

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

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

Date: **4 May 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 Leave to Appeal the “Decision on Defence Urgent Request for Delay in Opening of LRV and CLRV Evidence Presentation”**

**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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**REGISTRY**

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**Registrar**

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**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations  
Section Other**

## I. INTRODUCTION

1. Pursuant to Article 82(1)(d) of the Rome Statute ('Statute'), the Defence for Dominic Ongwen ('Defence') respectfully seeks leave to appeal the Trial Chamber IX's ('Trial Chamber') "Decision on Defence Urgent Request for Delay in Opening LRV and CLRV Evidence Presentation" ('Decision 1248').<sup>1</sup>
2. The Defence avers that the three requirements for granting an interlocutory appeal pursuant to Article 82(1)(d) of the Statute are satisfied in respect to two issues hereinafter identified. First, each of the appealable issues for which appellate resolution is sought arises out of Decision 1248, and each is essential for the determination of Decision 1248's correctness. Second, Decision 1248 directly concerns Mr Ongwen's right to a fair and expeditious conduct of the proceedings, as well as, the outcome of the trial. Third, an immediate resolution will materially advance the proceedings by removing doubts about the procedural and fair trial matters that significantly affect Mr Ongwen's preparation of his defence.

## II. PROCEDURAL HISTORY

3. On 24 April 2018, the Defence filed its "Defence Urgent Request for Delay in Opening of LRV and CLRV Cases Pursuant to Articles 67(1)(b) and 67(1)(e) of the Rome Statute" ('Defence Request').<sup>2</sup> The Defence requested the extension of at least one month in order to afford adequate time to prepare for Legal Representatives of Victims ('LRV') and Common Legal Representative for Victims ('CLRV') cases, in order to ensure compliance with Mr Ongwen's rights under Article 67(1)(b), 67(1)(e) and 64(2) of the Rome Statute ('Statute').<sup>3</sup>
4. On 26 April 2018, the Prosecution filed its "Prosecution's Response to the Defence Urgent Request for Delay in Opening of LRV and CLRV Cases".<sup>4</sup> The Prosecution requested that the Defence Request be rejected and submitted that the Defence failed to establish that it is in the interests of justice to delay the proceedings by at least one month.<sup>5</sup>

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<sup>1</sup> ICC-02/04-01/15-1248.

<sup>2</sup> ICC-02/04-01/15-1239.

<sup>3</sup> Defence Request, paras 1-2.

<sup>4</sup> ICC-02/04-01/15-1245.

<sup>5</sup> Prosecution Response, paras 2-3, 7-9.

5. On the same day, the CLRV filed its “CLR Response to the “Defence Urgent Request for Delay in Opening of LRV and CLRV Cases, Pursuant to Articles 67(1)(b) and 67(1)(e) of the Rome Statute””.<sup>6</sup> The CLRV submitted, *inter alia*, that the Defence Request is frivolous and should be dismissed *in limine*.<sup>7</sup>
6. Also on 26 April 2018, the LRV filed its “Victims response to “Defence Urgent Request for Delay in Opening of LRV and CLRV Cases, Pursuant to Articles 67(1)(b) and 67(1)(e) of the Rome Statute””.<sup>8</sup> The LRV requested that the Defence Request be rejected and submitted that the Defence had sufficient time and resources to prepare for the opening of the LRV and CLRV cases.<sup>9</sup>
7. Finally, on 26 April 2018, the Trial Chamber issued Decision 1248 rejecting the Defence Request. The Trial Chamber found that Mr Ongwen has not suffered any undue prejudice in the present case and an extension of one month is not necessary.<sup>10</sup>

### III. APPLICABLE LAW

8. Pursuant to Article 82(1)(d) of the Statute, either party may appeal a decision that involves an issue 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 Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings. 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”.<sup>11</sup> The Chamber is vested with the power to certify the existence of an appealable issue;<sup>12</sup> however, when determining whether leave to appeal should be granted, the 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.<sup>13</sup>
9. According to Rule 155(1) of the Rules of Procedure and Evidence (‘RPE’), a party shall make a written application for leave to appeal to the Chamber that gave the decision, setting out the reasons for the request for leave to appeal. The application for leave to appeal shall state the

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<sup>6</sup> ICC-02/04-01/15-1246.

<sup>7</sup> CLRV Response, paras 2 and 17.

<sup>8</sup> ICC-02/04-01/15-1247.

<sup>9</sup> LRV Response, paras 2, 11-17.

<sup>10</sup> Decision 1248, para. 16.

<sup>11</sup> ICC-01/04-168, para. 19.

<sup>12</sup> ICC-01/04-168, para. 20.

<sup>13</sup> See *e.g.* ICC-01/09-02/11-253, para. 28.

name and number of the case or situation and shall specify the legal and/or factual reasons in support thereof, in accordance with Regulation 65(1) of the Regulations of the Court ('RoC'). It shall also specify the reasons warranting immediate resolution by the Appeals Chamber of the matter at issue.<sup>14</sup>

10. The Appeals Chamber has ruled that only an 'issue' may form the subject-matter of an appealable decision, which it defined as "an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion".<sup>15</sup> Further, an issue is "a subject the resolution of which is essential for the determination of the matters arising in the judicial cause under examination" and may be "legal or factual or a mixed one".<sup>16</sup> The issue must be one apt to "significantly affect", that is, in a material way, either the fair and expeditious conduct of the proceedings, or the outcome of the trial.<sup>17</sup> In other words, the issue "must be one likely to have repercussions on either of these two elements of justice".<sup>18</sup>
11. The Appeals Chamber has defined the term "fair" as being associated with the norms of a fair trial and corresponding human rights, as per Articles 64(2) and Article 67(1) of the Statute.<sup>19</sup> In particular, it noted that the "expeditious conduct of the proceedings in one form or another constitutes an attribute to a fair trial".<sup>20</sup> The term "proceedings" extends to proceedings prior and subsequent to the current proceedings.<sup>21</sup>
12. The Appeals Chamber also held that an issue will be appealable "where the possibility of error in an interlocutory or intermediate decision may have a bearing" on the outcome of the trial.<sup>22</sup> The Chamber, when deciding on a request for leave to appeal, "must ponder the possible implications of a given issue being wrongly decided on the outcome of the case", thereby forecasting the consequences of such an occurrence.<sup>23</sup>
13. Regarding the second aspect of a request for leave to appeal (the immediate resolution by the Appeals Chamber), the Appeals Chamber has held that this criterion will be satisfied if the

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<sup>14</sup> Regulation 155(2) of the RoC.

<sup>15</sup> ICC-01/04-168, para. 9.

<sup>16</sup> ICC-01/04-168, para. 9.

<sup>17</sup> ICC-01/04-168, para. 10.

<sup>18</sup> ICC-01/04-168, para. 10.

<sup>19</sup> ICC-01/04-168, para. 11.

<sup>20</sup> ICC-01/04-168, para. 11.

<sup>21</sup> ICC-01/04-168, para. 12.

<sup>22</sup> ICC-01/04-168, para. 13.

<sup>23</sup> ICC-01/04-168, para. 13.

relevant Chamber rules that an authoritative determination on the appeal would “move forward” the proceedings and “remove doubts about the correctness of the decision or map a course of action along the rights lines.”<sup>24</sup> The issue at stake must also be “such that its immediate resolution by the Appeals Chamber will settle the matter posing for decision through its authoritative determination, ridding thereby the judicial process of possible mistakes that might taint either the fairness of the proceedings or the outcome of the trial”.<sup>25</sup> The solving of the issue by the Appeals Chamber is aimed to “ensure that the proceedings follow the right course”.<sup>26</sup>

#### IV. SUBMISSIONS

##### A. The appealable issues arise from Decision 1248

14. The Defence seeks leave to appeal the following issues arising from Decision 1248, namely:

- **Issue 1: Whether Decision 1248 violates Mr Ongwen’s fair trial rights under Articles 67(1)(b), 67(1)(e) and 64(2) of the Statute; and b) whether Decision 1248 complies with the Trial Chamber’s previous decision ICC-02/04-01/15-1199**

15. This issue arises from Decision 1248. In particular, the Trial Chamber held:

*The Chamber is conscious of the Defence’s duty to review comprehensively all items disclosed and subsequently confer with the accused.*<sup>27</sup>

16. In this regard, the Trial Chamber also found that:

*The Chamber has in the past, keeping in mind the rights of the accused, deliberately set new disclosure deadlines to allow the Defence sufficient time to prepare. Taking into account the purpose, content and quantity of the disclosed materials, the Defence has been given adequate time to prepare itself for the Legal Representatives’ evidence presentation. The accused has not suffered any undue prejudice in the present case and an extension of one month is not necessary.*<sup>28</sup>

17. The above statements indicate that the Trial Chamber is cognisant of Mr Ongwen’s fair trial rights and recognizes the Defence’s duty to review comprehensively all items disclosed and subsequently confer with the accused. To substantiate its ruling, the Trial Chamber even refers

<sup>24</sup> ICC-01/04-168, paras 14-15.

<sup>25</sup> ICC-01/06-168, para. 14.

<sup>26</sup> ICC-01/04-168, para. 15.

<sup>27</sup> Decision 1248, para. 12.

<sup>28</sup> Decision 1248, para. 16.

to<sup>29</sup> paragraph 22 of the Defence Request that discusses the CLRV's very limited translation of its experts reports into Acholi,<sup>30</sup> and the related impediments to the Defence duty to confer with Mr Ongwen and receive instructions from him.

18. The issue here is that although the Trial Chamber indicates awareness of Mr Ongwen's fair trial rights and the Defence duties, Decision 1248 fully ignores and fails to address the Defence submissions regarding CLRV's limited translations of its experts reports into Acholi, Mr Ongwen's disadvantage to review the impugned materials and the inadequate time to confer with and carry out Mr Ongwen's instructions.<sup>31</sup> Thus, Decision 1248 objectively violates Mr Ongwen's rights as enshrined in Articles 67(1)(b), 67(1)(e) and 64(2) of the Statute.
19. The Trial Chamber must "ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused".<sup>32</sup> The rights of the accused include "adequate time for the preparation of the defence," communication with counsel<sup>33</sup> and the examination of witnesses against him.<sup>34</sup> Additionally, the Trial Chamber directed the LRV and CLRV that Acholi translations be produced of the anticipated testimony summaries.<sup>35</sup> The duty of the Trial Chamber is to safeguard Mr Ongwen's fair trial rights and the Trial Chamber justly sought to ensure the protection of these rights by directing the LRV and CLRV to produce summaries of anticipated testimonies and Acholi translations of these summaries.
20. In its request, the Defence submitted three challenges threatening Mr Ongwen's fair trial rights. First, the Defence is under a strict ethical and professional duty to review comprehensively the items disclosed by both victims' teams for the purpose of preparing defence. Second, the Defence is obligated to confer with, and carry out Mr Ongwen's instructions during the upcoming LRV and CLRV cases. Finally, because the CLRV failed to provide the required Acholi translations of its experts' reports and Mr Ongwen's limited formal education, the Defence is required to spend extended periods of time helping Mr Ongwen to review the documents and prepare for examination of witnesses against him. Given these submissions and

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<sup>29</sup> Decision 1248, para. 12 and fn. 21.

<sup>30</sup> Defence Request, para. 22 and fn. 24: (*See* confidential Annex A where the CLRV disclosed one page summaries for each of their expert reports which total 167 pages).

<sup>31</sup> Defence Request, paras 22-24.

<sup>32</sup> Article 64(2) of the Statute.

<sup>33</sup> Article 67(1)(b) of the Statute.

<sup>34</sup> Article 67(1)(e) of the Statute.

<sup>35</sup> ICC-02/04-01/15-1199, paras 79-80.

the limited time available, the Defence concluded that receiving the necessary input and instructions from Mr Ongwen was impossible.<sup>36</sup>

21. In the decision on the LRV and CLRV requests to present evidence,<sup>37</sup> the Trial Chamber explained that the purpose of the requirement was to “protect the rights of the accused”<sup>38</sup> and “facilitate the preparation of the Defence”.<sup>39</sup> The same decision requires the CLRV and LRV to produce the Acholi translations of summaries of anticipated testimonies to the Defence. As pointed out in the Defence Request,<sup>40</sup> the CLRV failed to comply with this requirement, and the Trial Chamber omitted to take this failure into consideration when deciding upon the Defence Request.
22. In particular, the Defence notes that the CLRV did not provide sufficient Acholi summaries. Rather, it provided three one-page long work products.<sup>41</sup> In other words, the Defence received a three-page long work product in Acholi supposedly mirroring 167 pages of important expert reports that are being submitted into evidence *via* Rule 68(3) of the Rules of Procedure and Evidence.<sup>42</sup> This three-page long work product fails to encompass the vast amount of pertinent information within 167 pages of expert reports. These work products are broad, incomplete and do not fulfil the stated purpose of the Trial Chamber’s decision on the LRV and CLRV presentation of evidence.
23. As a result of the limited translations provided by the CLRV, the Defence is required to spend significant time with Mr Ongwen reviewing the lengthy expert reports in English. The limited translations provided hinder the Defence from efficiently communicating with Mr Ongwen and delay the preparation of the defence. Due to this delay and the Defence’s ethical and professional obligation to review the material comprehensively and to confer with Mr Ongwen,

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<sup>36</sup> Defence Request, paras 12-24.

<sup>37</sup> ICC-02/04-01/15-1199.

<sup>38</sup> ICC-02/04-01/15-1199, para. 84.

<sup>39</sup> ICC-02/04-01/15-1199, para. 80.

<sup>40</sup> Defence Request, para. 22 and fn. 24.

<sup>41</sup> Acholi translation of a work product related to Expert Report no. 1 (UGA-PCV-0001-0309) is one page long and contains 2 paragraphs; Acholi translation of a work product related to Expert Report no. 2 (UGA-PCV-0002-0488) is one page long and contains three paragraphs; Acholi translation of a work product related to Expert Report no. 3 (UGA-PCV-0003-1051) is one page long and contains two paragraphs.

<sup>42</sup> Expert Report No. 1 (UGA-PCV-0001-0020) is 58 pages long; Expert Report No. 2 (UGA-PCV-0002-0005) is 70 pages long; Expert Report No. 3 (UGA-PCV-0003-0046) is 39 pages long. This equals to 167 pages; *see also* ICC-02/04-01/15-1239-Conf-AnxA.

“adequate time for the preparation of the defence”<sup>43</sup> does not exist. This is a violation of Mr Ongwen’s fair trial rights as enshrined in Article 67(1)(b), 67(1)(e) and 64(2) of the Statute.

24. In sum, Decision 1248 fails to comply with the Trial Chamber’s previous decision ICC-02/04-01/15-1199 setting the requirements regarding the provision of Acholi translations of summaries of expert reports and violates Mr Ongwen’s rights to adequate time to prepare a defence and to communicate with counsel, and thus warrants the Appeals Chamber’s immediate intervention at the interlocutory level.

- **Issue 2: Whether the Trial Chamber acted *ultra vires* for disregarding the Defence procedural right to prepare and file a request for leave to reply to a response from the Prosecution within three days of notification pursuant to Regulations 24(5), 31 and 34(c) of the Regulations of the Court (‘RoC’) and the Defence’s procedural right to reply to submissions from the CLRV and LRV pursuant to Rule 91(2) of the RPE**

25. Issue 2 arises from Decision 1248. The Trial Chamber issued Decision 1248 on the Defence Request three hours after the notification of responses from Prosecution, CLRV and LRV.<sup>44</sup> In Decision 1248, the Trial Chamber rejected the Defence’s request for a delay in opening of LRV and CLRV evidence presentation.

26. The issue here is not the rejection of the Defence’s request. Rather, the issue is whether the Trial Chamber denied the Defence its procedural right to file a request for leave to reply to responses from the Prosecution by issuing Decision 1248 three hours after the submission of responses. The issue also deals with the Defence’s procedural right pursuant to Rule 91(2) of the RPE where the Defence and Prosecution have a right to reply to submissions from the LRV and CLRV.<sup>45</sup> In other words, without any further inquiry or shortening of the time within which to file a request for leave to reply or the reply to the CLRV and LRV, the Trial Chamber – acting beyond its inherent powers and functions – denied the Defence the right to prepare and file its potential request for leave to reply and the procedural right to reply to the CLRV and LRV.

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<sup>43</sup> Article 67(1)(b) of the Statute.

<sup>44</sup> Email Communication from the Court Management Section to the *Ongwen* case parties and participants, 26 April 2018, 15:10 CET.

<sup>45</sup> *See also* ICC-02/04-01/15-350, para. 34 (Pre-Trial Chamber II’s order that all replies pursuant to Rule 91(2) must be filed within three days.).

27. The Defence may “reply to a response with the leave of the Chamber”<sup>46</sup> and the request for leave to reply must “be filed within three days of notification in accordance with Regulation 31 of the response”.<sup>47</sup> The Defence possesses the procedural right to file a request for leave to reply within three days of notification of the response. If the request is granted by the Trial Chamber, then the Defence may file a reply. However, here, the Defence has been denied its procedural right. Furthermore, Rule 91(2) of the RPE states “[t]he Prosecutor and the defence shall be allowed to reply to any...written observation by the legal representative for victims”.<sup>48</sup>
28. Issuing Decision 1248 reduced the time within which to file a request for leave to reply from three days to three hours, and denied the Defence its right to reply to the LRV and CLRV. The Trial Chamber did not issue any order or instructions shortening the time within which to file a request for leave to reply or file the Rule 91(2) reply. Given the Defence’s right to reply and to file a leave to reply, the Trial Chamber should have informed the Defence of the reduced time to file its replies and request.
29. Therefore, the Defence avers that the Trial Chamber’s failure to permit the Defence to prepare and file a request for leave to reply to the Prosecution, and its procedural right to reply to the CLRV and LRV responses, violates Mr Ongwen’s fair trial rights, specifically the right to exhaust all remedies at the trial level before he raises the issue on appeal, and thus warrants the Appeals Chamber’s immediate intervention at the interlocutory level.

**B. The appealable issues affect the fair and expeditious conduct of the *Ongwen* case proceedings**

30. The Defence reiterates that when determining whether a request for leave to appeal should be granted, the Trial Chamber must not justify or defend the correctness of its decision, but instead focus on determining whether the issues presented significantly affect the fairness of the proceedings.<sup>49</sup> Mr Ongwen has the right to a reasoned statement<sup>50</sup> and “reasoned statement of the Trial Chamber’s findings on the evidence and conclusions” must be provided.<sup>51</sup> A reasoned statement includes a “holistic evaluation and weighing of all the evidence taken together in relation to the fact at issue”.<sup>52</sup> The Trial Chamber did not consider all of the evidence relating

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<sup>46</sup> Regulation 24(5) of the RoC.

<sup>47</sup> Regulation 34(c) of the RoC.

<sup>48</sup> Rule 91(2) of the PRE.

<sup>49</sup> See e.g. ICC-02/09-02/11-253, para. 28.

<sup>50</sup> ICC-01/05-01/13-2275-Red, para. 1540.

<sup>51</sup> Article 74(5) of the Statute.

<sup>52</sup> ICC-01/04-01/06-3121-Red, para. 22.

to the issues that affects the fair and expeditious conduct of the case proceedings. Furthermore, the Trial Chamber failed to provide a full and reasoned statement regarding the issues.

31. The Defence submits that leaving these two appealable issues unresolved and unsubstantiated by a reasoned statement of the Appeals Chamber would significantly affect the fair and expeditious conduct of the *Ongwen* case proceedings. The fair conduct of proceedings ensures that the proceedings are conducted in accordance with international human rights and the rights guaranteed in the Statute. For example, a violation of Mr Ongwen's fair trial rights under Articles 67(1)(b) and 67(1)(e) of the Statute, or a denial of Mr Ongwen's right to exhaust all remedies at the trial level, do affect those rights, as well as, the fairness of the *Ongwen* case proceedings.

**C. The appealable issues affect the outcome of the *Ongwen* case trial**

32. Given that the two appealable issues focus on essential legal and procedural matters before this Trial Chamber, the Appeals Chamber's resolution of such matters will significantly affect the outcome of this trial.
33. In other words, if leave is granted and the appeal successful, reversal of Decision 1248 may resolve the disputed issues in the *Ongwen* case, such as the issue of insufficient Acholi translation and the Defence's procedural right to file a leave to reply to a response. This could, self-evidently, have an impact on the outcome of the *Ongwen* case trial.

**D. An immediate resolution of the appealable issues may materially advance the *Ongwen* case proceedings**

34. As held by the Appeals Chamber, the purpose of interlocutory appeal is "removing doubts about the correctness of a decision or mapping a course of actions along the rights lines", which "provides a safety net for the integrity of the proceedings".<sup>53</sup> In the present case, there is no such safety net since Decision 1248 deals with Mr Ongwen's most fundamental fair trial rights issues that may be affected by errors which ought to be resolved by the Appeals Chamber.
35. In sum, the Defence avers that an immediate and urgent resolution of these two appealable issues by the Appeals Chamber will materially advance the proceedings. If the appealable issues are resolved now, they may not have to be raised again during the Defence presentation of evidence, which may result in materially advancing the *Ongwen* case proceedings.

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<sup>53</sup> ICC-01/04-168, para. 15.

**V. RELIEF SOUGHT**

36. For the reasons stated above, the Defence respectfully requests that leave is granted by the Trial Chamber to appeal these two issues:

- Issue 1: Whether Decision 1248 violates Mr Ongwen's fair trial rights under Articles 67(1)(b), 67(1)(e) and 64(2) of the Statute; and b) whether Decision 1248 complies with the Trial Chamber's previous decision ICC-02/04-01/15-1199 and
- Issue 2: Whether the Trial Chamber acted *ultra vires* for disregarding the Defence procedural right to prepare and file a request for leave to reply to a response within three days of notification pursuant to Regulations 24(5), 31 and 34(c) of the Regulations of the Court and the Defence's procedural right to reply to submissions from the CLRV and LRV pursuant to Rule 91(2) of the RPE.

Respectfully submitted,



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

Dated this 4<sup>th</sup> day of May, 2018  
At Gulu, Uganda