

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: **22 April 2024**

APPEALS CHAMBER

Before:

**Judge Luz del Carmen Ibáñez, Presiding Judge
Judge Tomoko Akane
Judge Solomy Balungi Bossa
Judge Gocha Lordkipanidze
Judge Erdenebalsuren Damdin**

SITUATION IN UGANDA

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

PUBLIC

**Defence Notice of Appeal of the Reparations Order dated 28 February 2024 and Request
for Suspensive Effect**

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(4) of the Rome Statute ('Statute'), Rules 150(1) and (2) of the Rules of Procedure and Evidence ('RPE') and Regulation 57 of the Regulations of the Court ('RoC'), the Defence for Dominic Ongwen ('Defence') hereby submits its notice of appeal in the Situation of Uganda, in *The Prosecutor vs Dominic Ongwen*, against Trial Chamber IX's *Reparations Order* ('Impugned Decision'), dated 28 February 2024, ICC-02/04-01/15-2074¹ and Trial Chamber IX's *Decision on the Defence Request for an Order to Disclose the Names of the Victim Sample Pool of Participating Victims*, dated 20 April 2023, ICC-02/04-01/15-2043-Conf.² This appeal is directed at the whole Impugned Decision and at Trial Chamber IX's decision ICC-02/04-01/15-2043-Conf as a whole.
2. Pursuant to article 82(3) of the Statute and Rule 156(5) of the RPE, and considering the of numerous glaring errors committed Trial Chamber IX when issuing the Impugned Decision, the Defence respectfully requests suspension of the implementation of the Impugned Decision.

II. PROCEDURAL HISTORY

3. On 4 February 2021, Trial Chamber IX issued its Trial Judgment in the case against Dominic Ongwen, convicting him of 61 counts of war crimes and crimes against humanity.³
4. On 6 May 2021, Trial Chamber IX gave Mr Ongwen a 25-year sentence.⁴
5. On 15 December 2022, the Appeals Chamber unanimously confirmed the Judgment⁵ and confirmed, by majority, the Sentence.⁶
6. On 28 February 2024, Trial Chamber IX issued the Impugned Decision against Mr Ongwen.⁷

¹ Trial Chamber IX, *Reparations Order*, [ICC-02/04-01/15-2074](#), with Annexes I, II and III.

² Trial Chamber IX, *Decision on the Defence Request for an Order to Disclose the Names of the Victim Sample Pool of Participating Victims*, ICC-02/04-01/15-2043-Conf.

³ Trial Chamber IX, *Trial Judgment*, [ICC-02/04-01/15-1762-Red](#).

⁴ Trial Chamber IX, *Sentence*, [ICC-02/04-01/15-1819-Red](#).

⁵ Appeals Chamber, *Judgment on the appeal of Mr Ongwen against the decision of Trial Chamber IX of 4 February 2021 entitled "Trial Judgment"*, [ICC-02/04-01/15-2022-Red](#).

⁶ Appeals Chamber, *Judgment on the appeal of Mr Ongwen against the decision of Trial Chamber IX of 6 May 2021 entitled "Sentence"*, [ICC-02/04-01/15-2023](#), with the *Partly Dissenting Opinion of Judge Luz del Carmen Ibáñez Carranza*, [ICC-02/04-01/15-2023-Anx1](#).

⁷ Trial Chamber IX, *Reparations Order*, [ICC-02/04-01/15-2074](#).

7. On 14 March 2024, the Appeals Chamber granted the Defence an extension until 22 April 2024 to file its notice of appeal and 24 June 2024 to file its appeals brief.⁸

III. ARGUMENT FOR SUSPENSIVE EFFECT

8. The Appeals Chamber has previously found that Article 82(3) of the Statute and Rule 156(5) of the RPE govern requests for suspensive effect of reparation orders that are impugned on appeal.⁹ The Appeals Chamber has also previously found that a request for suspensive effect of a reparation order must be made in the notice of appeal.¹⁰

9. In relation to when suspensive effect will be granted, the Appeals Chamber has previously explained:

*The decision on such a request is within the discretion of the Appeals Chamber. Therefore, when faced with a request for suspensive effect, the Appeals Chamber will consider the specific circumstances of the case and the factors it considers relevant for the exercise of its discretion under the circumstances.*¹¹

10. “In past decisions, the Appeals Chamber, when deciding on requests for suspensive effect, has considered whether the implementation of the decision under appeal (i) “would create an irreversible situation that could not be corrected, even if the Appeals Chamber were to find in favour of the appellant” (ii) “would lead to consequences that would be very difficult to correct and may be irreversible”, or (iii) “could potentially defeat the purpose of the [...] appeal”.¹²
11. The Defence contends that the likelihood of the Impugned Decision being reversed or amended by the Appeals Chamber is real given the glaring nature of errors raised in this notice of appeal.

⁸ Appeals Chamber, *Decision on the Defence’s request for time extension for the notice of appeal and appeal brief against Trial Chamber IX’s “Reparations Order”*, [ICC-02/04-01/15-2080](#) (noting that the Appeals Chamber granted the same extension to the CLRV and the LRV and that the Defence could amend its brief 14 days after Mr Ongwen received an Acholi copy of the operative parts of the Impugned Decision).

⁹ Appeals Chamber, *Decision on the admissibility of the appeals against Trial Chamber I’s “Decision establishing the principles and procedures to be applied to reparations” and directions on the further conduct of proceedings*, [ICC-01/04-01/06-2953](#) (hereinafter: ‘Lubanga Decision on the Admissibility’), para. 80.

¹⁰ Appeals Chamber, *Decision on the Defence request for suspensive effect*, [ICC-01/04-02/06-2691](#), para. 14.

¹¹ Lubanga Decision on the Admissibility of the Appeal, para. 81 (citing Appeals Chamber, *Decision on the request of Mr Ruto and Mr Sang for suspensive effect*, [ICC-01/09-01/11-391](#), para. 8; Appeals Chamber, *Decision on the request of Mr Kenyatta and Mr Muthaura for suspensive effect*, [ICC-01/09-02/11-401](#), para. 8; Appeals Chamber, *Decision on the Prosecutor’s request to give suspensive effect to the appeal against Trial Chamber I’s oral decision to release Mr Thomas Lubanga Dyilo*, [ICC-01/04-01/06-2536](#), para. 7; Appeals Chamber, *Decision on the Request of Mr Bemba to Give Suspensive Effect to the Appeal Against the ‘Decision on the Admissibility and Abuse of Process Challenges’*, [ICC-01/05-01/08-817](#), para. 6 and the footnotes referred to therein.).

¹² Lubanga Decision on the Admissibility of the Appeal, para. 82 (citing Appeals Chamber, *Decision on the request of Mr Ruto and Mr Sang for suspensive effect*, [ICC-01/09-01/11-391](#), para. 9; Appeals Chamber, *Decision on the request of Mr Kenyatta and Mr Muthaura for suspensive effect*, [ICC-01/09-02/11-401](#), para. 9.).

Therefore, implementation of the Impugned Decision at this stage could result in considerable time being spent and resources being allocated by the Trust Fund for Victims, as well as unnecessarily raising expectations of victims, for something that has a real chance of not being implemented.

12. The Defence avers that the possible outcome of this appeal will inevitably reduce the total number of victims for the crimes for which Mr Ongwen was convicted and ease the process of identification of the real victims. Therefore, failure to issue the suspensive order will render the appeal moot and nugatory. As such, the Defence requests the Appeals Chamber to suspend the implementation of the Impugned Decision until it renders a judgment on the appeal.

IV. NOTIFICATION OF GROUNDS OF APPEAL

13. **Ground 1:** Trial Chamber IX erred in law by refusing to order the disclosure of the names of persons in the sample of victims' dossier ('Dossier').¹³ Trial Chamber IX's refusal to order the disclosure of the names of all 205 persons in the Dossier materially infringed on Mr Ongwen's right to a fair proceeding. Because of this denial of Mr Ongwen's rights, he and his Defence were unable to make fair assessments of the Dossier with material found in the case file.¹⁴ The failure to allow the Defence to make a fair assessment of the Dossier caused an increased number of estimated beneficiaries, and thus increased Mr Ongwen's overall liability.
14. **Ground 2:** Trial Chamber IX erred in law by its dismissal of the Defence's arguments about Ugandan national proceedings related to reparations for persons from Abok IDP Camp.¹⁵ Trial Chamber IX erred in law by misinterpreting Article 75(6) of the Statute when it wrote that "domestic proceedings do not impact reparations before the Court."¹⁶ This statement is an incorrect interpretation of the Statute. The correct interpretation of the Statute has the potential to decrease significantly the amount of reparations owed by Mr Ongwen.
15. **Ground 3:** Trial Chamber IX erred in both law and in fact by determining that residents of Pajule, Odek, Lukodi and Abok IDP Camps, and non-resident civilians present at the time of the attack, are "presumed to be victims of the crimes of an attack against the civil [sic]

¹³ See Trial Chamber IX, *Decision on the Defence Request for an Order to Disclose the Names of the Victim Sample Pook of Participating Victims*, ICC-02/04-01/15-2043-Conf.

¹⁴ The Defence here refers to material found in the case file by virtue of disclosure, not that officially submitted into evidence.

¹⁵ Impugned Decision, paras 48-49.

¹⁶ Impugned Decision, para. 49.

population as such and persecution, through the underlying act of attack against the civilian population as such.¹⁷ The Defence shall argue that Trial Chamber IX increased the estimated number of victims by expanding the definition of victim under these crimes, thus increasing the estimated number of victims by the thousands.

16. **Ground 4:** Trial Chamber IX erred in law and fact by extending the potential indirect victim pool by creating the “African extended family exception”, thereby opening the floodgates to anyone of any distant relation to a direct victim to collect reparations.¹⁸ The Defence shall show that this material error wrongfully caused a significant increase in the estimated number of potential victims. Furthermore, the Defence shall demonstrate Trial Chamber IX’s use of traditions and culture during trial, in the Trial Judgment, in the Sentence and in the Impugned Decision are at odds and significantly different.
17. **Ground 5:** Trial Chamber IX erred in law and procedure by issuing the symbolic award of €750 per victim, specifically not intending this award to act as partial restitution or compensation for harm suffered.¹⁹ The Defence shall demonstrate how the decision to grant an award outside the scope of restitution and/or compensation is against the law, procedure and customary practices, and had seriously inflated the amount of reparations ordered in the Impugned Decision.
18. **Ground 6:** Trial Chamber IX erred in procedure by prioritizing direct witnesses who were participating victims of the case over direct victims who did not participate in the case.²⁰ The decision to prioritise one direct victim (not in dire need) over another goes against the spirit of reparations, and shall extend the time needed to disseminate reparations to persons. Furthermore, it is against the fundamental fairness of the victims, especially those who desired to participate in the proceedings, but were unable to file their victim participation forms before the deadline set by Trial Chamber IX.
19. **Ground 7:** Trial Chamber IX erred in fact when it failed to appreciate why the Defence demanded that specific victims in the Dossier must be required to give medical documentation to prove their disabilities.²¹ Trial Chamber IX failed to understand the manner in which the Defence requested medical documentation from specific persons in the Dossier. The Chamber’s failure to appreciate the issues clearly outlined by the Defence caused an increase in the

¹⁷ Impugned Decision, paras 103 and 163-165.

¹⁸ Impugned Decision, paras 128-132.

¹⁹ Impugned Decision, paras 621-634.

²⁰ Impugned Decision, para. 660.

²¹ Impugned Decision, paras 524-525.

estimated number of potential victims eligible for reparations, causing an increase in Mr Ongwen's liability to the victims.

20. **Ground 8:** Trial Chamber IX erred in fact when it refused to take into account that Mr Ongwen was not the brigade commander of Sinia Brigade until 4 March 2004.²² By failing to take into account that Mr Ongwen was not the commander of Sinia Brigade, Trial Chamber IX significantly increased the estimated number of victims of SGBC and child soldiers for which Mr Ongwen was responsible, which caused a significant increase in the amount of reparations owed by Mr Ongwen.
21. **Ground 9:** Trial Chamber IX erred in fact when it used the divisor of four (4) in determining the number of estimated victims of SGBC and child soldiers attributed to Mr Ongwen as commander of Sinia Brigade.²³ By failing to take into account that Control Altar was a fully operational brigade, Trial Chamber IX significantly increased the estimated number of victims of SGBC and child soldiers for which Mr Ongwen was responsible, and committed reversible error.
22. **Ground 10:** Trial Chamber IX erred in fact when it determined the population estimates for Pajule, Lukodi, Odek and Abok.²⁴ Trial Chamber IX failed to take into account all available material when determining the population estimates of the IDP camps, which significantly increased the estimated number of potential beneficiaries, and thus significantly increasing the total liability of Mr Ongwen. The Registry's failure to conduct more in-depth and detailed mapping exercises also contributed to this error.
23. **Ground 11:** Trial Chamber IX erred in fact when it recognised other complementary healing regimes and mechanisms but failed to recognise the complementary relevance and importance of the Acholi cultural reparation and restorative mechanisms.²⁵ Trial Chamber IX failed throughout the case and in the Impugned Decision to recognise the contributions and significance of these cultural mechanisms towards the complementarity objectives of the Statute and international law, thus giving a significantly higher reparations order than it should have given.

²² Impugned Decision, para. 734.

²³ Impugned Decision, paras 734, 737 and 738.

²⁴ Impugned Decision, paras 670-674 and 701-729.

²⁵ Impugned Decision, paras 596, 600-610, and 612-638.

24. **Ground 12:** Trial Chamber IX erred in law and fact when it decided the victims suffered spiritual attacks, cultural problems and *cen*, while characterising the conditions as mental illnesses without a clinical basis of its diagnosis.²⁶ The Chamber's error resulted in an increased number of potential beneficiaries without proof of the relationship between the alleged spiritual attacks, cultural problems or *cen* with alleged mental illnesses.
25. **Ground 13:** Trial Chamber IX erred in fact in its assessment of mental health as a moral health victimization for the attacks for which Mr Ongwen was convicted.²⁷ The manner in which the Chamber determined that unproven mental health issues were related to the attacks, and these mental health issues translated into moral health victimization, significantly increased the amount of potential beneficiaries determined by the Chamber, and thus increased the amount of Mr Ongwen's liability.
26. **Ground 14:** Trial Chamber IX erred in law and fact when determining that four participating victims qualified, on a balance of probabilities, as victims of Mr Ongwen.²⁸ Trial Chamber IX increased the number of SGBC victims, and expanded the definition of SGBC victims beyond the Trial Judgment, when assessing the Dossier. Failure to correct this error shall result in a significant amount of persons receiving reparations who are not victims of crimes for which Mr Ongwen was convicted, and thus depriving persons who do qualify as victims.
27. **Ground 15:** Trial Chamber IX erred in law and fact when applying the balance of probabilities test.²⁹ The error in law and fact permeates the entire decision, and would irreparably harm Mr Ongwen and the true victims. Trial Chamber IX's failure to apply the correct standard would cause significant financial harm to Mr Ongwen, and by correcting this error, stop the unjust enrichment of ineligible persons.

²⁶ Impugned Decision, paras 240-242, 368-369, 393-398, 600-610 and footnotes 912-915.

²⁷ Impugned Decision, paras 231-242.

²⁸ Impugned Decision, Confidential Annex A, paras 2843-2864, 2896-2914, 2915-2930 and 2931-2946.

²⁹ As this issue permeates the entire Impugned Decision, the Defence does not point to a specific area of the Impugned Decision.

V. RELIEF

28. The Defence for Dominic Ongwen respectfully request the Appeals Chamber to:
- a. Give suspensive effect to the implementation of the Impugned Decision and
 - b. Accept these 15 grounds of appeal.

Respectfully submitted,



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Chief Charles Achaleke Taku
On behalf of Dominic Ongwen

Dated this 22nd day of April, 2024
At Maryland, United States of America