

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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Date: 29 March 2016

PRE-TRIAL CHAMBER II

Before:

Judge Cuno Tarfusser, Presiding Judge
Judge Marc Perrin de Brichambaut
Judge Chang-ho Chung

SITUATION IN UGANDA

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

Public

Defence Request for Leave to Appeal Issues in Confirmation of Charges Decision

Source: Defence for Dominic Ongwen

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

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I. INTRODUCTION

1. Pursuant to Article 82(1)(d) of the Rome Statute, the Defence for Dominic Ongwen ('Defence') respectfully requests leave to appeal the "Decision on the confirmation of charges against Dominic Ongwen".¹

2. The Defence requests leave to appeal on the following five issues:
 - a. Pre-Trial Chamber II ('Chamber') erred when it refused to exclude non-translated statements and transcripts ('Statements') disclosed on 21 December 2015 ('First Issue');²
 - b. The Chamber erred when it failed to consider evidence presented by the Defence as to the age of Dominic Ongwen ('Second Issue');³
 - c. The Chamber erred in the Decision by failing to issue a well-reasoned decision ('Third Issue');⁴
 - d. The Chamber erred when it decided that Article 25(3)(c) does not require a substantial contribution to the crime ('Fourth Issue');⁵ and
 - e. The Chamber erred when it decided that forced marriage was not subsumed by the crime of sexual slavery ('Fifth Issue').⁶

3. An immediate determination of these issues by the Appeals Chamber is necessary for the fair and expeditious outcome of the proceedings and trial, and would materially advance the proceedings and the functions of the Court.

¹ ICC-02/04-01/15-422-Conf. ('Decision')

² Decision, paras 20-23.

³ Decision, para. 150.

⁴ *See generally* Decision.

⁵ Decision, para. 43.

⁶ Decision, paras 87-95.

II. PROCEDURAL HISTORY

4. On 18 May 2005, the Office of the Prosecutor ('Prosecution') requested an arrest warrant against Dominic Ongwen.⁷ On 8 July 2005, the Chamber issued an arrest warrant for Dominic Ongwen.⁸
5. On 6 January 2015, Mr Ongwen surrendered to United States Special Forces. On 21 January 2015, Mr Ongwen was transferred to the International Criminal Court Detention Centre.
6. On 26 January 2015, Mr Ongwen made his initial appearance before the Chamber.⁹
7. On 21 December 2015, the Prosecution submitted its Document Containing the Charges ('DCC'), List of Evidence and Pre-Confirmation Brief.¹⁰ On 6 January 2016, the Defence submitted its List of Evidence.¹¹ On 18 January 2016, the Defence filed its Pre-Confirmation Brief.¹²
8. From 21 January 2016 through 27 January 2016, the Chamber held the Confirmation of Charges Hearing ('Hearing').
9. On 23 March 2016, the Chamber handed down the Decision.

⁷ ICC-02/04-01/15-3-Conf-Red2.

⁸ ICC-02/04-01/15-6.

⁹ ICC-02/04-01/15-T-4-ENG.

¹⁰ ICC-02/04-01/15-375, ICC-02/04-01/15-375-Conf-AnxA, ICC-02/04-01/15-375-Conf-AnxC and ICC-02/04-01/15-375-Conf-AnxD.

¹¹ ICC-02/04-01/15-392-Conf-AnxA.

¹² ICC-02/04-01/15-404-Conf.

III. SUBMISSIONS

A. *The Law*

10. Article 82(1)(d) sets the standard for interlocutory appeals before any chamber of the court. The standard for an interlocutory appeal is that:

A decision that involves an issue¹³ that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

11. The purpose of such procedure is to “pre-empt the repercussions of erroneous decisions on the fairness of the proceedings or the outcome of the trial”¹⁴ The Pre-Trial Chamber is vested with the power to certify the existence of an appealable issue,¹⁵ however when determining whether leave to appeal should be granted, the Pre-Trial Chamber must not justify or defend the correctness of its decision, but instead determine whether the issues presented significantly affect the fairness of the proceedings.¹⁶

B. *Application of the Law*

First Issue: Whether The Chamber erred when it refused to exclude non-translated statements and transcripts (‘Statements’) disclosed on 21 December 2015

12. At paragraph 23 of the Decision, the Chamber rejected the Defence request to exclude from the Prosecutor’s list of evidence the seventeen witness statements and transcripts disclosed on 21 December 2015 without corresponding

¹³ All issues arise from the Decision and are not mere disagreements between the Chamber and the Defence. *See* ICC-01/04-168 AO3, para. 9.

¹⁴ ICC-01/04-168, para 19.

¹⁵ ICC-01/04-168, para 20.

¹⁶ ICC-01/09-02/11-253, para 28.

Acholi translation. Rule 76(3) of the Rules of Procedure and Evidence ('Rules') provides that statements of prosecution witnesses shall be made available in original and in a language which the accused fully understands and speaks. Defence submits that this is not a mere procedural right granted to a person under arrest or summons to appear but a fundamental fair trial right guaranteed to a suspect.

13. The First Issue arises from the Decision because these statements were relied upon by the Prosecutor for the Hearing, and relied upon by the Chamber for the Decision. If the Statements were of limited amount and material, and were not needed for the Chamber's Decision because of the limited nature of the Hearing,¹⁷ the proper course of conduct would have been to exclude so as not to violate the rights of the suspect as enshrined in Article 67(1)(f) of the Statute and reinstated in Rule 76(3) of the Rules. The reasons advanced by the Chamber in paragraphs 21 and 22 of the Decision are clearly insufficient to overlook a fair trial violation.

14. Further, the Defence recalls its submissions in its request for the postponement of the confirmation of charges hearing filed on 30 December 2015¹⁸ where inter alia, the Defence highlighted the problems with the volume of late disclosure and the access to properly evaluate the new disclosures. The Pre-Trial Chamber in its decision of 12 January 2016¹⁹ dismissed all the claims put forward by the Defence, and yet, in the Confirmation Decision, the Chamber wishes to down play the apparent difficulties faced by the Defence. Perhaps with a postponement of the Confirmation of Charges Hearing, the Defence would have had sufficient time to review the new disclosures and identify those statements pertinent to the Confirmation Hearing. As such, since this option was not available, the Chamber

¹⁷ Decision, para. 22.

¹⁸ ICC-02/04-01/15-385.

¹⁹ ICC-02/04-01/15-396.

should have excluded those statements to ensure a fair, expeditious hearing and ultimately the outcome of the trial.

15. The First Issue affects the fairness of the proceedings. The ability of the suspect to participate in the proceedings is a fundamental right, as enshrined in Article 67(1)(f) of the Statute and reinstated in Rule 76(3) of the Rules. This right is fundamental and should the trial proceed without clarification of the Appeals Chamber, Mr Ongwen would not have been given sufficient notice of the charges confirmed against him. If leave to appeal is granted, the Defence will show how this right is so fundamental; the Assembly of State Parties has rejected proposals to change Rule 76(3) of the Rules and other similar regulations for this very reason.²⁰

16. These Statements represent 14 witnesses and 334 pages of Statements classified at incriminatory and used by the Prosecution at the Hearing. It is the right of Mr Ongwen to have these Statements translated, or at the least, give his legal team time to review and request the translations. The fact that some members of the Defence know Acholi and could have translated the Statements to Dominic Ongwen is not material. It is no one else's job to translate these documents except for the Prosecution.

17. The proper interpretation of Rule 76(3) of the Rules is vital to the expeditious conduct of the proceedings. If the Prosecution is left unchecked by the Chamber, Statements submitted for trial might not get to Mr Ongwen in time to aid properly in his defence.

18. The Defence seriously worries that Acholi translations of documents will not get into Mr Ongwen's hand in time for him to aid his Defence. The Defence further

²⁰ For example, see ICC-ASP/13/28.

reminds the Chamber that it requested and was denied funds for a translator to aid in translating documents.²¹ It is imperative that Mr Ongwen receive translated Statements well in advance to aid his defence, which includes field investigations. Failure to have proper translations will undoubtedly cause delays in the trial.

19. An immediate resolution of the First Issue will materially advance the proceedings by decisively answering the extent to which Rule 76(3) applies to the proceedings. The Defence should not have to request postponements of trial (or the Hearing) because translations have been disclosed for Mr Ongwen to read.

Second Issue: Whether The Chamber erred when it failed to consider evidence presented by the Defence as to the age of Dominic Ongwen

20. At paragraph 150 of the Decision, the Chamber dismissed Defence submission on the age of Mr Ongwen as “entirely without legal basis, and the Chamber will not entertain it further.” It specifically refused to rule upon Mr Ongwen’s age.

21. While the Defence acknowledges that Mr Ongwen, in his first remarks to the honourable Chamber, stated that he was born in 1975,²² however, upon further investigation by the Defence which was explored in the confirmation brief, it is apparent that Mr Ongwen’s birth date is disputed. The Chamber erred in declining to explore the issue further, especially considering the fact that the Prosecution did not proffer any evidence to confirm Mr Ongwen’s birth date. The Defence offered the best evidence available, the only living person present for Dominic’s birth, D26-008. This defect greatly affects the fairness of the proceedings because Mr Ongwen’s age is a key element in relation to the crimes for which he is charged and the influences placed upon him for the defence of

²¹ See ICC-02/04-01/15-281-Conf-Exp and ICC-02/04-01/15-296.

²² ICC-02/04-01/15-T-4-ENG ET WT.

duress. The Chamber's error therefore in assigning a birth date affects the expeditiousness of the proceedings and the outcome of the trial. As such, an immediate resolution by the Appeals Chamber is necessary and may materially advance the proceedings.

22. The person named in the Decision is not Mr Ongwen. It is only fair and proper that if this Court continues to detain and proceed with the trial, the proper information be used.

23. The Second Issue affects the expeditious conduct of the proceedings because proper determination will allow the Defence, which is woefully understaffed, to allocate its resources in a more productive manner. The Chamber cannot turn a blind-eye to material issues, including Mr Ongwen's age.

24. An immediate resolution of the Second Issue will materially advance the proceedings. Mr Ongwen's birth is a part of the DCC and Decision. It is a material defect which the Chamber refused to answer. If Mr Ongwen is not the person named in the DCC or Decision, he should be released.

Third Issue: Whether The Chamber erred in the Decision by failing to issue a well-reasoned decision

25. The Third Issue not only arises from the Decision, the Third Issue is the Decision.

26. Rule 64(2) of the Rules states that a Chamber *shall* give reasons for any rulings it makes on evidentiary matters. These reasons shall be placed in the record of proceedings.

27. The Appeals Chamber has indicated the need for a well-reasoned decision, noting that the extent of the reasoning will depend on the circumstances of the case but that it is nonetheless essential that a decision indicates with sufficient clarity its basis.²³ The reasoning need not recite and set out each and every factor, but it must identify facts it found to be relevant to the conclusion reached. The Appeals Chamber has further quoted jurisprudence from the European Court of Human Rights where it was held that a well-reasoned decision is part of the fair trial guarantees under Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 as amended by Protocol 11 (213 United Nations Treaty Series 221 et seq., registration no. 2889). A well-reasoned decision makes it easy for an accused, (in this case a suspect), to *exercise usefully the rights of appeal available to him*.²⁴ The Defence also notes the jurisprudence from the ICTY Appeals Chamber which is quoted by the Appeals Chamber in this Court. *A reasoned decision is an element of the right to a fair trial*, and only on the basis of a reasoned decision will proper appellate review be possible.

28. The present decision is riddled with findings whose basis and reasoning is not clear. As an example earlier given, the Chamber appears to have concluded the year of Dominic's birth, notwithstanding the lack of evidence on the matter from the Prosecution, and inconsistent and contradictory evidence from the Defence. Another example can be found in paragraph 56 of the Decision where the Chamber states that the evidence "*overwhelmingly*" shows the effective hierarchical structure of the LRA. This conclusion is not supported by reference to the evidence.

29. At paragraphs 73, 78, 136, 138, 147 of the Decision and paragraphs 10 and 11 of the confirmed charges, the Chamber ruled that orders were generally

²³ ICC-01/04-01/06-774.

²⁴ ICC-01/04-01/06-774, para. 30

communicated from Joseph Kony and other leaders to the Brigade commander who communicated them to the battalion commanders. Yet, there is no factual allegation to establish that this command structural chain of communication was respected in respect of the alleged crimes imputed to Mr Ongwen.

30. Furthermore, in paragraph 62, the Chamber makes a finding that there is “*specific evidence*” to indicate that Mr, Ongwen shared the view that civilian camps had to be deliberately attacked. However, there is a general reference to a number of witnesses without any direction to the specificity of their testimony regarding this conclusion. At paragraph 154, the Chamber found that Mr Ongwen subscribed to the ideology of the LRA but there is no factual finding about what this LRA ideology is. Instead, paragraph 154 of the Decision reads: “Instead, the available evidence demonstrates that Dominic Ongwen shared the ideology of the LRA, including its brutal and perverted policy with respect to civilians it considered supporting the government”. The Decision fails to clearly lay out the “*available evidence*” demonstrating the LRA ideology that Mr Ongwen is charged with supporting in furtherance of the crimes retained against him.

31. At paragraph 46 of the Decision, the Chamber relied on records of intercepted LRA radio communications in confirming the charges against Mr Ongwen. However, in several of the charges confirmed, the Chamber merely stated dates but did not indicate with reasonable specificity the records of intercepted LRA radio communications it relied on to confirm the charges.²⁵

32. The Third Issue significantly affects the fairness of the proceedings because the Chamber did little to delineate the facts and circumstances of the case falling short of this required standard of official court documents. Should the trial proceed without the clarification of the Appeals Chamber, the presumption of

²⁵ See paras 71, 76, 81, 83, 136 and 141 of the Decision.

innocence would not be properly respected as it leaves open the possibility that Mr Ongwen would undergo trial on the basis of a possible error in assessing whether there existed substantial evidence to believe that he participated in the alleged offences.

33. The Third Issue significantly affects the expeditious conduct of the proceedings because it deprives the Defence of proper guidelines for the facts and circumstances of the case, causing it to keep a broad base when investigating the case. Furthermore, it grants the Prosecution much more leeway during the proceedings, which shall inevitably require the Defence to seek delays in the proceedings.
34. The Third Issue further significantly affects the outcome of the trial because it will cause the Defence to spend countless and needless time on broad issues. Failure to define proper facts and circumstances, and properly cite where said facts and circumstances come from, will cause issues in the future which will require litigious and needless litigation for the Trial Chamber.
35. An immediate resolution of the Third Issue will materially advance the proceedings by giving proper structure and boundaries to the proceedings. As the official court document for the charges, an overly vague document with almost no evidentiary citations will cause confusion and problems throughout the rest of the proceedings. To stop this, immediate guidance from the Appeals Chamber on the proper structure of the Decision is necessary.

Fourth Issue: Whether The Chamber erred when it decided that Article 25(3)(c) does not require a substantial contribution to the crime

36. At paragraph 43, the Chamber denied the Defence's interpretation of Article 25(3)(c), stating that it is not required that the assistance to the crime under this article be substantial.

37. The Fourth Issue significantly affects the fair and expeditious conduct of the proceedings. Proper interpretation of a mode of responsibility for which Mr Ongwen is accused of performing is vital to both parties in the case to determine the proper course of its investigation and presentation of evidence. As the Chamber has noted in paragraph 43, substantial is not found in Article 25(3)(c). The Defence draws the Chamber's attention to the fact that "essential" is not found in Article 25(3)(a), but it is found in the accepted application of indirect co-perpetration before all chambers of the ICC.

38. Failure to have a proper determination of the interpretation of Article 25(3)(c) will undoubtedly lead to delays in the proceedings, which would obstruct Mr Ongwen's fair trial right of a speedy trial. As such, failure of a determination by the Appeals Chamber would significantly affect the fair and expeditious conduct of the proceedings.

39. In its Decision, the Chamber cited to the Pre-Trial Chamber in *Gbagbo and Bemba et al.* In contrast, Article 21(1) of the Rome Statute requires that the Chamber first look at the Rome Statute,²⁶ then applicable principles and rules of international law.²⁷ If these are not present,²⁸ the Chamber may then go to previous principles and rules of the Court.²⁹ An immediate resolution of the Fourth Issue by the

²⁶ Article 21(1)(a) of the Rome Statute.

²⁷ Article 21(1)(b) of the Rome Statute.

²⁸ Also, the Chamber is required to determine if Article 21(1)(c) is applicable.

²⁹ Article 21(2) of the Rome Statute.

Appeals Chamber will materially advance the proceedings by providing a definitive answer to the construction of aiding and abetting under the Rome Statute, and would dispel any questions as to whether the Chamber should follow other Pre-Trial Chamber's determination³⁰ or follow applicable principles and rules of international law.³¹

Fifth Issue: Whether The Chamber erred when it decided that forced marriage was not subsumed by the crime of sexual slavery

40. The Fifth Issue arises from the Decision in paragraphs 87-95. The Chamber erred when it decided that forced marriage is not subsumed by the crime of sexual slavery. This is not simply a disagreement between the Chamber and the Defence, but a legal error that requires an immediate resolution by the Appeals Chamber to ensure a fair and expeditious trial and also materially advance the proceedings.

41. At paragraphs 86 and 88 of the Decision, The Chamber conceded that the Rome Statute does not explicitly include "forced marriage" as a crime within the jurisdiction of the court. The Chamber however adopted the submissions from the Office of the Prosecution to separate the conduct alleged from the crime of sexual slavery which is in the Statute and under the jurisdiction of the Court. The Chamber borrowed jurisprudence from the Special Court for Sierra Leone (SCSL) as well as from the Extraordinary Chambers in the Courts of Cambodia. This approach is flawed because the Chamber ignored the fact that this issue has been previously raised in this Court and the Pre -Trial Chamber I stated that sexual slavery encompasses forced marriage and forced labour involving compulsory

³⁰ *Id.*

³¹ Article 21(1)(b) of the Rome Statute. *See Popovi et al.*, "Judgement", IT-05-88, ICTY Appeals Chamber, para. 1741, found at http://www.icty.org/x/cases/popovic/acjug/en/150130_judgement.pdf and *Mrkšić et al.*, "Judgement", IT-95-13/1-A, ICTY Appeals Chamber, para. 200, found at <http://www.icty.org/x/cases/mrksic/acjug/en/090505.pdf>.

sexual activity.³² The Defence further submits that the superficial title of “marriage” or “wife” does not meet the level of gravity envisaged by the framers of the Rome Statute.

42. The Fifth Issue affects the fair trial right of Mr Ongwen because the Chamber created a new element for a non-existent crime, to wit, exclusivity in the alleged conjugal unions. This finding is beyond the purview of the confirmation hearing and judicial activism in these circumstances impinge on Mr Ongwen’s rights to a fair trial since he is being charged with crimes that are not even enshrined in the Statute.

43. The findings of the Chamber jeopardize the expediency of the proceedings because the parties have to litigate on a point of law that has already been adjudicated upon. It is of interest to note that the prosecution did not even seek leave to appeal the Pre-Trial I Chamber Decision above mentioned. This is notwithstanding the fact that it was rendered in October 2008 after the SCSL Appeals Chamber Decision from February 2008.

44. An immediate resolution from the Appeals Chamber will materially advance the proceedings because it will give clarity to the question of whether or not there is a crime within the Rome Statute of forced marriage or whether it is subsumed in the crime of sexual slavery.

³² ICC-01/04-01/07-717, para. 431.

V. RELIEF

45. The Defence respectfully request the Chamber to grant leave to appeal on the five issues outlined above.

Respectfully submitted,



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

Dated this 29th day of March, 2016

At The Hague, Netherlands