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**International
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TRIAL CHAMBER IX

Before: Judge Bertram Schmitt, Presiding Judge
Judge Péter Kovács
Judge Raul Cano Pangalangan

SITUATION IN UGANDA

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

Confidential

CLRV Response to the "Defence Request for Leave to Appeal 'Decision scheduling a hearing on sentence and setting the related procedural calendar'"

Source: Office of Public Counsel for Victims

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

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I. INTRODUCTION

1. The Common Legal Representative of the Victims participating at trial¹ (the “CLR V”) submits that the “Defence Request for Leave to Appeal ‘Decision scheduling a hearing on sentence and setting the related procedural calendar’” (the “Request”)² should be rejected because it fails to meet the specific requirements of leave to appeal pursuant to article 82(1)(d) of the Rome Statute (the “Statute”).

2. In particular, the CLR V posits that the purported issue does not arise from the “Decision scheduling a hearing on sentence and setting the related procedural calendar” (the “Impugned Decision”)³ since the substantive matter raised by the Defence is not ruled upon by the Trial Chamber (the “Chamber”) or contained in the ruling which is of purely procedural nature. Moreover, the CLR V objects to the reference to Mr Ongwen as a person with mental disabilities since such qualification has no factual or legal basis.

¹ See the “Decision on contested victims’ applications for participation, legal representation of victims and their procedural rights” (Pre-Trial Chamber II, Single Judge), [No. ICC-02/04-01/15-350](#), 27 November 2015, p. 19; the “Decision on issues concerning victims’ participation” (Pre-Trial Chamber II, Single Judge), [No. ICC-02/04-01/15-369](#), 15 December 2015, pp. 10-11; the “Second decision on contested victims’ applications for participation and legal representation of victims” (Pre-Trial Chamber II, Single Judge), [No. ICC-02/04-01/05-384](#), 24 December 2015, pp. 20-22; and the “Decision on the ‘Request for a determination concerning legal aid’ submitted by the legal representatives of victims” (Trial Chamber IX, Single Judge), [No. ICC-02/04-01/15-445](#), 26 May 2016, para. 13.

² See the “Defence Request for Leave to Appeal ‘Decision scheduling a hearing on sentence and setting the related procedural calendar’”, [No. ICC-02/04-01/15-1766-Conf](#), 10 February 2021 (the “Request”).

³ See the “Decision scheduling a hearing on sentence and setting the related procedural calendar”, [No. ICC-02/04-01/15-1763](#), 4 February 2021 (the “Impugned Decision”).

II. PROCEDURAL BACKGROUND

3. On 4 February 2021, the Chamber rendered the Trial Judgment (the “Judgment”) declaring Mr Ongwen guilty of 61 charges of war crimes and crimes against humanity.⁴ The Chamber also issued the Impugned Decision on the same day.⁵

4. On 10 February 2021, the Defence filed the Request.⁶

III. LEVEL OF CLASSIFICATION

5. In accordance with regulation 23bis (2) of the Regulations of the Court, the present submission is filed confidential following the classification chosen by the Defence. A public redacted version will be filed in due course.

IV. SUBMISSIONS

6. Article 82(1)(d) of the Statute sets out the criteria for granting a request for leave to appeal as follows: (a) the decision shall involve an issue that would significantly affect: (i) the fair and expeditious conduct of the proceedings; or (ii) the outcome of the trial; and (b) for which, in the opinion of the relevant Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings. For the purposes of the first prong of this test, the Appeals Chamber defined an “issue” as “*an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion*”.⁷ Moreover, the Appeals Chamber

⁴ See the “Trial Judgment” (Trial Chamber IX), [No. ICC-02/04-01/15-1762-Conf](#), 04 February 2021. (the “Judgment”) (Public redacted version of the document was filed on the same day. [No. ICC-02/04-01/15-1762-Red](#))

⁵ See the Impugned Decision, *supra* note 3.

⁶ See the Request, *supra* note 2.

⁷ See the “Judgement on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal” (Appeals Chamber), [No. ICC-01/04-168 OA 3](#) 13 July 2006, para. 9.

ruled that *“the Pre-Trial or Trial Chamber is vested with power to state, or more accurately still, to certify the existence of an appealable issue”*.⁸

7. Consequently, it must first be determined whether the purported *“issue”* identified in the Request is an *“appealable issue”* within the meaning of article 82(1)(d) of the Statute, as interpreted by the jurisprudence of the Court. Indeed, *“while an application for leave to appeal should not contain in detail the arguments which the party intends to raise before the Appeals Chamber, it must still identify clearly the appealable issue, including by way of indicating a specific factual and/or legal error. Only in this case can the Chamber assess whether the issue, provided it was wrongly decided, may have implications on the fairness and expeditiousness of the proceedings or outcome of the trial”*.⁹

8. The Defence seeks leave to appeal the following issue:

“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 [...], 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?”

9. The CLRV submits that this purported issue does not arise from the Impugned Decision. In fact, said ruling is primarily based on rule 143 of the Rules of Procedure and Evidence (the “Rules”) which states that *“[p]ursuant to article 76, paragraphs 2 and 3, for the purpose of holding a further hearing on matters related to sentence and, if applicable, reparations, the Presiding Judge shall set the date of the further hearing. [...]”*. Consequently, the Chamber merely decided to: (i) hold a hearing under article 76(2) of the Statute in order to hear submissions and any additional evidence relevant to the sentence to be imposed to the convicted person; (ii) schedule said hearing; (iii) instruct the parties and participants to make any submissions concerning additional evidence on

⁸ *Idem*, para. 20.

⁹ See the “Decision on three applications for leave to appeal” (Pre-Trial Chamber I), [No. ICC-02/11-01/11-307](#), 30 November 2012, para. 70.

sentencing and on the sentence to be imposed on Mr. Ongwen.¹⁰ These rulings are of purely procedural nature, not dealing with any substantive issue related to Mr Ongwen's rights to receive an Acholi translation of the Judgment and/or his ability to have adequate time and facilities to prepare his submissions on sentencing.

10. As held by the Appeals Chamber, a properly constituted appealable issue must first and foremost arise from the Impugned Decision.¹¹ In other words, the issue identified by the appellant must be a specific issue which has been dealt in¹² or must emanate from the Impugned Decision.¹³ Yet, Mr Ongwen's supposed need to receive the Acholi translation of the Judgment and/or the approximate time frame for the Language Services Section of the Registry (the "LSS") to make available said translation were not raised or litigated by the Defence before the Chamber. Nor did the Chamber make factual finding or issue binding ruling in this regard. As a result, this purported issue fails to constitute a proper appealable issue.

11. Moreover, the CLRV notes with concern the Defence's allegations about "*the issue of discrimination based on disability*"¹⁴ due to the fact that "*Mr Ongwen is a mentally disabled defendant*".¹⁵ The CLRV stresses that the reference to Mr Ongwen as a person with mental disabilities has no factual or legal basis. In fact, in the Judgment, the Chamber explicitly rejected said allegations.¹⁶ In particular, the Chamber considered as entirely untenable the Defence's submission to the effect that it had discriminated against Mr Ongwen by treating him as if he were not a defendant with mental

¹⁰ See the Impugned Decision, *supra* note 3, p. 6.

¹¹ See the "Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal", *supra* note 7, para. 9.

¹² See the "Decision on the 'Defence Application for Leave to Appeal the 'Decision on the defence request for a temporary stay of proceedings'" (Trial Chamber IV), [No. ICC-02/05-03/09-428](#), 13 December 2012, para. 7.

¹³ See the "Decision on the Prosecutor's and Defence requests for leave to appeal the decision adjourning the hearing on the confirmation of charges" (Pre-Trial Chamber I), [No. ICC-02/11-01/11-464](#), 31 July 2013, para. 8; and the "Decision on the Defence Request for Leave to Appeal" (Pre-Trial Chamber II), [No. ICC-01/04-02/06-207](#), 13 January 2014, para. 11.

¹⁴ See the Request, *supra* note 2, paras. 23.

¹⁵ *Ibid.*

¹⁶ See the Judgment, *supra* note 4, paras. 108-109.

disabilities.¹⁷ Throughout the trial proceedings, the Chamber assessed the accused's mental health and made relevant rulings on information provided by independent medical experts.¹⁸ Most importantly, the Chamber found, based on the expert evidence, that Mr Ongwen is not suffering from the mental illnesses suggested by the Defence.¹⁹

12. In any event, these findings were made in the Judgment, not in the Impugned Decision. The Defence may disagree with the Chamber's assessment of the body of evidence concerning the mental health status of Mr Ongwen and pursue its arguments at the proper appellate forum. Yet, the CLRV submits again that the Chamber did not make any factual finding or issue binding ruling regarding said issue in the Impugned Decision. Nor was the Chamber under any obligation to do so.

13. Moreover, the CLRV also stresses that this is the second time that the Defence qualifies Mr Ongwen as a mentally disabled person and seeks leave to appeal a decision which did not at all deal with his mental health status. On a previous occasion, the Chamber held that the question of whether Mr Ongwen may be a mentally disabled person was never considered in issuing its ruling and thus said issue did not arise from that decision.²⁰

14. Even if the Chamber considers this purported issue as an appealable issue, it cannot possibly significantly affect the fair and expeditious conduct of proceedings since *no* legal or factual findings were made in relation to Mr Ongwen's rights to receive an Acholi translation of the Judgment or his mental health status in the Impugned Decision. In fact, the Defence has reportedly been contacted by the LSS which had requested it to identify the sections of the Judgment which it wishes to be

¹⁷ *Ibid.*

¹⁸ *Ibid.*

¹⁹ *Idem*, paras. 2475-2477, 2484, 2492-2493, 2518, 2538 and 2580.

²⁰ See the "Decision on Defence Request for Leave to Appeal the Decision on Defence Request for Medical Examination of Mr Ongwen" (Trial Chamber IX), [No. ICC-02/04-01/15-1640](#), 16 October 2019, paras. 11-12.

translated into Acholi.²¹ Any prospective agreement between the Defence and the LSS for the translation of the Judgment falls outside of the parameters of the Impugned Decision.

15. *Arguendo*, even if leave is granted, an appeal is conducted before the Appeals Chamber with the specific purpose of reviewing the proceedings that took place before a lower Chamber.²² As mentioned *supra*, the Chamber did not make any legal or factual findings in relation to the issue that the Defence now raises. Therefore, even if the Appeals Chamber was to address this matter, it would then be reviewing said issue for the first time, akin to a first instance court, which is against its corrective function.²³ Thus, the immediate resolution of the purported issue by the Appeals Chamber will not materially advance the proceedings as the latter will be engaging in an academic exercise in reviewing a ruling which is not contained in the Impugned Decision.

²¹ See the "Defence request for a suspension of its notice of its intent to appeal Trial Chamber IX's Trial Judgment", [No. ICC-02/04-01/15-1764-Conf](#), 08 February 2021, para. 31.

²² See the "Decision on the 'Filing of Updated Investigation Report by the Government of Kenya in the Appeal against the Pre-Trial Chamber's Decision on Admissibility'" (Appeals Chamber), [No. ICC-01/09-02/11-202 OA](#), 28 July 2011, para. 11.

²³ See the "Judgment on the appeal of the Prosecutor against the decision of Trial Chamber IV of 12 September 2011 entitled 'Reasons for the Order on translation of witness statements (ICC-02/05-03/09-199) and additional instructions on translation'" (Appeals Chamber), [No. ICC-02/05-03/09-295 OA2](#), 17 February 2012, para. 20.

V. CONCLUSION

16. For the foregoing reasons, the Common Legal Representative of the Victims respectfully requests the Chamber to reject the Request because the issue identified by the Defence does not constitute an appealable issue; nor does it meet the stringent requirements for granting interlocutory appeal under article 82(1)(d) of the Statute.

A handwritten signature in black ink, reading "Paolina Massidda", with a horizontal line underneath the name.

Paolina Massidda
Principal Counsel

Dated this 15th day of February 2021

At The Hague, The Netherlands