

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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Date: 11 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

**Prosecution's Response to Defence Request for Leave to Appeal Decision
ICC-02/04-01/15-1248**

Source: The Office of the Prosecutor

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

The Office of the Prosecutor

Ms Fatou Bensouda
Mr James Stewart
Mr Benjamin Gumpert

Counsel for Dominic Ongwen

Mr Krispus Ayena Odongo
Mr Charles Taku
Ms Beth Lyons

Legal Representatives of Victims

Mr Joseph Akwenyu Manoba
Mr Francisco Cox

Common Legal Representatives for Victims

Ms Paolina Massidda
Ms Jane Adong

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

Ms Paolina Massidda
Ms Caroline Walter
Mr Orchlon Narantsetseg

The Office of Public Counsel for the Defence

Mr Xavier-Jean Keita

States Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Peter Lewis

Counsel Support Section

Victims and Witnesses Section

Detention Section

**Victims Participation and Reparations
Section**

Other

Introduction

1. The Defence Request for Leave to Appeal¹ ("Request") the Decision on Defence Urgent Request for Delay in Opening of LRV and CLRV Evidence Presentation² ("Decision") should be denied. The Defence raises two issues in its Request, namely whether the Decision violates Mr Ongwen's fair trial rights and complies with the Trial Chamber's previous decision 1199³ ("First Issue");⁴ and whether the Trial Chamber acted *ultra vires* for disregarding the Defence's procedural right to file a request for leave to reply to a response from the Prosecution and to the submissions from the CLRV and LRV ("Second Issue").⁵ These two issues are not appealable as they do not meet the criteria for leave to appeal under article 82(1)(d) of the Rome Statute.

Submissions

The First Issue does not arise from the Decision

2. The Defence fails to show that the First Issue arises from the Decision. The Defence's arguments related to both aspects raised under the First Issue fail to fully represent the Decision and do therefore not arise from it.

3. The preservation of Mr Ongwen's fair trial rights was in fact carefully analysed in the Decision. The Defence disagrees with the Trial Chamber's conclusions and its rejection of the Defence's request for delay in the opening of the LRV's and CLRV's evidence presentation. As conflicts of opinion do not amount to

¹ ICC-02/04-01/15-1253.

² ICC-02-04-01/15-1248.

³ ICC-02/04-01/15-1199.

⁴ Request, paras. 14-24.

⁵ Request, paras. 25-29.

an identifiable subject requiring a decision for its resolution, the First Issue is not appealable.⁶

4. The Defence submission that the Decision is inconsistent with the Trial Chamber's previous decision 1199, as it failed to take the alleged insufficiency of Acholi translations provided by the CLRV into consideration, does not arise from the Decision. In fact, the Chamber considered the "purpose, content and quantity of the disclosed materials" and concluded that they were sufficient to enable adequate preparation by the Defence.⁷ Accordingly, this aspect of the First Issue equally does not arise from the Decision and the Defence merely disagrees with the Chamber's conclusion, which falls short of raising an appealable issue. The Request should be dismissed on this basis alone

The First Issue does not meet the remaining criteria under article 82(1)(d)

5. Even if the First Issue did so arise, it does not meet the remaining—cumulative— requirements under article 82(1)(d) of the Statute for leave to appeal. A failure to fulfil any one of these criteria is fatal to any application for leave to appeal. The First Issue does not significantly affect the fair and expeditious conduct of the proceedings, or the outcome of the trial, nor would an immediate resolution of the First Issue by the Appeals Chamber materially advance the proceedings.

6. As regards the fair and expeditious conduct of proceedings, the Chamber clearly explained the limitations that are placed upon the evidence adduced by the CLRV in this trial. That evidence relates to general matters "unrelated to Mr Ongwen's individual criminal responsibility".⁸ The Chamber specifically instructed that the CLRV "should not attempt to elicit evidence which aims to prove the

⁶ ICC-01/04-168 OA3, para. 9.

⁷ Decision, paras. 12 and 16.

⁸ Decision, para. 14.

elements of the crimes charged or Mr Ongwen's role in their commission".⁹ In other words the Chamber's alleged failure to observe Mr Ongwen's fair trial rights (and its alleged inconsistency with a previous decision) by refusing to delay the proceedings relates to matters which will not affect the determination of Mr Ongwen's guilt or innocence. Thus, these matters cannot reasonably be said to affect the fairness of the proceedings. As regards expeditiousness, the only result of granting leave for the matter to proceed to resolution by the Appeals Chamber would be delay.

7. In this respect the Chamber is entitled to have regard to the fact that the Defence was aware of the nature of the materials provided by the CLRV for over two weeks before it requested the delay that is refused in the Decision. The terms of article 82(1)(d) require the Defence to satisfy the Chamber that the First Issue would significantly affect the fair and *expeditious* conduct of the proceedings, and that an *immediate* resolution may materially advance the proceedings. The Defence's own leisurely conduct belies any claims to urgency.

8. For the same reasons set out in paragraph 6 above, the First Issue does not impact on the outcome of the trial. Similarly, considering the limited impact of the First Issue, an interlocutory appeal will not materially advance the proceedings in the sense of ensuring that the proceedings follow the right course.¹⁰

The Second Issue does not arise from the Decision

9. The second issue concerns the alleged deprivation of its "right" to seek leave from the Chamber to reply to the submissions made by the Prosecution, the LRV and CLRV.¹¹ The Defence has—unsuccessfully—raised this issue previously, in a different context. On 25 January 2018, the Defence filed a request that the Chamber should

⁹ Decision, para. 13, citing Oral Decision, ICC-02/04-01/15-T-65-Red-ENG, page 56, lines 7-8.

¹⁰ ICC-01/04-01/06-2404, para. 33.

¹¹ Request, para. 26.

reconsider a previous decision¹² on the basis that “the Decision extinguished the Defence’s right to reply under Rule 91(2), as well as the right to seek leave to reply under Regulations 24(5) and 34(c)”.¹³

10. Regulation 24 of the Regulations of the Court deals with the filing of responses and replies by both parties and participants to the proceedings, including legal representatives for the victims.¹⁴ The Prosecution notes that regulation 24(5) specifically regulates replies to responses and confers upon the Chamber the discretion to permit or refuse any reply. If, in the Chamber’s view, a reply would not assist them in reaching its decision, then it is within the Chamber’s discretion to issue its decision forthwith, particularly where time is of the essence.

11. Although rule 91(2) creates a general right of reply to “any oral or written observations” by the legal representatives, this does not specifically address the issue of replies to responses. The Prosecution submits that the specific terms of regulation 24 should apply, according to the canon of interpretation *lex specialis derogate legi generali*. Thus, the Second Issue is founded upon a faulty interpretation of the law and cannot be said to arise from the Decision, alternatively amounts to a mere disagreement by the Chamber’s exercise of its discretion.

The Second Issue does not meet the criteria under article 82(1)(d)

12. The Defence also fails to demonstrate that the alleged deprivation of its “right” to seek leave from the Chamber to reply to the submissions made by the

¹² Decision on Defence Request for Findings on Fair Trial Violations Related to the Acholi Translation of the Confirmation Decision, ICC-02/04-01/15-1147.

¹³ Defence Reply to Victims’ Joint Response to “Defence Request for Findings on Fair Trial Violations and Remedy, Pursuant to Articles 67 and 64 of the Rome Statute,” pursuant to Rule 91(2), ICC-02/04-01/15-1149. See further para. 14 below.

¹⁴ Regulation 25(2) specifically addresses responses by participating victims and their legal representatives. In this context, regulation 25(5) must accordingly be understood to regulate replies to responses by legal representatives for victims.

Prosecution, the LRV and CLRV¹⁵ significantly affected the fair and expeditious conduct of the proceedings or the outcome of the trial.

13. This issue does not affect the fair and expeditious conduct of the proceedings. The Defence's arguments to the contrary are speculative and premature and fail to show a concrete prejudice as a result of the Chamber's Decision. This is especially the case bearing in mind the limited scope of the anticipated evidence to be presented by the LRV and CLRV. According to the consistent jurisprudence before this Court, the Defence cannot speculate in the abstract that the Decision causes a prejudice to the rights of the Accused in order to invoke an issue concerning the fairness of the proceedings.¹⁶ An issue must have something more concrete than a merely hypothetical impact on the fairness or expeditiousness of proceedings.¹⁷ Nor is it sufficient to provide unsubstantiated arguments.¹⁸ A purely general complaint does not suffice.¹⁹

14. In this context, the Prosecution further notes the Chamber's previous reasoning on reaching a conclusion on disputed matters expeditiously and without allowing the Parties time to seek leave to reply to submissions made by the victims' representatives:²⁰ "It is important for victims to have their submissions considered in order for their participation in the proceedings to be meaningful. However, sometimes the Chamber reaches its conclusions independently of these submissions and, on this occasion, the Decision's reasoning did not end up relying upon the Victims Response. This document is referenced only once in the whole Decision, and this reference appears in the procedural history [.....] For the Defence to argue in

¹⁵ Request, para. 26.

¹⁶ See ICC-01/04-168 OA3, para. 10; ICC-02/04-01/05-316, p. 6; ICC-01/09-02/11-211 paras. 33 and 39; ICC-01/09-02/11-88, para. 25, see also paras. 23-27; ICC-01/04-01/06-2109, para. 22; ICC-01/05-01/08-680, para. 36; ICC-01/09-02/11-275, paras. 28-29; ICC-01/09-01/11-301, para. 30.

¹⁷ ICC-01/04-01/07-1958, para. 20. See also ICC-02/04-01/05-367, paras. 21-22.

¹⁸ ICC-01/09-01/11-1154, para. 26.

¹⁹ ICC-01/04-01/06-2463, para. 31.

²⁰ ICC-02/04-01/15-1152, para. 6.

these circumstances that a lack of reply led to any error or injustice justifying reconsideration is simply untenable.”

15. The Defence also fails to establish how the immediate resolution by the Appeals Chamber of the Second Issue will settle the matter and move the case forward.²¹ Indeed the Defence gives no indication of what the content of the reply, the alleged right to which the Decision deprived it of, would have been, and how it might have altered the conclusions of the Decision. Similarly, because any suggested unfairness, at this stage, is wholly speculative, it follows that *an immediate* resolution of the issue by the Appeals Chamber will not materially advance the proceedings”.²²

Conclusion

16. For the reasons set out above, the Request should be rejected.



Fatou Bensouda, Prosecutor

Dated 11th day of May 2018

At The Hague, The Netherlands

²¹ ICC-01/04-168 OA3, para. 15.

²² ICC-01/04-01/06-2109, para. 22; ICC-01/09-01/11-1154, para. 28.