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**International
Criminal
Court**

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

Date: **17 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 Trial Chamber's Oral Decision on the
Exclusion of Certain Parts of the CLRV Expert Report**

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 ('Statute'), the Defence for Dominic Ongwen ('Defence') seeks leave to appeal the Trial Chamber IX's ('Trial Chamber') oral decision rejecting the Defence request to exclude certain parts¹ of the Common Legal Representative for Victims ('CLRV') expert report ('T-175 Decision').²
2. In particular, it is the Defence position that the Trial Chamber's T-175 Decision rejecting the Defence request is inconsistent with the Trial Chamber's prior rulings regarding the scope of CLRV and Legal Representatives of Victims ('LRV') presentation of evidence, restrictions on the evidence that the LRV and CLRV are allowed to elicit, and the purpose and content of the materials disclosed by the LRV and CLRV.³
3. The Defence submits that the three requirements for granting an interlocutory appeal pursuant to Article 82(1)(d) of the Statute are satisfied in respect to one issue hereinafter identified:
 - 1) The appealable issue for which appellate resolution is sought arises out of T-175 Decision and is essential for the correct determination of this decision;
 - 2) T-175 Decision directly concerns Mr Ongwen's fair trial rights under Articles 67(1)(e) and 64(2) of the Statute, as well as, the outcome of the trial;
 - 3) An immediate resolution of this issue will materially advance the proceedings by removing doubts about the role and purpose of the LRV and CLRV presentation of evidence and about the Trial Chamber's rulings regarding this matter that significantly affects Mr Ongwen's fair trial rights.
4. The Defence reserves its right to submit a leave to appeal, if necessary, when the Trial Chamber issues its decision on the translation objections.⁴ The Trial Chamber stated this legal matter is under consideration and therefore a decision is still pending.⁵

¹ UGA-PCV-0001-0020, at 0058 – 0062 (pp 38-42).

² ICC-02/04-01/15-T-175-CONF-ENG ET, pp 1-13. (Open Session).

³ ICC-02/04-01/15-1248, paras 13-14; ICC-02/04-01/15-1199, para. 18; Transcript of hearing on 4 April 2017, ICC-02/04-01/15-T-65-Red-ENG, page 55, line 14 to page 56, line 16.

⁴ See T-175 Decision, p. 7, lines 3-25, p. 8, lines 1-13.

⁵ See T-175 Decision, p. 12, lines 21-23: ("Regarding the translation issue, the Chamber notes that this issue has been raised numerous times and is already under consideration in a request that has been submitted by the Defence").

II. PROCEDURAL HISTORY

5. On 4 April 2017, the Trial Chamber ruled in its oral decision on the scope of the questioning by the LRV that:

[T]he LRV may not ask questions as the Prosecution has, irrespective of whether the Prosecution elicited information on the same point or not. The Chamber will sustain objections if it determines that, for example, the LRVs are attempting to elicit evidence which aims to prove the elements of the crimes charged or Mr Ongwen's role in their commission. However, the LRV may appropriately ask certain questions to witnesses about other matters which are relevant to the personal interests of the victims. This may include questions about harms which the witness personally suffered or harms of other victims which the witness observed. As always, the Chamber emphasises that objections will be received and resolved on a case-by-case basis.⁶

6. On 6 March 2018, the Trial Chamber issued its "Decision on the Legal Representatives for Victims Requests to Present Evidence and Views and Concerns and related requests"⁷ and recalled "its oral decision of 4 April 2017 on the scope of questioning by the LRV. The Trial Chamber held that "the same limitations and considerations apply to the questioning of witnesses which are called upon request by the Legal Representatives"⁸ and "the Legal Representatives' experts will not appear to elicit evidence which aims to prove the elements of the crimes charged or Mr Ongwen's role in their commission."⁹
7. Finally, on 26 April 2018, the Trial Chamber issued "Decision on Defence Urgent Request for Delay in Opening of LRV and CLRV Evidence Presentation."¹⁰ The Trial Chamber ruled that "the Legal Representatives should not attempt to 'elicit evidence which aims to prove the elements of the crimes charged or Mr Ongwen's role in their commission'"¹¹ and that "[i]n this particular instance the experts will all speak to general matters unrelated to Mr Ongwen's individual criminal responsibility (such as victimisation of affected communities, Acholi culture, issues related to children and youth, and effects on victims of sexual/gender based crimes)."¹²

⁶ Transcript of hearing on 4 April 2017, ICC-02/04-01/15-T-65-Red-ENG ('T-65'), page 56, lines 3-13.

⁷ ICC-02/04-01/15-1199-Red ('Decision 1199').

⁸ Decision 1199, para. 18.

⁹ Decision 1199, para. 23.

¹⁰ ICC-02/04-01/15-1248 ('Decision 1248').

¹¹ Decision 1248, para. 13.

¹² Decision 1248, para. 14.

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.”¹³ The Chamber is vested with the power to certify the existence of an appealable issue.¹⁴ 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 issue presented significantly affects the fairness of the proceedings.¹⁵
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 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.¹⁶
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.”¹⁷ 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.”¹⁸ The issue must be one apt to “significantly affect” the fair and expeditious conduct of the proceedings or the outcome of the trial.¹⁹ In other words, the issue “must be one likely to have repercussions on either of these two elements of justice”.²⁰

¹³ ICC-01/04-168, para. 19.

¹⁴ ICC-01/04-168, para. 20.

¹⁵ *See e.g.* ICC-01/09-02/11-253, para. 28.

¹⁶ Rule 155(1) of the RPE.

¹⁷ ICC-01/04-168, para. 9.

¹⁸ ICC-01/04-168, para. 9.

¹⁹ ICC-01/04-168, para. 10.

²⁰ ICC-01/04-168, para. 10.

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.²¹ In particular, it noted that the “expeditious conduct of the proceedings in one form or another constitutes an attribute to a fair trial.”²² The term “proceedings” extends to proceedings prior and subsequent to the current proceedings.²³
12. The Appeals Chamber also held 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.²⁴ 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.²⁵
13. Regarding the second aspect of a request for leave to appeal (the immediate resolution by the Appeals Chamber), the Appeals Chamber held this criterion will be satisfied if the 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 right lines.”²⁶ 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.”²⁷ The solving of the issue by the Appeals Chamber is aimed to ensure “that the proceedings follow the right course.”²⁸

IV. SUBMISSIONS

A. The appealable issue arises from T-175 Decision

14. The Defence seeks leave to appeal the following issue arising from T-175 Decision, namely:

²¹ ICC-01/04-168, para. 11.

²² ICC-01/04-168, para. 11.

²³ ICC-01/04-168, para. 12.

²⁴ ICC-01/04-168, para. 13.

²⁵ ICC-01/04-168, para. 13.

²⁶ ICC-01/04-168, paras 14-15.

²⁷ ICC-01/06-168, para. 14.

²⁸ ICC-01/04-168, para. 15.

J Issue 1: Whether the Trial Chamber’s decision²⁹ is inconsistent with its previous rulings³⁰ establishing the scope of the LRV and CLRV presentation of evidence, restrictions on the evidence that the LRV and CLRV are allowed to elicit, and the purpose and content of the materials disclosed by the LRV and CLRV.

15. This issue arises from T-175 Decision. In particular, the Trial Chamber held:

The request by the Defence to exclude pages 38 to 42 of the expert report into evidence is rejected. With regard to the argument that the report mentions the testimony of unknown witnesses, the Chamber notes that all references made in the four pages are done by witnesses that are known to the Defence, that the extracts cited are already in evidence.³¹

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

The Chamber further stresses, as pointed out by the Defence, the limited purpose of the testimony by these witnesses. It recalls decision 1199 and its oral instruction from 4 April 2017 that the victim representatives may, and I quote again: “Appropriately ask certain questions to witnesses about other matters which are relevant to the personal interests of the victims.” This may include questions about harms which the witnesses personally suffered or harms of other victims which the witness observed. The expert report is, therefore, not outside of these instructions.³²

17. The above mentioned quotes from the T-175 Decision are findings on the Defence request raised before the start of the testimony of CLRV’s expert, PCV-0001, on 14 May 2018. The Defence requested the Trial Chamber to exclude pages 38-42 of the PCV-0001’s expert report³³ because the content of these pages contradicts the Trial Chamber’s instructions regarding the LRV and CLRV presentation of evidence, and thus is prejudicial to Mr Ongwen’s fair trial rights.³⁴
18. The Defence further submitted that “the reason we’re taking this position has to do with the specific examples used here, some of which go to Article 56 witnesses who are identified, some are anonymous Article 56 witnesses and a few other are just testimony thrown in. In the main,

²⁹ T-175 Decision.

³⁰ T-65; Decision 1199; and Decision 1248.

³¹ T-175 Decision, p. 11, lines 16-21.

³² T-175 Decision, p. 12, lines 4-11.

³³ UGA-PCV-0001-0020, at 0058 – 0062 (pp 38-42).

³⁴ T-175 Decision, p. 3, lines 7-11; p. 3, lines 12-20; p. 6, line 25, p. 7, lines 1-2; p. 8, lines 7-10.

we consider in the aggregate all of these as prejudicial to the fair trial rights of the client if they are included in the report [and] it is admitted as such”.³⁵

19. Defence counsel, Ms Beth Lyons, presented the Trial Chamber with the following examples to support the exclusion of pages 38-42 of the PCV-0001’s expert report:

- a) “Multiple victim witnesses provided testimony throughout the Court’s proceedings. Included in this testimony were impact statements that detailed both the physical and psychological trauma that resulted from rapes and other crimes committed by Ongwen and the LRA”.³⁶ Here the Defence reiterates that this statement does not make any distinction between allegations against Mr Ongwen and the LRA. Mr Ongwen is not synonymous with the LRA. Therefore, this statement is guilt by association and violates any specificity that Mr Ongwen is entitled to under fair trial.³⁷
- b) “I did not want to sleep in his house but he told me to do so. I could not have refused. If I refused I would be killed”.³⁸ Here, the Defence reiterates that this is a clear example of prejudice against Mr Ongwen because of the potential assumption that “he” is Mr Ongwen. This also violates specificity that Mr Ongwen is entitled to under fair trial.³⁹
- c) Similarly, the expert report refers to Prosecution witness P-0070’s testimony which discusses the alleged distribution of abductees between the LRA commanders.⁴⁰ In this regard, the Defence reiterates that even if this is a general comment, the mere fact that this statement appears in expert report submitted into evidence in the case against Mr Ongwen can be understood as prejudicial against Mr Ongwen.⁴¹
- d) “Repeatedly the court heard about Mr Ongwen or other LRA commanders raping children”.⁴² Here, the Defence reiterates that Mr Ongwen is not charged with raping children. Therefore, this section of expert report is prejudicial to Mr Ongwen.⁴³

³⁵ T-175 Decision, p. 2, lines 24-25; p. 3, lines 1-6.

³⁶ T-175, p. 3, lines 23-25, p. 4, line 1; *see also* UGA-PCV-0001-0020, at 0058, para. 1.

³⁷ T-175, p. 4, lines 2-5.

³⁸ UGA-PCV-0001-0020, at 0059; *see also* T-175, p. 4, lines 22-23.

³⁹ T-175, p. 4, lines 22-25, and p. 5, lines 1-2.

⁴⁰ UGA-PCV-0001-0020, at 0059; T-175, p. 5, lines 3-7.

⁴¹ T-175 Decision, p. 5, lines 3-7.

⁴² UGA-PCV-0001-0020, at 0059; *see also* T-175, p. 5, lines 8-14.

⁴³ T-175, p. 5, lines 8-14.

- e) “Another article 56 witness articulated her traumatic experience of rape:...went in, he followed me, he came in after me. He shut the door. He lay down and he asked me to lie down as well”.⁴⁴ In this regard, the Defence reiterates that this is another example of prejudicial effect of inclusion against Mr Ongwen because of the potential attribution that “he” could be Mr Ongwen.⁴⁵ This is also an example of an anonymous Article 56 witness. The expert report does not specify who this witness is.⁴⁶
- f) The Defence also reiterates that the reference to the testimony of Prosecution witness P-0235 on page 42 of the expert report discusses evidence which aims to prove the elements of the crimes charged by the Prosecution or Mr Ongwen’s role in their commission. Therefore, the submission of this section violates the Trial Chamber’s prior rulings on the scope of the LRV and CLRV presentation of evidence.⁴⁷
- g) “Witness UGA-OTP-P-0227 describes how Ongwen would select a sex slave to rape and would rape her anally and/or vaginally”.⁴⁸ Here the Defence reiterates that in addition to CLRV expert’s discussion about the evidence that aims to prove the elements of crimes charged against Mr Ongwen, the CLRV expert submits his own legal conclusion based on the Prosecution witness P-0227’s testimony.⁴⁹ This is in violation with the Trial Chamber’s prior rulings on the scope of the LRV and CLRV presentation of evidence.
- h) “Witness UGA-OTP-P-0396 was forced to eat the liver of a murder victim. She was also raped repeatedly. She spoke of the stigmatization she feared upon her reintegration into the community”.⁵⁰ In this regard, the Defence reiterates that this statement goes to discussion about the evidence which aims to prove the elements of the charged crimes against Mr Ongwen and his role in their commission.⁵¹

20. Nonetheless, the Trial Chamber rejected the Defence exclusion request by holding that “all references made in the four pages are done by witnesses that are known to the Defence, that the extracts cited are already in evidence”.⁵² Thus, the Trial Chamber failed to comply with its prior rulings establishing the scope of the LRV and CLRV presentation of evidence, restrictions

⁴⁴ UGA-PCV-0001-0020, at 0060.

⁴⁵ T-175 Decision, p. 5, lines 15-19.

⁴⁶ T-175 Decision, p. 5, line 23.

⁴⁷ T-175 Decision, p. 5, lines 24-25, and p. 6, lines 1-3; *see also* UGA-PCV-0001-0020, at 0061.

⁴⁸ UGA-PCV-0001-0020, at 0061.

⁴⁹ T-175 Decision, p. 6, lines 13-19; *see also* UGA-PCV-0001-0020, at 0061.

⁵⁰ UGA-PCV-0001-0020, at 0062; *see also* T-175 Decision, p. 6, lines 21-24.

⁵¹ T-175 Decision, p. 6, lines 21-24.

⁵² T-175 Decision, p. 11, lines 16-21.

on the evidence that the LRV and CLRV are allowed to elicit, and the purpose and content of the materials disclosed by the LRV and CLRV.⁵³

21. In particular, the Trial Chamber's finding that the impugned references are made by witnesses that are known to the Defence is erroneous and requires an immediate appellate resolution. First, as stated above, some witnesses are anonymous and therefore are not known to the Defence. Even so, it is irrelevant whether the references made in the four pages are done by witnesses that are known to the Defence. In other words, whether the Defence knows the particular witness and associated references is not the legal standard articulated in the Trial Chamber's instructions regarding the scope of the LRV and CLRV presentation of evidence.
22. Rather, the main point of the Defence submission was that the CLRV expert PCV-0001 was allowed to comment on references that are of incriminatory nature and discuss elements of the crimes charged against Mr Ongwen. Further, the CLRV was allowed to submit these impugned references into evidence *via* Rule 68(3) of the RPE. This violates Trial Chamber's prior rulings on this matter.
23. Therefore, the Trial Chamber's failure to provide a reasoned statement of its findings on the Defence's main argument and rule in compliance with its previous rulings is prejudicial to Mr Ongwen's fair trial rights and warrants an immediate appellate resolution by the Appeals Chamber of this Court.

B. The appealable issue affects the fair and expeditious conduct of the *Ongwen* case proceedings

24. The Defence avers 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 issue presented significantly affects the fairness of the proceedings.⁵⁴ Mr Ongwen has the right to a reasoned statement⁵⁵ and "reasoned statement of the Trial Chamber's findings on the evidence and conclusions" must be provided.⁵⁶ A reasoned statement includes a "holistic evaluation and weighing of all the evidence taken together in relation to the fact at issue".⁵⁷ Here the Trial Chamber did not consider all of the Defence submissions and exact references from the expert report relating to the issue that affects the fair

⁵³ T-65, page 55, line 14, and page 56, line 16; Decision 1199, para. 18, and 23; Decision 1248, paras 13-14.

⁵⁴ See e.g. ICC-02/09-02/11-253, para. 28.

⁵⁵ ICC-01/05-01/13-2275-Red, para. 1540.

⁵⁶ Article 74(5) of the Statute.

⁵⁷ ICC-01/04-01/06-3121-Red, para. 22.

and expeditious conduct of the case proceedings. Thus, the Trial Chamber failed to provide a full and reasoned statement regarding the impugned issue.

25. The Defence submits that leaving this issue 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. The Trial Chamber's T-175 Decision contradicts its prior rulings on the scope of the LRV and CLRV presentation of evidence and allows the CLRV to submit into evidence an expert report that, *inter alia*, discusses the elements of crimes charged against Mr Ongwen. Thus, the decision is prejudicial to Mr Ongwen and violates his rights under Articles 67(1)(e) and 64(2) of the Statute.

C. The appealable issue affects the outcome of the *Ongwen* case trial

26. Given that the appealable issue focuses on essential legal matter that deals with the scope of the LRV and CLRV presentation of evidence, the Appeals Chamber's resolution of this matter will significantly affect the outcome of this trial.
27. In other words, if leave is granted and the appeal is successful, reversal of T-175 Decision may resolve the issue in the *Ongwen* case, which would have an impact on the outcome of the case.

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

28. 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".⁵⁸ In the present case, there is no such safety since T-175 Decision – dealing with the admission of statements by the CLRV expert that are prejudicial to Mr Ongwen – contains a legal error which ought to be resolved by the Appeals Chamber.
29. In sum, the Defence avers that an immediate and urgent resolution of this appealable issue by the Appeals Chamber will materially advance the proceedings. If the appealable issue is

⁵⁸ ICC-01/04-168, para. 15.

resolved now, it may not need to be raised again during the Defence presentation of evidence, which may result in materially advancing the *Ongwen* case proceedings.

V. RELIEF SOUGHT

30. For the reasons stated above, the Defence respectfully requests that leave is granted by the Trial Chamber to appeal the following issue:

) **Issue 1: Whether the Trial Chamber's decision⁵⁹ is inconsistent with its previous rulings⁶⁰ establishing the scope of the LRV and CLRV presentation of evidence, restrictions on the evidence that the LRV and CLRV are allowed to elicit, and the purpose and content of the materials disclosed by the LRV and CLRV.**

Respectfully submitted,



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

Dated this 17th Day of May, 2018

At The Hague, Netherlands

⁵⁹ T-175 Decision.

⁶⁰ T-65; Decision 1199; and Decision 1248.