

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No.: ICC-02/04-01/15
Date: 24 January 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

**Decision on Defence Request for Findings on Fair Trial Violations Related to
the Acholi Translation of the Confirmation Decision**

To be notified, in accordance with Regulation 31 of the *Regulations of the Court*, to:

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Detention Section

**Victims Participation and Reparations
Section**

Others

Trial Chamber IX ('Chamber') of the International Criminal Court ('Court'), in the case of *The Prosecutor v. Dominic Ongwen*, having regard to Articles 64 and 67(1)(a) and (f) of the Rome Statute ('Statute'), Rule 134(2) of the Rules of Procedure and Evidence ('Rules') and Regulation 24(5) of the Regulations of the Court, issues the following 'Decision on Defence Request for Findings on Fair Trial Violations Related to the Acholi Translation of the Confirmation Decision'.

I. Procedural history and relief sought

1. On 8 January 2018, the Defence filed a motion ('Request') requesting that the Chamber: (a) make findings on fair trial violations in respect to notice and translation; and (b) order a temporary stay of proceedings until the violations are remedied.¹ The fair trial violation alleged is that Mr Ongwen had not been provided a complete translation of the decision on the confirmation of charges ('Confirmation Decision') into a language he fully understands and speaks – Acholi.²
2. On 10 January 2018, after the Chamber brought to the Defence's attention that there is an Acholi translation of the Confirmation Decision and inquired if this affected the relief sought,³ the Defence again requested a ruling on the Request ('Addendum').⁴ The Defence submits that the translation in question was received late and – because the Confirmation Decision's separate opinion was not likewise translated – incomplete.⁵

¹ Defence Request for Findings on Fair Trial Violations and Remedy, Pursuant to Articles 67 and 64 of the Rome Statute, 8 January 2018, ICC-02/04-01/15-1127.

² Request, ICC-02/04-01/15-1127, paras 1, 3-4, 19-20, 32.

³ Email from Trial Chamber IX to the Defence and other participants, 8 January 2018 at 16:57, *referring to* Acholi Translation of Decision on the confirmation of charges against Dominic Ongwen, 13 December 2017, ICC-02/04-01/15-422-Conf-tACH (first issued on 23 March 2016 with separate opinion of 19 May 2016).

⁴ Addendum to 'Defence Request for Findings on Fair Trial Violations and Remedy, Pursuant to Articles 67 and 64 of the Rome Statute' (ICC-02/04-01/15-1127), filed 8 January 2018, ICC-02/04-01/15-1129.

⁵ Addendum, ICC-02/04-01/15-1129, paras 8-10.

3. On 17 January 2018, the Office of the Prosecutor responded ('Response'),⁶ submitting that the relief sought be rejected in full.
4. On 19 January 2018, the Defence sought leave to reply to the Response on the basis of two factual errors ('Request for Leave to Reply'), namely that Mr Ongwen's counsel speaks Lango (not Acholi) and that the Confirmation Decision opinion is a separate opinion (not a dissenting opinion).⁷
5. On 22 January 2018, the Legal Representatives for Victims jointly filed a submission opposing the relief sought in the Request.⁸

II. The accused's understanding of the charges

6. On 21 January 2016 at the confirmation hearing, the Presiding Judge of Pre-Trial Chamber II asked Mr Ongwen if he was fully aware of the charges and notified of them in Acholi. Mr Ongwen responded as follows:

Thank you, your Honour. Well, from my point of view, whether the charges are read or not read is all going to be a waste of time. You may speak five words and only two issues are correct. You may speak ten words and only two things are correct. The reading out these charges, whether they are true or not, is all going to be a waste of time. I've been handed out the document translated in Acholi, so I've read and understood it. Thank you.⁹

7. The translated document referenced by the accused is the Prosecution's document containing the charges.¹⁰ All 70 charges alleged by the Prosecution in this document were confirmed by the Pre-Trial Chamber. As noted by the Prosecution, the operative part of the Confirmation Decision is an almost

⁶ Prosecution Response to "Defence Request for Findings on Fair Trial Violations and Remedy, Pursuant to Articles 67 and 64 of the Rome Statute.", ICC-02/04-01/15-1140.

⁷ Defence Request for Leave to Reply to Prosecution's Response to "Defence Request for Findings on Fair Trial Violations and Remedy, Pursuant to Articles 67 and 64 of the Rome Statute", ICC-02/04-01/15-1143.

⁸ Victims' Joint Response to "Defence Request for Findings of Fair Trial Violations and Remedy, Pursuant to Articles 67 and 64 of the Rome Statute" (ICC-02/04-01/15-1127), ICC-02/04-01/15-1144.

⁹ Transcript of Hearing, 21 January 2016, ICC-02/04-01/15-T-20-ENG, page 6 lines 9-14.

¹⁰ Document Containing the Charges, 22 December 2015, ICC-02/04-01/15-375-AnxA-Red (Acholi translation at ICC-02/04-01/15-375-Conf-AnxB).

verbatim recitation of the charges as they appeared in the document containing the charges.¹¹

8. On 30 May 2016, the Chamber set a deadline for any motions requiring resolution prior to the commencement of trial.¹² The Defence filed no request for an Acholi translation of the Confirmation Decision by this deadline.
9. On 6 December 2016, at the commencement of the trial (a hearing, like all hearings in this case, which Mr Ongwen followed in real-time through Acholi interpretation), the following occurred:
 - (i) The Court Officer read the essential portions of the confirmed charges in open court.¹³
 - (ii) The Chamber had an exchange with the accused as to whether he understood the charges. In particular, the Presiding Judge asked the accused, 'Is it correct that you received the decision confirming the 70 charges also in Acholi?'. The accused responded, 'Yes, I did receive the charges in Acholi, but I reiterate it is the LRA who abducted people in northern Uganda'.¹⁴ Mr Ongwen seems to have been mistaken about receiving a Confirmation Decision translation given the arguments in the Request, but at the time no one from the Defence considered it necessary to intervene and correct the record.
 - (iii) At the conclusion of this exchange, Mr Ongwen did not give an unqualified affirmation that he understood the charges. The Chamber then gave a reasoned decision specifying why it was satisfied that Mr

¹¹ What minimal changes are made are set out in Confirmation Decision, ICC-02/04-01/15-422-Red, para. 158. *See also* Response, ICC-02/04-01/15-1140, para. 2.

¹² Decision Setting the Commencement Date of the Trial, 30 May 2016, ICC-02/04-01/15-449, para. 11.

¹³ Transcript of Hearing, ICC-02/04-01/15-T-26-ENG ('Commencement of Trial'), page 8 line 20 to page 15 line 25.

¹⁴ Commencement of Trial, ICC-02/04-01/15-T-26-ENG, page 16 line 21 to page 17 line 2.

Ongwen nevertheless understood the nature of the charges against him, explaining at one point that 'Mr Ongwen's remarks that the LRA is not him and that the LRA committed these acts demonstrate an understanding of the confirmed charges. Mr Ongwen's remarks are rather a dispute as to Mr Ongwen's responsibility for these alleged acts.'¹⁵

- (iv) The Chamber then asked the parties whether they had any remaining objections or observations concerning the conduct of the proceedings which have arisen since the confirmation hearing. The Defence did not raise the issue of translation of the Confirmation Decision, but instead said the following:

May it please your Honours. We've carefully listened to the decision today and want just to say that in the course of the proceedings we expect that specificity be given to aspects of some of the charges which may -- with regard to venue, northern Uganda, within a period of five years, is so huge. So we hope that in relation to the question of specificity as the proceedings proceed, in order to have appropriate notice of some of the charges, we will raise this as the occasion arises in the course of the trial.¹⁶

10. The Defence then proceeded to examine 53 Prosecution witnesses over the course of 2017 without seeking any relief from the Chamber regarding the translation of the Confirmation Decision. The Acholi translation of the Confirmation Decision, but not the separate opinion of Judge Perrin de Brichambaut, appears to have been finalised on 13 December 2017.¹⁷

III. Applicable law

11. Article 67(1)(a) of the Statute sets out the right of the accused '[t]o be informed promptly and in detail of the nature, cause and content of the charge, in a

¹⁵ Commencement of Trial, ICC-02/04-01/15-T-26-ENG, page 17 line 11 to page 19 line 15.

¹⁶ Commencement of Trial, ICC-02/04-01/15-T-26-ENG, page 21 lines 7-14.

¹⁷ The Defence explains that, despite this notification date, the Defence itself was not formally notified of the translation. Addendum, ICC-02/04-01/15-1129, paras 5-7.

language which the accused fully understands and speaks'.¹⁸ Although the Defence is correct that the accused *fully* understanding the language in question denotes a high level of fluency,¹⁹ the statutory scheme sets forth no requirement that the entire confirmation decision must be translated into the accused's language.

12. Accused before this Court also have a right to translations, but this right is qualified as a right '[t]o have free of any cost, the assistance of a competent interpreter and such translations *as are necessary to meet the requirements of fairness*'.²⁰
13. Rule 134(2) of the Rules requires the Chamber to give the parties an opportunity at the commencement of trial to raise any objections or observations concerning the conduct of the proceedings which have arisen since the confirmation hearings. This rule mandates that '[s]uch objections or observations may not be raised or made again on a subsequent occasion in the trial proceedings without leave of the Trial Chamber in this proceeding'.
14. A stay of proceedings is an exceptional remedy warranted only when breaches of the rights of the accused are such as to make it impossible to present a defence within the framework of their rights. Depending on whether a fair trial is possible at a later stage, a stay of proceedings can be temporary (i.e. conditional) or permanent.²¹

¹⁸ Article 67(1)(a) of the Statute.

¹⁹ Request, ICC-02/04-01/15-1127, paras 22-27, *referencing* Appeals Chamber, *The Prosecutor v. Germain Katanga*, Judgment on the appeal of Mr. Germain Katanga against the decision of Pre-Trial Chamber I entitled "Decision on the Defence Request Concerning Languages", 27 May 2008, ICC-01/04-01/07-522, OA 3.

²⁰ Article 67(1)(f) of the Statute (emphasis added).

²¹ Appeals Chamber, *The Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled "Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008", 21 October 2008, ICC-01/04-01/06-1486, OA 13, paras 78-80; Appeals Chamber, *The Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction

IV. Analysis

15. As to the preliminary matter of the Defence Request for Leave to Reply, the Chamber does not consider that its reasoning would be assisted by receiving further submissions on how the two identified factual errors resulted in the 'Prosecution's misunderstanding and misinterpretations of Article 67 of the Statute'.²² Accordingly, the Chamber rejects the Leave to Reply Request.
16. The Defence submits that it is entitled to findings for fair trial violations and corresponding remedies due to late and incomplete translation of the Confirmation Decision. The Chamber considers the relief sought both untimely and unjustified.
17. The Chamber notes that the accused has had a translated document containing the charges (whose text is repeated in the disposition of the Confirmation Decision) well before the trial's commencement, and before even the confirmation hearing. The lack of an Acholi translation of the entire Confirmation Decision was immediately apparent to the Defence well before the commencement of trial on 6 December 2016. The Defence concedes as much.²³ However, when given the opportunity mandated by Rule 134(2) of the Rules to object to commencing the trial, the Defence did not mention the need for any translations. The Defence instead made a vague reference to expecting that 'specificity be given to aspects of some of the charges',²⁴ which is an issue different from that of the translation of the charges, and gave no indication that the trial could not proceed.

of the Court pursuant to article 19 (2) (a) of the Statute of 3 October 2006, 13 December 2006, ICC-01/04-01/06-772, OA 4, para. 39.

²² Request for Leave to Reply, ICC-02/04-01/15-1143, para. 8.

²³ Request, ICC-02/04-01/15-1127, para. 5, *referencing* Defence Observations on Fair Trial and Request for Orders on Prosecution Resources and Additional Defence Resources, 11 December 2017, ICC-02/04-01/15-1098, para. 29 n. 21.

²⁴ *See* paragraph 9(iv) above.

18. Prior to trial, when a post-confirmation issue of such significance arises that the moving party considers that failure to resolve it would warrant a stay of proceedings, Rule 134(2) of the Rules requires that this issue be raised no later than the commencement of trial.²⁵ For the Defence to frame the lack of an Acholi translation as a trial-halting proposition 13 months after its commencement is plainly untimely. Noting that no leave from the Chamber is sought to raise this objection now, the Request is dismissible for its untimeliness alone.
19. Even if the Request was timely, there is no reason to believe that the Chamber's decision on 6 December 2016 that Mr Ongwen sufficiently understands the charges requires revisiting. When it comes to the accused's understanding of the charges in this case, an important distinction must be made between the operative part of the Confirmation Decision and its reasoning. The Pre-Trial Chamber clearly explained that the content of 'the charges' appears only in the operative part:
- [I]t is only the charges as reproduced in the operative part of the Confirmation Decision which are binding to the proceedings in that they delineate the facts and circumstances setting the parameters of the charges for which Dominic Ongwen is committed to trial. No binding effect (whether on factual or legal matters) is instead attached to the reasoning provided in the Confirmation Decision by which the Chamber explains how it reached its final determination under article 61(7) of the Statute.²⁶
20. Before the confirmation hearing, Mr Ongwen received an Acholi translation of the text which mirrors the operative part of the Confirmation Decision. He also had the confirmed charges read to him on the first day of trial, has heard the entire trial through Acholi interpretation and has instructed his defence team throughout the trial without any discernible impediments.

²⁵ See also Rule 122(3)-(4) of the Rules (setting an analogous regime governing objections or observations concerning an issue related to the conduct of the proceedings prior to the confirmation hearing).

²⁶ Decision on the Defence request for leave to appeal the decision on the confirmation of charges, 29 April 2016, ICC-02/04-01/15-428.

21. It must also be noted that any postponement of the proceedings for a translation of the entire confirmation decision – never mind a measure as extreme as a temporary stay – would be without purpose because the Defence now has an Acholi translation of the Confirmation Decision. Noting that the charges confirmed are contained exclusively in the operative part of the document already provided in Acholi, the Chamber fails to see how a lack of translation of a separate opinion affects the accused’s right under Article 67(1)(a) or is ‘necessary for the requirements of fairness’ under Article 67(1)(f) of the Statute. The Defence is entitled to seek the Registry’s assistance in acquiring an Acholi translation of the separate opinion, but the Chamber considers that any delays in receiving such a document do not affect the fairness of the trial.
22. For these reasons, even if the Request was not untimely, it must be rejected on its merits.

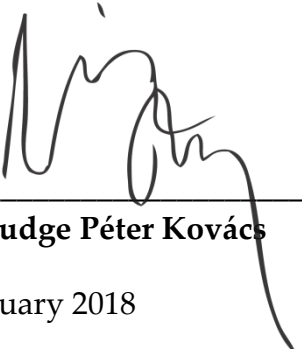
FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

REJECTS the Request for Leave to Reply; and

REJECTS the Request.



Judge Bertram Schmitt, Presiding Judge



Judge Péter Kovács



Judge Raul C. Pangalangan

Dated 24 January 2018

At The Hague, The Netherlands