

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

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

Date: **8 January 2018**

**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 Findings on Fair Trial Violations and Remedy, Pursuant to Articles  
67 and 64 of the Rome Statute**

**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**

Fatou Bensouda, Prosecutor  
James Stewart, Deputy Prosecutor  
Benjamin Gumpert, QC

**Counsel for the Defence**

Krispus Ayena Odongo  
Chief Charles Achaleke Taku  
Beth S. Lyons

**Legal Representatives of the Victims**

Joseph Akwenyu Manoba  
Francisco Cox

**Common Legal Representative for Victims**

Paolina Massidda  
Jane Adong

**Unrepresented Victims**

**Unrepresented  
(Participation/Reparation)**

**Applicants**

**The Office of Public Counsel for Victims**

Paolina Massidda  
Orchlon Narantsetseg  
Caroline Walter

**States' Representatives**

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

Xavier-Jean Keita

**Amicus Curiae**

**REGISTRY**

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**Registrar**

Herman Von Hebel

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**Counsel Support Section**

**Victims and Witnesses Unit**

Nigel Verrill

**Detention Section**

**Victims Participation and Reparations  
Section Other**

## I. INTRODUCTION AND PROCEDURAL HISTORY

1. The trial in which Mr Ongwen is being prosecuted for 70 crimes and 7 modes of liability is entering its 14<sup>th</sup> month in January 2018, and – to date – Mr Ongwen has not been provided with a complete translation of the charging document, the Confirmation of Charges Decision ('CoC'), including the Separate Opinion of Judge de Brichambaut, into a language he fully understands and speaks – Acholi.
2. The Defence has repeatedly requested an Acholi translation of the complete CoC, dating back to after the March 2016 CoC Decision was issued.<sup>1</sup>
3. Yet, the fact that there is no complete Acholi translation remains a continuing violation of Article 67(1)(a) and (f) of the Rome Statute ('Statute').
4. At issue is whether or not the continued violations of Article 67 of the Statute, particularly (1)(a) and (1)(f) – almost two years after the charging instrument, the CoC, was issued – are consistent with Article 21(3) of the Statute, and must trigger an urgent remedy, to wit, a temporary stay of the proceedings.
5. The Defence has repeatedly identified violations of Article 67 of the Statute in its pleadings, based on the Trial Chamber's ('Chamber') jurisdiction conferred under Article 64(2) of the Statute.
6. Most recently, fair trial violations were raised in Defence pleadings filed on 27 October 2017,<sup>2</sup> and on 11 December 2017.<sup>3</sup>
7. On 27 October 2017, the Defence filed its *Observations on Evidence Presentation*. In this pleading, the Defence identified the lack of translation of the complete CoC, the charging instrument, as impairing Mr Ongwen's ability to refer to the charging document and to assist Counsel effectively in the preparation and conduct of the Defence in his defence.<sup>4</sup>

<sup>1</sup> ICC-02/04-01/15-1098, footnote 21.

<sup>2</sup> ICC-02/04-01/15-1029, "Defence Observations on the Preliminary Directions for any LRV or Defence Evidence Presentation and Request for Guidance for No-case-to-answer Motion", 27 October 2017, Confidential filing with Confidential Annexes A-C ('*Observations on Evidence Presentation*').

<sup>3</sup> ICC-02/04-01/15-1098, "Defence Observations on Fair Trial and Request or Orders on Prosecution and Additional Defence Resources," 11 December 2017, Public filing ('*Defence Fair Trial Observations*').

<sup>4</sup> *Observations on Evidence Presentation*, para. 34.

8. On 11 December 2017, the Defence filed its *Defence Fair Trial Observations*. In this pleading, the fair trial violations of notice and failure to translate the CoC, were again explicitly identified by the Defence.<sup>5</sup>
9. The Single Judge issued decisions<sup>6</sup> on both Defence pleadings. On 16 November 2017, the Single Judge issued his *Decision on Evidence Presentation*,<sup>7</sup> and on 19 December 2017, his *Decision on Request for Reports and Resources*.<sup>8</sup>
10. However, the Single Judge's decisions on both Defence filings remained silent on the fair trial violations of Article 67(1)(a) and (f) of the Statute.
11. In his 4 January 2018 decision,<sup>9</sup> the Single Judge rejected the Defence request for leave to appeal<sup>10</sup> his *Decision on Request for Reports and Resources*, holding that in respect to the 'Third Issue' (whether the *Decision on Request for Reports and Resources* should have made a finding in respect to fair trial violations) "[it] does not arise from the Impugned Decision" since the Defence did not request a finding on fair trial violations in its *Defence Fair Trial Observations* motion of 11 December 2017.<sup>11</sup>
12. The Defence submits that the instant request, to make findings on the fair trial violations, specifically addresses the issue raised in the *Decision on Leave to Appeal*.
13. However, the Defence is left perplexed by the *Decision on Leave to Appeal*.
14. It is an uncontested and fundamental principle that fair trial rights are fundamental human rights, and there is no contention on the jurisprudence in support of Article 67 of the Statute, both at the international courts and tribunals and in international instruments. We note, for

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<sup>5</sup> *Defence Fair Trial Observations*, paras 29-34.

<sup>6</sup> ICC-02/04-01/15-1074, "Decision on Defence Observations on the Preliminary Directions for any LRV or Defence Evidence Presentation and Request for Guidance on Procedure for No-Case-to-Answer Motion", 16 November 2017, Public filing ('*Decision on Evidence Presentation*'); ICC-02/04-01/15-1114, "Decision on Request for Reports and Additional Resources to the Defence, 19 December 2017, Public filing ('*Decision on Request for Reports and Resources*'). The Defence has noted that the title of the 19 December *Decision* does not include a reference to Defence Fair Trial Observations, which was the first part of the title of the Defence pleading.

<sup>7</sup> *Decision on Evidence Presentation*, ICC-02/04-01/15-1074.

<sup>8</sup> *Decision on Request for Reports and Resources*, ICC-02/04-01/15-1114.

<sup>9</sup> ICC-02/04-01/15-1126, "Decision on the Defence Request for Leave to Appeal the Decision on Request for Reports and Additional Resources to the Defence", 4 January 2018, Public filing ('*Decision on Leave to Appeal*').

<sup>10</sup> ICC-02/04-01/15-1115, "Defence Request for Leave to Appeal the Single Judge's "Decision on Requests for Reports on the Resources of the Parties to the Case and Order for Additional Resources to the Defence"", 21 December 2017, Public filing ('*Request for Leave to Appeal*').

<sup>11</sup> *Decision on Leave to Appeal*, para. 9.

example, the unequivocal language of the Appeals Chamber in the *Lubanga* Appeal Judgment, affirming the provisions of Article 21(3) of the Statute and the power of a Chamber to stay proceedings because of violations of an accused's fundamental human rights.<sup>12</sup>

15. The Defence submits that it was implicit in the remedy in its *Defence Fair Trial Observations* that the Chamber would have to decide the issue of whether there were fair trial violations.
16. But, even if the Defence made no explicit request, the Chamber, *sua sponte*, could make a finding on fair trial violations. A Trial Chamber has the obligation, pursuant to Articles 64(2) and 21(3) of the Statute, to ensure the fair trial rights of an accused, which are fundamental human rights and which must be applied and interpreted, consistent with internationally recognized human rights.
17. The Defence submits that Chamber's silence on fair trial issues raised by the Defence prejudices and harms the rights of the Accused, as well as the legitimacy of the forum in which he is being prosecuted.
18. As the Trial Hearing Schedule<sup>13</sup> proceeds into 2018 towards the end of the Prosecution case, followed by the beginning of the Defence case, the Defence submits that these fair trial violations pursuant to Article 67(1)(a) and (f) of the Statute must be addressed by the Chamber and urgently remedied.
19. Hence, the Defence, pursuant to Articles 64 and 67 of the Statute, requests that the Chamber (a) makes findings on the fair trial violations in respect to notice and translation, previously identified in its *Defence Fair Trial Observations*,<sup>14</sup> and (b) order a temporary stay of proceedings until the violations are remedied.
20. The Defence submits that the decisions on the Defence pleadings above - the *Decision on Evidence Presentation*<sup>15</sup> and *Decision on Request for Reports and Resources*<sup>16</sup> - both fail to address the fundamental fair trial violations of notice and translations identified therein, and make no findings thereon.

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<sup>12</sup> ICC-01/04-01/06-3121, para. 147.

<sup>13</sup> *Decision on Evidence Presentation*, para. 18.

<sup>14</sup> *Defence Fair Trial Observations*, paras 29-34.

<sup>15</sup> ICC-02/04-01/15-1074.

<sup>16</sup> ICC-02/04-01/15-1114.

21. For this reason, the Defence again seeks a finding on the fair trial violations and, if there are violations found by the Chamber, an appropriate remedy of a temporary stay of the proceedings until the violations are remedied.

## II. SUBMISSIONS

### A. Argument

22. Ultimately, the Trial Chamber in question is responsible for ensuring the fair trial of an accused. Pursuant to Article 64(2) of the Statute, the Trial Chamber is obliged to ensure a fair trial.<sup>17</sup>
23. In the *Katanga* Decision, the Appeals Chamber has held that fair trial violations in respect to notice and language should be assessed under a high standard.<sup>18</sup>
24. In particular, the Appeals Chamber, reversing the Pre-Trial Chamber I decision, held that the Pre-Trial Chamber I had erred in interpreting the standard to be applied under Article 67(1)(a) and (f) of the Statute, and remitted the matter for a new determination of Appellant's request for Lingala interpretation and translation. The Appeals Chamber also held that it interprets the standard to be applied "to be higher than that put forward by the Pre-Trial Chamber I,"<sup>19</sup> and found that the Pre-Trial Chamber I "did not comprehensively consider the importance of the fact that the word 'fully' is included in the text [of Article 67(1)(a) of the Statute] and the article's full legislative history."<sup>20</sup>
25. In its *Katanga* Decision, the Appeals Chamber pointed out that the Pre-Trial Chamber I failed to interpret the language "fully understands and speaks", in accordance with the provisions of the Vienna Convention on the Law of Treaties, Article 31(1) which provides that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."<sup>21</sup>

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<sup>17</sup> Judgment on the appeal of Mr. Germain Katanga against the decision of Pre-Trial Chamber I entitled "Decision on the Defence Request Concerning Languages," 27 May 2008, Appeals Chamber, ICC-01-04-01/07-522 (*Katanga* Decision), para. 61 (The Appeals Chamber held that the Pre-Trial Chamber erred in its interpretation of the standard to be applied under Article 67(1)(a) and (f)); *see also* Article 64(2) of the Statute.

<sup>18</sup> *Katanga* Decision, paras 62-64.

<sup>19</sup> *Katanga* Decision, para. 63.

<sup>20</sup> *Katanga* Decision, para. 37.

<sup>21</sup> *Katanga* Decision, paras 37-38.

26. The Appeals Chamber emphasized that the requirements for notice and translation, when examined in the legislative history, supported a high standard to be used in interpreting the provisions of Article 67(1)(a) and (f) of the Statute.<sup>22</sup>
27. While the specifics in the *Katanga* case (whether or not Appellant fully understood French, or whether the language of Lingala was the language he fully understood and spoke) are different than in our case, the legal principle is the same: the right to interpretation and translation must be interpreted within the context of Article 67(1)(a) of the Statute, the right to be informed promptly, and in detail of the nature, cause and content of the charge, in a language which an accused fully understands and speaks. This principle must be interpreted with a high standard.
28. Here, proceeding with the trial – in the absence of Mr Ongwen being provided with a complete translation in Acholi of the CoC decision, the charging instrument, which is 104 pages in English, and the Separate Opinion of Judge de Brichambaut – continues to violate his rights under Article 67 of the Statute.
29. These violations are inconsistent with internationally recognized human rights, and thus, also violate Article 21(3) of the Statute.
30. Particularly at this juncture in the case, months before the projected start of the Defence case, the prejudice and harm are magnified as to Mr Ongwen’s fair trial right to raise a defence, pursuant to Article 67(1)(e) of the Statute.

## **B. Remedy**

31. The Defence notes that the Appeals Chamber in *Lubanga* case has held that proceedings may be stayed where “‘a fair trial becomes impossible because of breaches of the fundamental rights of the [...] accused by his/her accusers’ and where the breaches are such ‘as to make it impossible’ for the accused to make his/her defence ‘within the framework of the rights’ as laid out in the Statute’”.<sup>23</sup>
32. The Defence submits that it is impossible for Mr Ongwen to exercise his right to present a defence, in a situation where he does not have the complete CoC decision translated into the Acholi language.

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<sup>22</sup> *Katanga* Decision, paras 41-62.

<sup>23</sup> ICC-01/04-01/06-3121, para. 147.

33. To proceed with 'business as usual' in the context of these fundamental fair trial violations and violations of his internationally recognized human rights in respect to notice and translation is unfair and prejudicial to Mr Ongwen, and irreparably harms his ability to present his defence.
34. Due to the need of an urgent remedy of this situation, the Defence proposes that a temporary stay of the proceedings would likely hasten the possible resolution of the fair trial violations.

### III. REMEDY SOUGHT

35. For the reasons stated above, the Defence respectfully requests that the Chamber:
- a) Make findings on the fair trial violations in respect to notice and translation; and
  - b) Order a temporary stay of proceedings until the violations are remedied.

Respectfully submitted,



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Hon. Krispus Ayena Odongo  
On behalf of Dominic Ongwen

Dated this 8th day of January, 2018

At Gulu, Uganda