

**Cour
Pénale
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**International
Criminal
Court**

Original: **English**

No.: **ICC-02/04-01/15 OA 4**

Date: **6 June 2019**

THE APPEALS CHAMBER

Before: Judge Luz del Carmen Ibáñez Carranza, Presiding Judge
Judge Chile Eboe-Osuji
Judge Howard Morrison
Judge Piotr Hofmański
Judge Solomy Balungi Bossa

SITUATION IN UGANDA

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

Public

**Prosecution's request for leave under regulation 28 to file a response to Defence's
Further Submissions (ICC-02/04-01/15-1536-Corr)**

Source: Office of the Prosecutor

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

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I. INTRODUCTION

1. The Prosecution seeks leave, under regulation 28 of the Regulations of the Court, to file a response to the Defence's Further Submissions¹ on the first and second questions identified by the Appeals Chamber in its Order for Further Submissions² concerning Mr Ongwen's appeal³ against Trial Chamber IX's Decision on alleged defects in the Confirmation Decision.⁴

II. SUBMISSIONS

2. The Appeals Chamber should exercise its discretion to allow this request under regulation 28.⁵ As the Prosecution respectfully stated in its response to the Order, it could not provide a detailed response to 1 and 2 until Mr Ongwen - to whom these questions are primarily addressed - had done so.⁶

3. Having now reviewed Mr Ongwen's Further Submissions on these two questions, the Prosecution is of the view that they include material that may necessitate the Prosecution's response to assist the Appeals Chamber to adjudicate the appeal.⁷ The Prosecution's additional submission will show, among others, that Mr Ongwen's Further Submissions are non-responsive or irrelevant to the specific questions identified by the Appeals Chamber and/or to the sole issue on appeal, namely whether the Trial Chamber erred in dismissing Mr Ongwen's alleged

¹ ICC-02/04-01/15-1536-Corr ("Ongwen Further Submissions").

² ICC-02/04-01/15-1524 ("Order").

³ ICC-02/04-01/15-1496-Corr ("Ongwen Appeal").

⁴ ICC-02/04-01/15-1476 ("Impugned Decision").

⁵ ICC-01/04-01/07-476, paras. 17-18 ("The Appeals Chamber considers that its decision [...] left it open the possibility of a Chamber being moved to act pursuant to regulation 28 of the Regulations . [...] '[i]t may be regarded as axiomatic that, if any power is conferred upon a court to make an order or issue a decision, the parties have an implicit right to move the Chamber to exercise it'. [...] the Appeals Chamber considers that a Chamber may act pursuant to regulation 28 of the Regulations upon request or upon its own motion").

⁶ ICC-02/04-01/15-1532, paras. 2, 17.

⁷ ICC-01/04-01/07-476 OA2, paras. 19, 20 (In allowing additional submissions, the Appeals Chamber considered, among others, that the applicant was not privy to the *ex parte* proceedings in issue and the interests of justice merited resort to regulation 28); ICC-01/04-01/07-522 OA3, para. 16 (The Appeals Chamber considered that the supplementary material containing a recent decision of the ICTY Appeals Chamber would be of assistance in deciding the appeal); ICC-01/04-01/06-424, para.7 (The Appeals Chamber may exercise regulation 28 discretion should arguments raised in a response in support of an appeal by a party make further submissions by the appellant necessary for the proper disposal of the appeal). See also ICC-01/09-02/11-206 OA, para. 9.

challenges to the Confirmation Decision *in limine*; they raise *new* matters that Mr Ongwen did not place before the Trial Chamber in his challenge to the sufficiency of the Confirmation Decision; and some of these *new* matters are the subject of separate litigation before the Trial Chamber and/or Trial Chamber decisions.

4. Since appellate review of a Trial Chamber's decision is *corrective*, and not a *de novo* review,⁸ the Appeals Chamber should not overturn the Impugned Decision based on the new facts that Mr Ongwen did not place before the Trial Chamber while being in position to do so. Nor should Mr Ongwen be allowed to use this appeal to challenge the Trial Chamber's decisions on matters that are the subject of separate litigation before the Trial Chamber and are thus outside the scope of the present appeal.

5. *First*, Mr Ongwen's submissions on alleged defects to the *modes of liability* are irrelevant and non-responsive to question 1.⁹ They identify matters that did not arise *during the course of the trial* before the Trial Chamber as required by that question.¹⁰ Rather, they concern issues that had arisen prior to the trial – that is to say, as soon as the Confirmation Decision was issued.¹¹

6. *Second*, the following matters, again made in response to question 1, raise new matters that Mr Ongwen did not place before the Trial Chamber, fall outside the scope of the appeal, or concern matters that are the subject of separate litigation before the Trial Chamber and/or Trial Chamber decisions:

⁸ ICC-02/05-03/09-295 OA2, para. 20; ICC-02/04-01/15-1430.

⁹ Ongwen Further Submissions, paras. 5-7.

¹⁰ The first question identified by the Appeals Chamber is as follows: Which are the specific issues that, in the view of Mr Dominic Ongwen, *arose during the course of the trial* warranting the application of rule 134(3) of the Rules? (Emphasis added).

¹¹ In the Confirmation Decision, the Pre-Trial Chamber dismissed Mr Ongwen's challenges to indirect co-perpetration. ICC-02/04-01/15-422-Red, paras. 37-41. At trial, Mr Ongwen did not raise any objection to this mode of liability or any aspect of this Confirmation Decision even when specifically asked by the Presiding Judge at the commencement of his trial if he had any rule 134(2) objections to make. ICC-02/04-01/15-T-26-ENG, p. 21, lines 13-18; ICC02/04-01/15-T-26-ENG, p. 21, line 22 to p. 22, line 4. Mr Ongwen belatedly raised any challenges to the formulation of the charges almost three years after the Confirmation Decision was issued.

- (a) alleged Prosecution disclosure failures;¹²
- (b) alleged dispute over the questioning of witnesses concerning events that occurred outside the temporal scope of the charges;¹³ and
- (c) alleged prejudice from alleged failure to fully translate the Confirmation Decision in the Acholi language.¹⁴

7. *Third*, the following matters made in response to question 2,¹⁵ raise new matters that Mr Ongwen did not place before the Trial Chamber, fall outside the scope of the appeal, or concern matters that are the subject of separate litigation before the Trial Chamber and/or Trial Chamber decisions:

- (a) alleged inability to object timeously to the Confirmation Decision due to alleged “inequality of resources between the Defence and the Prosecution,”¹⁶ and “Mr Ongwen’s mental health conditions and disability”;¹⁷ and

¹² Ongwen Further Submissions, paras. 8-11. For the separate litigation before the Trial Chamber and/or Trial Chamber decisions on this matter see e.g., ICC-02/04-01/15-1329-Corr-Red (Mr Ongwen’s disclosure request); ICC-02/04-01/15-1341-Red (Prosecution’s response to Mr Ongwen’s disclosure request); ICC-02/04-01/15-1351 (Trial Chamber’s decision rejecting Mr Ongwen’s disclosure request); ICC-02/04-01/15-1360 (Mr Ongwen’s request for leave to appeal Trial Chamber decision on disclosure request); ICC-02/04-01/15-1362 (Prosecution response to Mr Ongwen’s request for leave to appeal Trial Chamber decision on disclosure request); ICC-02/04-01/15-1364 (Trial Chamber’s decision rejecting Mr Ongwen’s leave to appeal decision on disclosure).

¹³ Ongwen Further Submissions, paras. 12-14. For Mr Ongwen’s objections and Trial Chamber’s decisions on this separate matter, see e.g., ICC-02/04-01/15-T-85, p. 4, line 16-23 (Defence’s objections); ICC-02/04-01/15-T-85, p. 4, line 25; p. 5, line 1, and p. 5, lines 4-25 (Prosecution’s response to Defence’s objections); ICC-02/04-01/15-T-85, p. 7, lines 15-26; p. 8, lines 1-9 (Trial Chamber’s decision on Defence’s objections); ICC-02/04-01/15-T-147, p. 4, lines 15-25 to p. 6 lines 1-15 (Defence’s objections); ICC-02/04-01/15-T-147, p. 6, lines 18-25 (Prosecution’s response to Defence’s objection); ICC-02/04-01/15-T-147, p. 7, line 2-14 (Trial Chamber’s decision to Defence’s objections).

¹⁴ Ongwen Further Submissions, paras. 15-18. For the separate litigation before the Trial Chamber and/or Trial Chamber decisions on this matter see ICC-02/04-01/15-1127 (Mr Ongwen translation request); ICC-02/04-01/15-1140 (Prosecution’s response to Mr Ongwen’s translation request); ICC-02/04-01/15-1147 (Trial Chamber decision on Mr Ongwen’s translation request).

¹⁵ The second question identified by the Appeals Chamber is as follows: Why did Mr Dominic Ongwen raise concrete alleged defects in the confirmation of charges decision three years after it was issued?

¹⁶ Ongwen Further Submissions, paras. 23, 24. See also para. 21.

¹⁷ Ongwen Further Submissions, paras. 23, 26.

(b) alleged prejudicial Trial Chamber evidentiary regime.¹⁸

8. For the above reasons, the Prosecution requests the Trial Chamber leave to permit it to file a response to Mr Ongwen's Further Submissions pursuant to regulation 28. To expedite the current appeals proceedings, the Prosecution is ready to file this response within five days of the Chamber's decision and to limit the response to seven pages. Even if the Appeals Chamber is not minded to grant leave to the Prosecution to file more detailed submissions, the Prosecution requests the Chamber to dismiss Mr Ongwen's Further Submissions based on the information in this request.



Fatou Bensouda, Prosecutor

Dated this 6th June 2019
At The Hague, the Netherlands

¹⁸ Ongwen Further Submissions, paras. 24-25. For the separate litigation before the Trial Chamber and/or Trial Chamber decisions on this matter, see e.g., ICC-02/04-01/15-1519-Red (Mr Ongwen's request on evidentiary regime); ICC-02/04-01/15-1526-Conf (Prosecution response to Mr Ongwen's request on evidentiary regime); ICC-02/04-01/15-486 (Joint submissions on conduct of the proceedings); ICC-02/04-01/15-497 (Decision on the conduct of the proceedings).