

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: **ICC-02/04-01/15**
Date: **10 February 2021**

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

Public Redacted Version of “Defence Request for Leave to Appeal ‘Decision scheduling a hearing on sentence and setting the related procedural calendar’”, filed 10 February 2021

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

Counsel for the Defence

Krispus Ayena Odongo
Chief Charles Achaleke Taku
Beth Lyons

Legal Representatives of the Victims

Joseph Akwenyu Manoba
Francisco Cox

Common Legal Representative for Victims

Paolina Massidda

Unrepresented Victims**Unrepresented Applicants
(Participation/Reparation)****The Office of Public Counsel for Victims**

Paolina Massidda
Caroline Walter
Orchlón Narantsetseg
States' Representatives

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

Xavier-Jean Keita

Amicus Curiae**REGISTRY****Registrar**

Peter Lewis

Counsel Support Section**Victims and Witnesses Unit**

Nigel Verrill

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') seeks leave to appeal the Single Judge of Trial Chamber IX's ('Single Judge' and 'Chamber' respectively) "Decision scheduling a hearing on sentence and setting the related procedural calendar"¹ ('Impugned Decision'). The appellate issue is:
 - a. Did the Impugned Decision violate Mr Ongwen's rights in respect to sentencing under Article 76(2) and fair trial rights under Articles 67(1)(a), (b), (e) and (f) of the Rome Statute and Rule 144(2)(b) of the Rules of Procedure and Evidence ('Rules'), namely an Acholi translation of the Trial Judgment ('Judgment') and the ability to have adequate time and facilities to prepare his defence of his sentence,² before the sentencing proceedings can commence, especially considering that Mr Ongwen is a special needs person ('Issue 1')?
2. The Defence incorporates by reference the jurisprudence of the Appeals Chamber with respect to seeking leave to appeal as set out in prior requests.³ This request for leave to appeal is without prejudice to any further requests to postpone the Article 76(2) hearing pursuant to Rule 143 of the Rules.

II. CONFIDENTIALITY

3. Pursuant to Regulations 23*bis* of the RoC, this request is submitted as confidential as it names persons whose names are not to be public in filings and medical issues still listed as confidential. A public redacted version shall be filed contemporaneously.

III. APPLICABLE STANDARD

4. Pursuant to Article 82(1)(d) of 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 Pre-Trial or Trial 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

¹ [ICC-02/04-01/15-1763](#) ('Impugned Decision').

² See Articles 67(1)(a) and (b) of the Rome Statute.

³ [ICC-02/04-01/15-1334](#)-Red, paras 4-10.

fairness of the proceedings or the outcome of the trial”.⁴ The Pre-Trial Chamber is vested with the power to certify the existence of an appealable issue,⁵ however when determining whether leave to appeal should be granted, the Pre-Trial 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.⁶

5. 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.⁷
6. 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”.⁸ 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”.⁹ 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.¹⁰ In other words, the issue “must be one likely to have repercussions on either of these two elements of justice”.¹¹
7. The Appeals Chamber has defined the term “fair” as being associated with the norms of a fair trial and corresponding human rights, as per Article 64(2) and 67(1) of the Statute.¹² In particular, it noted that the “expeditious conduct of the proceedings in one form or another

⁴ [ICC-01/04-168](#), para. 19.

⁵ *Ibid.*, para. 20.

⁶ See e.g. [ICC-01/09-02/11-253](#), para. 28.

⁷ Regulation 155 (2) of the RoC.

⁸ [ICC-01/04-168](#), para. 9.

⁹ *Ibid.*

¹⁰ *Ibid.*, para. 10.

¹¹ *Ibid.*

¹² *Ibid.*, para. 11.

constitutes an attribute to a fair trial”.¹³ The term “proceedings” extends to proceedings prior and subsequent to the current proceedings.¹⁴

8. 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.¹⁵ The Pre-Trial 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.¹⁶
9. 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 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”.¹⁷ 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 mar the outcome of the trial”.¹⁸ The solving of the issue by the Appeals Chamber is aimed to “ensure that the proceedings follow the right course”.¹⁹

IV. APPLICABLE LAWS

10. Article 67(1)(f) of the Rome Statute grants Mr Ongwen the fair trial right “[t]o have, free of any cost, [...] such translations as are necessary to meet the requirement of fairness, if any of the [...] documents presented to the Court are not in a language which the accused fully understands and speaks.”
11. Article 67(1)(b) of the Rome Statute grants Mr Ongwen the fair trial right “[t]o have adequate time and facilities for the preparation of the defence...”.

¹³ *Ibid.*

¹⁴ *Ibid.*, para. 12.

¹⁵ *Ibid.*, para. 13.

¹⁶ *Ibid.*, para. 13.

¹⁷ *Ibid.*, paras 14-15.

¹⁸ *Ibid.*, para. 14.

¹⁹ *Ibid.*, para. 15.

12. Article 67(1)(e) of the Rome Statute grants Mr Ongwen the fair trial right “[t]o examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her. The accused shall also be entitled to raise defences and to present other evidence admissible under this Statute.”
13. Article 67(1)(a) of the Rome Statute grants Mr Ongwen the fair trial right “[t]o be informed promptly and in detail of the nature, cause and content of the charge, in a language which the accused fully understands and speaks.”
14. Article 76(2) of the Rome Statute grants Mr Ongwen the fair trial right to present “additional evidence or submissions relevant to sentence, in accordance with the Rules of Procedure and Evidence.”
15. Rule 144(2)(b) of the Rules grants Mr Ongwen the fair trial right to have “[c]opies of all the above-mentioned decisions [...] as soon as possible [...] in a language he or she fully understands or speaks, if necessary to meet the requirements of fairness under article 67, paragraph 1 (f). The Defence notes that the Judgment and sentencing decision falls within the category of decisions written about in Rule 144(2)(b) of the Rules.”²⁰
16. The Convention on the Rights of Persons with Disabilities, entered into force in 2008, ensures “full and equal enjoyment of all human rights and fundamental freedoms by persons with disabilities,” and “effective participation in society on an equal basis with others.”²¹

V. SUBMISSIONS

17. At the outset, the Defence notes that it called a representative of the Registry’s Language Service Section on 5 February 2021. The Defence was told that the translation of the Judgment into Acholi has not begun.²²
18. Furthermore, the Defence notes its email of 4 February 2021, and states that after discussing the issue with the Client, he asks that his fair trial rights pursuant the Rome Statute be asserted for sentencing, *to wit*, an Acholi translation of the Judgment and time to read it.

²⁰ See Rule 144(1) of the Rules.

²¹ Article 1 of the [Convention on the Rights of Persons with Disabilities](#), last accessed 10 February 2021.

²² Telephone call from [REDACTED] to [REDACTED], 5 February 2021.

A. Mr Ongwen's rights in respect to sentencing under Article 76(2) and fair trial rights under Articles 67(1)(a), (b), (e) and (f) of the Rome Statute and Rule 144(2)(b) of the Rules, namely an Acholi translation of the Judgment and the ability to have adequate time and facilities to prepare his defence of his sentence, before the sentencing proceedings can commence, especially considering that Mr Ongwen is a special needs person.

i. Issue 1 is an identifiable fair trial right which arises from the Impugned Decision that requires an immediate decision by the Appeals Chamber.

19. Mr Ongwen understands and speaks one language, Acholi. The issue of translations has been discussed and argued many times during the proceedings.²³ Rule 144 of the Rules lists the Judgment as an essential document, as does Rule 40(1)(c) of the Rules.
20. One cannot fathom how a decision is required to be published in six (6) different languages,²⁴ but not for the person against whom the Judgment is made. Rule 144(2)(b) of the Rules resolves this issue by requiring a translation if fairness so requires.
21. The Chamber convicted Mr Ongwen of 61 counts,²⁵ more than triple that of any other conviction at the ICC. The Judgment is 1,077 pages, far eclipsing all other Article 74 decisions. Still, to this date, Mr Ongwen has only been provided with seven (7) official translations of pleadings and one draft translation.²⁶ While not conceding that other decisions and pleadings were not necessary to have translated, the Judgment must be translated into Acholi for Mr Ongwen to be afforded his rights. This is not a mere disagreement, but a plain reading of the law and Mr Ongwen's fundamental rights.
22. Furthermore, Issue 1 arises from the Impugned Decision. The Impugned Decision sets a calendar of events leading up to a hearing on sentencing held from 12-16 April 2021.²⁷ The Chamber is aware that an Acholi translation of the Judgment has not been made. With respect, owing to the length of the Judgment and issues handled during the proceedings about translations, the Impugned Decision implicitly recognises that the sentencing proceeding shall commence, continue and be finalised before Mr Ongwen is ever afforded his right to have the Judgment in a language he understands and speaks. Without such translations, Mr Ongwen

²³ See [ICC-02/04-01/15-1668](#), paras 5-32.

²⁴ See Article 50(1) of the Rome Statute (*including* Arabic, Chinese, English, French, Russian and Spanish).

²⁵ See Judgment.

²⁶ See [ICC-02/04-01/15-1668](#), para. 32. The Defence notes that the draft translation was the Prosecution's closing brief.

²⁷ See [Impugned Decision](#), paras 3-7.

cannot read and understand the Judgment, and his ability to participate in the proceedings pursuant to Articles 67(1)(b), (e) and 76(2) shall be violated.

23. The Chamber is also aware of the issues of discrimination based on disability and reasonable accommodation, as evidenced from its discussion in paras 106-115.²⁸ While the Chamber rejects the position of the Defence that it discriminated against Mr Ongwen as a mentally disabled defendant in respect, *inter alia*, to reasonable accommodation, resulting in fair trial violations, the issue remains alive, arising out of the Impugned Decision.
24. The bottom line is the key point of whether Mr Ongwen, a mentally disabled defendant, can exercise his rights equally to a defendant who is not mentally disabled, and what reasonable accommodations, including but not limited to scheduling, need to be implemented to enable him to implement his rights.
25. Finally, the Defence highlights that the Judgment is a highly instructive document for sentencing. The sentencing document, as written about above, is another critical document encompassed by the language requirement of Rule 144(2)(b) of the Rules. Mr Ongwen has the right to be able to read the Judgment in a language he understands or speaks before this next critical decision is taken.
26. The Defence asserts that Issue 1 is an identifiable issue which arises from the Impugned Decision and that the Appeals Chamber must make a decision on Issue 1 before the sentencing proceedings move further.

ii. Issue 1 significantly affects the fairness and expeditiousness of the proceedings and the outcome of the sentencing.

27. The Registry has been nearly absent on Acholi translations of decisions in the case. As noted above, the Defence has only received seven (7) pleadings and one (1) draft translations of a pleading. It is noteworthy that it took complaints from the Defence to receive the confirmation decision in Acholi, which came near the end of the Prosecution's case-in-chief in the winter of 2018.²⁹

²⁸ [Judgment](#), paras 106-115.

²⁹ See [ICC-02/04-01/15-1668](#), paras 21-26.

28. The case has been “extensive and complex”, and the Judgment reflects the case.³⁰ Fairness mandates, as does the Rome Statute and the Rules,³¹ that Mr Ongwen be given an Acholi translation of the Judgment before the sentencing proceedings commence. Without being able to read the Judgment in a language which Mr Ongwen reads and understands, Mr Ongwen shall be deprived of his fundamental fair trial right of participating in the sentencing proceedings and presenting evidence and/or witnesses during the week of 12 April 2021. Failure to provide Mr Ongwen with an Acholi translation of the Judgment would strip Mr Ongwen of his fair trial rights pursuant to Articles 67(1)(a), (b), (e) and (f), Article 76(2) and Rule 144(2)(b) of the Rules.
29. Requiring the provision of the Judgment in Acholi before the sentencing proceedings shall aid to the expeditious conduct of the proceedings. Failure to provide Mr Ongwen with an Acholi translation of the Judgment before the deadlines set in the Impugned Decision shall result in later litigation before the Appeals Chamber about Mr Ongwen’s guaranteed fundamental rights being violated.
30. Finally, Mr Ongwen has the right to confer with Counsel about the Judgment and to present evidence in mitigation for sentencing.³² Without being provided an Acholi translation of the Judgment, and considering the complexity of the Judgment, Mr Ongwen shall be deprived of these rights. Mr Ongwen cannot advise Counsel about possible evidence if he cannot read what has been written. After reading what has been decided by the Chamber, Mr Ongwen may be able to advise Counsel on persons to interview and evidence to present for sentencing.
31. The Defence asserts that a resolution by the Appeals Chamber on Issue 1 is necessary to ensure the fairness and expeditiousness of the sentencing proceedings and would significantly affect the outcome of the proceedings.

iii. An immediate resolution of Issue 1 will materially advance the proceedings.

32. Again, as it cannot be overstated, Mr Ongwen has received eight (8) translations or draft translations of the 1,765 pleadings in this case from the Registry. Rule 144(2)(b) of the Rules, through the Rome Statute, grants Mr Ongwen the fair trial right to have the Judgment in a

³⁰ See [ICC-02/04-01/15-T-259-ENG](#), p. 4, ln. 14.

³¹ See paras 10-15 above.

³² Articles 67(1)(b) and (e) and Article 76(2) of the Rome Statute.

language he understands or speaks, which is Acholi.³³ Mr Ongwen cannot fully participate in the sentencing proceedings until such time that a full Acholi translation of the Judgment is provided.

33. An immediate resolution by the Appeals Chamber shall remove doubt as the correctness of holding sentencing proceedings without providing Mr Ongwen a full translation of the Judgment. Without receiving an Acholi translation of the Judgment, Mr Ongwen's rights pursuant to Articles 67(1)(a), (b), (e) and (f), Article 76(2) and Rule 144(2)(b) would mean little. It shall also settle this question for further cases and allow proper preparation by future defence teams.

VI. RELIEF

34. For the reasons stated above, the Defence respectfully requests that leave is granted by the Trial Chamber to appeal the following issue:
- a. Mr Ongwen must be afforded his rights under Articles 67(1)(a), (b), (e) and (f) and Article 76(2) of the Rome Statute and Rule 144(2)(b) of the Rules, namely a translation of the Trial Judgment and the ability to have adequate time and facilities to prepare his defence of his sentence, before the sentencing proceedings can commence.

Respectfully submitted,



.....

Hon. Krispus Ayena Odongo
On behalf of Dominic Ongwen

Dated this 10th day of February, 2021
At Kampala, Uganda

³³ See also Article 67(1)(a) of the Rome Statute and para. 20 above.