICC-02/04-01/15-1789-Conf, paras 15-20.

<sup>15</sup> Trial Chamber IX, *Prosecution's response to the Defence request to submit additional evidence at sentencing*, [ICC-02/04-01/15-1788](#), para. 8.

<sup>16</sup> Trial Chamber IX, *Decision on the 'Defence request to submit additional evidence for Trial Chamber IX's determination of the sentence'*, [ICC-02/04-01/15-1801](#), paras 20 and 28.

11. On 14-15 April 2021, the Chamber held the hearing on sentencing.
12. On 6 May 2021, the Chamber issued the Impugned Decision,<sup>20</sup> sentencing the Appellant to a joint sentence of 25 years.
13. On 24 May 2021, the Defence filed the “Defence Request for an Alteration of the due date for its Notice of Appeal and Document in Support of its Appeal of the Sentence.”<sup>21</sup>
14. On 26 May 2021, the Prosecution responded to the Defence request to alter the due dates of appeal documents for sentencing and agreed that the request was justified.<sup>22</sup>
15. On 2 June 2021, the Appeals Chamber granted the Defence’s request in for an extension of the due date for the notice of appeal and the appeal brief to 28 June 2021 and 26 August 2021 respectively.<sup>23</sup>

### III. APPLICABLE STANDARD

16. Article 81(2)(a) of the Rome Statute states that “[a] sentence may be appealed...by...the convicted person on the ground of disproportion between the crime and the sentence.”
17. Article 83(2) of the Rome Statute states that:

If the Appeals Chamber finds that the proceedings appealed from were unfair in a way that affected the reliability of the [...] sentence, or that the [...] sentence appealed from was materially affected by error of fact or law or procedural error, it may: (a) Reverse or amend the [...] sentence [...]. When the decision or sentence has been appealed only by the person convicted [...], it cannot be amended to his or her detriment.

18. Article 83(3) of the Rome Statute states that “[i]f in an appeal against sentence the Appeals Chamber finds that the sentence is disproportionate to the crime, it may vary the sentence in accordance with Part 7.”

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<sup>17</sup> Trial Chamber IX, *Corrected Version of ‘Defence Brief on Sentencing’*, filed on 1 April 2021, ICC-02/04-01/15-1809-Conf-Corr (public redacted version available [here](#)).

<sup>18</sup> Trial Chamber IX, *Prosecution’s Sentencing Brief*, [ICC-02/04-01/15-1806](#).

<sup>19</sup> Trial Chamber IX, *Victims’ Joint Submissions on sentencing*, [ICC-02/04-01/15-1808](#).

<sup>20</sup> See Impugned Decision.

<sup>21</sup> Appeals Chamber, *Defence Request for an Alteration of the due date for its Notice of Appeal and Document in Support of its Appeal of the Sentence*, [ICC-02/04-01/15-1828](#).

<sup>22</sup> Appeals Chamber, *Prosecution Response to the Defence request for an alteration of the due date for its notice of appeal and document in support of its appeal of the Sentence*, [ICC-02/04-01/15-1830](#).

<sup>23</sup> Appeals Chamber, *Decision on the Defence request for extension of time limit for the filing of the notice of appeal and the appeal brief*, [ICC-02/04-01/15-1837](#), para. 10.

19. Regulation 61 of the Regulations of the Court allows for the variation of grounds of the appeal to be filed after the notice of appeal has been filed.<sup>24</sup> The Defence makes this notation as the Appellant understands and speaks only Acholi and is mentally disabled, and a translation of the Impugned Decision cannot be expected until next year as LSS is working on the translation of the Trial Judgment. As such, the Defence may request a variation of the grounds once a full translation into Acholi of the Impugned Decision has been issued.

#### IV. GROUNDS OF APPEAL AGAINST THE IMPUGNED DECISION

**GROUND 1:** The Chamber erred in law and in procedure by issuing the Impugned Order<sup>25</sup> and Impugned Decision 2, thus disallowing the Appellant to participate meaningfully in the sentencing proceedings, thereby violating Appellant's fair trial rights under Articles 67(1)(a), (b), (e) and (f) of the Rome Statute and Rule 144(2)(b) of the Rules.<sup>26</sup> The Chamber's errors negatively and materially impacted the Impugned Decision.

**GROUND 2:** The Chamber erred in law and in procedure by rejecting the Defence's objections<sup>27</sup> to the Legal Representatives' submission of evidence from the bar in the "Victims' Joint submissions on sentencing"<sup>28</sup> and during their respective arguments during the sentencing hearing.<sup>29</sup> The Chamber's error negatively and materially impacted the Impugned Decision as it relied upon testimonial evidence not submitted through the official mechanisms authorised by the Statute, Rules and procedures which govern the Court.<sup>30</sup>

**GROUND 3:** The Chamber erred in fact in its conclusions about the Acholi Traditional Justice System in the Impugned Decision.<sup>31</sup> The errors include, but are not limited to:

- a) its failure to appreciate correctly the relevant cultural beliefs and practices that informed the conduct of the Appellant;<sup>32</sup>
- b) applying "Western values" in the Impugned Decision;<sup>33</sup>

<sup>24</sup> See Regulation 61(1) of the Regulations of the Court.

<sup>25</sup> See Impugned Decision, para. 2.

<sup>26</sup> See also para. 58 (noting the indented paragraph within paragraph 58).

<sup>27</sup> Impugned Decision, para. 13.

<sup>28</sup> Trial Chamber IX, *Victims' Joint Submissions on sentencing*, [ICC-02/04-01/15-1808](#), paras 99-115.

<sup>29</sup> See [ICC-02/04-01/15-T-260-ENG](#), pp 36-59.

<sup>30</sup> For example see Impugned Decision, paras 30 and 35-38.

<sup>31</sup> Impugned Decision, paras 15-43.

<sup>32</sup> The Defence also notes that the Impugned Decision uses the phrase "*so-called*" Acholi Traditional Justice System.

<sup>33</sup> For example see Impugned Decision, paras 32-33 and 40 (noting that the Chamber relied upon a European Englishman and a non-Acholi Ugandan for help in its interpretation of the use and efficacy of Acholi rituals).

- c) its refusal to allow one of the highest authorities on the Acholi Traditional Justice System to give oral testimony before the Chamber during the sentencing hearing,<sup>34</sup>
- d) its failure to acknowledge that the Defence request was to assist the Chamber in its understanding of the Acholi cultural beliefs and practices in its assessment of the personal circumstances of the Appellant as a mitigating factor;<sup>35</sup> and
- e) its failure to apply the principle of complementarity<sup>36</sup> in the Impugned Decision in sentencing.<sup>37</sup>

The Defence asserts these errors negatively and materially affected and caused a disproportionate sentence against the Appellant.

**GROUND 4:** The Chamber erred in law and in procedure when it sentenced the Appellant on both war crimes and crimes against humanity for the same underlying conduct, resulting in prejudice in the stigma of convictions, the ultimate sentence and impairing future possibilities for revision of the sentence and rehabilitation.<sup>38</sup> These errors materially affected and caused a disproportionate sentence against the Appellant.

**GROUND 5:** The Chamber erred in law by taking into account actions as aggravating circumstances which happened outside the scope of the charged period.<sup>39</sup> These errors materially affected and caused a disproportionate sentence against the Appellant.

**GROUND 6:** The Chamber erred in law and in fact by rejecting the mitigating and/or personal circumstance of the Appellant's family life in the Impugned Decision pursuant to Rules 145(1)(b) and (c) of the Rules.<sup>40</sup> These errors materially affected and caused a disproportionate sentence against the Appellant.

**GROUND 7:** The Chamber erred in law and in fact when it disregarded the Defence's arguments and decided that the Appellant's mental state did not meet the threshold provided for in Rule 145(2)(a)(i) of the Rules or that the Appellant's current mental state was not a

<sup>34</sup> Trial Chamber IX, *Decision on the 'Defence request to submit additional evidence for Trial Chamber IX's determination of the sentence'*, [ICC-02/04-01/15-1801](#), paras 20 and 28. See also Impugned Decision, para. 28.

<sup>35</sup> Trial Chamber IX, *Corrected Version of 'Defence Brief on Sentencing'*, filed on 1 April 2021, ICC-02/04-01/15-1809-Conf-Corr, paras 54-55 (public redacted version [here](#)).

<sup>36</sup> See the Preamble to the Rome Statute and Article 1 of the Rome Statute.

<sup>37</sup> Impugned Decision, paras 15-60.

<sup>38</sup> Impugned Decision, paras 153-161, 187-196, 225-234, 261-269, 294-308, 315-319, 340-351 and 356-373.

<sup>39</sup> For example, see Impugned Decision, paras 80, 84, 287 and 292.

<sup>40</sup> Impugned Decision, paras 117-124.

personal circumstance of the Appellant.<sup>41</sup> The Chamber also erred by relying upon the testimonies of P-0099, P-0101, P-0214, P-0226, P-0227, P-0235 and P-0236 as evidence to support that the Appellant did not meet this threshold<sup>42</sup> and by failing to take into account the Appellant's current mental disabilities when determining whether the Appellant met the "exceptional circumstances" situation from other international tribunals.<sup>43</sup> The Chamber's errors materially affected and caused a disproportionate sentence against the Appellant.

**GROUND 8:** The Chamber erred in law and in fact by disregarding the expert testimony of Professor Kristof Titeca, Dr Eric Awich Ochen<sup>44</sup> and Major Pollar Awich in its assessment of whether the Appellant met the threshold of Rule 145(2)(a)(i) of the Rules.<sup>45</sup> The Chamber's errors materially affected and caused a disproportionate sentence against the Appellant.

**GROUND 9:** The Chamber erred in law by deciding that four (4) deaths at Pajule IDP Camp met the threshold for multiple victims pursuant to Rule 145(2)(b)(iv) of the Rules.<sup>46</sup> The Chamber's error materially affected and caused a disproportionate sentence against the Appellant in relation to Counts 2 and 3.

**GROUND 10:** The Chamber erred in law by using the Appellant's unsworn statement pursuant to Article 67(1)(h) of the Statute against the Appellant in its determination of the joint sentence.<sup>47</sup> The Chamber's error materially affected and caused a disproportionate sentence, an additional five (5) years of imprisonment, against the Appellant.

**GROUND 11:** The Chamber erred in law by increasing the Appellant's sentence from 20 years to 25 years in the joint sentence in Section II(B) of the Impugned Decision<sup>48</sup>, on the grounds of aggravating circumstances which had already been considered during the Trial Judgment issued on convictions in Section II(A)(3) of the Impugned Decision; and without clearly identifying and isolating additional aggravating circumstances not used in Section II(A)(3) of the Impugned Decision, or that were not requirements to prove the convictions or

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<sup>41</sup> Impugned Decision, paras 90-105.

<sup>42</sup> Impugned Decision, para. 93.

<sup>43</sup> See Impugned Decision, paras 97 and 103-105.

<sup>44</sup> The Defence notes that while other expert witnesses were accorded the use of their professional titles, the Chamber failed to use Dr Ochen's professional title in the Impugned Decision.

<sup>45</sup> Impugned Decision, paras 113-116.

<sup>46</sup> Impugned Decision, paras 154-155.

<sup>47</sup> Impugned Decision, para 394. See generally Impugned Decision, paras 374-397.

<sup>48</sup> Impugned Decision, paras 374-397.



admissibility. The Chamber's errors materially affected and caused a disproportionate sentence, an additional five (5) years of imprisonment, against the Appellant.

**GROUND 12:** The Chamber erred in law and in procedure by counting, as aggravating circumstances, actions and/or mental states which were necessary to prove convictions in the Trial Judgment.<sup>49</sup> The Chamber's errors materially affected and caused a disproportionate sentence against the Appellant.

Respectfully submitted,



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

Dated this 28<sup>th</sup> day of June, 2021

At Lira, Uganda

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<sup>49</sup> Impugned Decision, paras 145, 152, 156, 161, 168, 173, 175, 182, 186, 191, 194, 196, 200, 205, 211, 213, 220, 224, 229, 232, 234, 237, 240-241, 246, 248-249, 255, 260, 262, 265, 267, 269, 272, 276, 279, 281-283, 286-288, 293, 298, 303, 308, 314, 324, 331-333, 339, 343, 347, 351, 355, 369 and 373.