

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No.: ICC-02/04-01/15

Date: 11 May 2018

TRIAL CHAMBER IX

Before: Judge Bertram Schmitt, Single Judge

SITUATION IN UGANDA

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

Public

**Decision on Defence Request for Reconsideration of or Leave to Appeal the
Directions on Closing Briefs and Closing Statements**

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

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Other

Judge Bertram Schmitt, acting as Single Judge on behalf of Trial Chamber IX ('Single Judge' and 'Chamber', respectively) of the International Criminal Court, in the case of *The Prosecutor v. Dominic Ongwen*, having regard to Articles 64(2), 67, 82(1)(d) of the Rome Statute ('Statute') and Rule 91(2) of the Rules of Procedure and Evidence ('Rules') issues the following 'Decision on Defence Request for Reconsideration of or Leave to Appeal the Directions on Closing Briefs and Closing Submissions'.

I. Background and submissions

1. On 13 April 2018, the Single Judge issued directions on the filing of the closing briefs and the presentation of closing statements ('Directions').¹ Therein, he held that: (i) the closing briefs are to be filed by all the parties and participants six weeks after the declaration of the closure of submission of evidence;² (ii) there would be no translations of these submissions into Acholi;³ and (iii) the closing statements will be held two weeks after the filings of the closing briefs.⁴
2. On 23 April 2018, the defence for Mr Ongwen ('Defence') filed a request to either reconsider the Directions or, in the alternative, grant leave to appeal ('Request').⁵ It seeks reconsideration with regard to four discrete aspects, requesting that: (i) the deadline between the closure of submission of evidence and the filing of the closing briefs ('Closing Briefs Deadline') be extended from 6 weeks to four months ('First Aspect'); (ii) Acholi translations of the closing briefs be filed simultaneously with the English versions ('Second Aspect'); (iii) the deadline between the closing briefs and the closing statements ('Closing Statements Deadline') be extended from two to four weeks ('Third Aspect') and (iv) the Defence be given the right to respond to the closing briefs of the legal

¹ Directions on Closing Briefs and Closing Statements, ICC-02/04-01/15-1226.

² Directions, ICC-02/04-01/15-1226, para. 3 and page 6.

³ Directions, ICC-02/04-01/15-1226, para. 6.

⁴ Directions, ICC-02/04-01/15-1226, para. 9 and page 6.

⁵ Defence Request for Reconsideration or Leave to Appeal ICC-02/04-01/15-1226, ICC-02/04-01/15-1238-Conf-Exp. A public-redacted version was filed on the same day, ICC-02/04-01/15-1238-Red.

representatives for victims ('Fourth Aspect').⁶ Alternatively, the Defence requests that leave to appeal with regard to the same issues should be granted.⁷

3. The Defence submits that exceptional circumstances exist justifying reconsideration. Concerning the First Aspect, it argues that, since Mr Ongwen does not understand English and the transcripts of the proceedings are not provided in Acholi, a longer period for the preparation of the closing brief is required. Otherwise, according to the Defence, Mr Ongwen's right to participate is violated.⁸ Further, it asserts that the right to a fair trial to have adequate time to prepare his defence is violated, since the Prosecution can start writing its closing brief now, whilst the Defence does not enjoy the same opportunity.⁹ This, according to the Defence, violates the accused's rights to prepare his defence in 'full equality with the Prosecution'.¹⁰
4. In respect of the Second Aspect, the Defence submits that it needs Acholi translations of the closing briefs in order to prepare for the closing submissions and that in absence of such translations the accused's fair trial rights will be violated. Further, it concludes that since the Defence has the right to reply to the closing submissions of the Victim Representatives, these submissions must be translated into Acholi.¹¹
5. With regard to the Third Aspect, the Defence invokes again the accused's fair trial rights in order to request four instead of two weeks after the filing of the closing submissions.

⁶ Request, ICC-02/04-01/15-1238-Red, para. 1.

⁷ Request, ICC-02/04-01/15-1238-Red, para. 2.

⁸ Request, ICC-02/04-01/15-1238-Red, para. 21.

⁹ Request, ICC-02/04-01/15-1238-Red, paras 27-30.

¹⁰ Request, ICC-02/04-01/15-1238-Red, para. 27.

¹¹ Request, ICC-02/04-01/15-1238-Red, paras 31-37.

6. In respect to the Fourth Aspect, the Defence argues it has a right to reply to the closing submissions of the Legal Representatives under Rule 91(2) of the Rules.¹²
7. In the alternative, the Defence requests leave to appeal the Directions. It submits that the Directions violate the accused's rights pursuant to Articles 64(2), 67(1)(b) and 67(1)(f) of the Statute by setting a Closing Briefs Deadline of six weeks ('First Issue'), stating that no Acholi translations of the closing briefs have to be filed concurrently ('Second Issue') and setting a Closing Statements Deadline of two weeks ('Third Issue').¹³ Further, the Defence asserts that the Directions violate the accused's 'fundamental right pursuant to Rule 91(2)' by not allowing the Defence to reply to the Victim Representatives closing briefs ('Fourth Issue').¹⁴
8. On 30 April 2018, the Office of the Prosecutor ('Prosecution')¹⁵ and Common Legal Representative for Victims ('CLR V', together with the Legal Representatives for Victims 'Victim Representatives')¹⁶ filed their responses, submitting that the Request should be rejected ('Prosecution Response' and 'CLR V Response', respectively).
9. The Prosecution submits that the Request fails to show an error of reasoning in the Directions and that no exceptional circumstances warrant reconsideration.¹⁷ In respect of the alternative request for leave to appeal the Directions the Prosecution argues, that all four issues – as framed by the Defence – do not arise from the Directions and do not meet the other criteria for leave to appeal.¹⁸

¹² Request, ICC-02/04-01/15-1238-Red, paras 41-43.

¹³ Request, ICC-02/04-01/15-1238-Red, para. 50 a – c.

¹⁴ Request, ICC-02/04-01/15-1238-Red, para. 50 d.

¹⁵ Prosecution's Response to Defence Request for Reconsideration or Leave to Appeal, ICC-02/04-01/15-1226, ICC-02/04-01/15-1250.

¹⁶ CLR Response to the "Public Redacted Version of 'Defence Request for Reconsideration or Leave to Appeal ICC-02/04-01/15-1226'", filed on 23 April 2018", ICC-02/04-01/15-1251.

¹⁷ Prosecution Response, ICC-02/04-01/15-1250, paras 2-9.

¹⁸ Prosecution Response, ICC-02/04-01/15-1250, paras 10-16.

10. The CLRV also submits that the criteria for reconsideration are not fulfilled¹⁹ and that the issue identified by the Defence do not meet the criteria for leave to appeal.²⁰

II. Analysis

11. The Single Judge will first address the request for reconsideration and then discuss the alternative request for leave to appeal.

i) Request for reconsideration

12. As previously noted by the Chamber, reconsideration is an exceptional measure which should only be undertaken if a clear error of reasoning has been demonstrated or if it is necessary to prevent an injustice. New facts and arguments arising since the issuance of the decision might be taken into consideration.²¹

13. The Single Judge notes that no new facts and arguments have arisen since the issuance of the Directions. All issues raised by the Defence were – explicitly or implicitly – taken into full consideration when issuing the Directions.

14. In relation to the First and Third Aspect of the Request i.e. that the Closing Briefs Deadline and the Closing Statements Deadline violate, due to their length, the accused's right to a fair trial, the Single Judge recalls, again, that the Directions were given at this early point in the proceedings to allow the parties and participants to plan their workload accordingly.²² On the Defence's own estimation, the Directions end up providing the Prosecution with over one year

¹⁹ CLRV Response, ICC-02/04-01/15-1251, paras 7-11.

²⁰ CLRV Response, ICC-02/04-01/15-1251, paras 16-21.

²¹ Decision on Request for Reconsideration of the Order to Disclose Requests for Assistance, 15 June 2016, ICC-02/04-01/15-468, para. 4; Decision on Legal Representatives' Request Regarding Opening Statements, 29 November 2016, ICC-02/04-01/15-610.

²² Directions, ICC-02/04-01/15-1226, para. 2.

to write its closing brief.²³ The Defence ends up with the exact same timeframe to write its own brief. The positions the parties are in are also not fundamentally different: the Prosecution will still actively participate when the Defence calls its witnesses and remain cognisant of the occurrences in the Defence case to assess whether it influences its closing brief. The Defence argues under the mistaken assumption that it can only start work on its submissions after the declaration of the closure of the submission of evidence. However, it is up to the Defence to organise its resources in a manner which allows it to meet those deadlines.

15. In relation to the Second Aspect, seeking the filing of Acholi translations of the closing submissions at the same time, the Single Judge notes that the Directions explain extensively why this is not necessary with reference to Article 67(1)(f) of the Statute.²⁴ The fact that the transcripts of the proceedings are not available in Acholi, as noted by the Defence, does not change this assessment. The accused is not expected to have perfect memory of the trial and, as noted by the Prosecution,²⁵ may consult the Acholi recordings of court hearings as needed for the preparation of the Defence closing brief. The Single Judge finds that the Defence is in a position to effectively prepare its closing statements without Acholi translations of the closing briefs.
16. The argument raised in the Fourth Aspect of the Request that Rule 92(1) of the Rules provides the Defence with an automatic right to file written submissions in answer to the Victim Representatives closing briefs is misguided since, as pointed out by the Defence itself,²⁶ the Defence will have the opportunity to reply to the closing briefs in its closing statements.

²³ Request, ICC-02/04-01/15-1238-Red, para. 28.

²⁴ Directions, ICC-02/04-01/15-1226, paras 5-8.

²⁵ Prosecution Response, ICC-02/04-01/15-1250, para. 5, *contra* Request, ICC-02/04-01/15-1238-Red, para. 24.

²⁶ Request, ICC-02/04-01/15-1238-Red, paras 33, 34 and 39.

17. Considering the above, the Single Judge finds that there is no clear error of reasoning or other exceptional circumstances warranting the reconsideration of the Directions. Accordingly, this part of the Request is rejected.

ii) Request for leave to appeal

18. The Single Judge recalls the interpretation of Article 82(1)(d) of the Statute as set out in detail in previous decisions.²⁷

19. In respect of the First, Second and Third Issue, the Single Judge finds that they do not significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial. For instance, in order to justify the effect on the expeditiousness on the proceedings, the Defence argues that – should the extension of Closing Brief Deadline not be granted – this ‘shall result in further complaints’ and that the Defence ‘shall be required to petition the Chamber for additional time’.²⁸ The Defence cannot use its own litigation strategy and the prospect of its own further complaints as affecting the expeditious conduct of the proceedings.

20. Similarly, in order to justify that the resolution of the Second Issue affects the expeditiousness of the trial, the Defence argues that without the Acholi translation it would be ‘seriously hampered in its preparation of the closing statements’ by having to wait for translations.²⁹ However, the Defence already has available to it all Prosecution witness statements and all hearing recordings in Acholi. The Directions are also rendered so far in advance as to give the Defence more than ample time to liaise with the Registry for translations of other materials, including the Prosecution’s prior arguments in its pre-trial brief. The Prosecution’s arguments in its closing brief are not expected to be meaningfully

²⁷ Decision on Defence Request for Leave to Appeal Decision ICC-02/04-01/15-521, 2 September 2016, ICC-02/04-01/15-529, paras 4-8. *See also* 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, paras 5-9.

²⁸ Request, ICC-02/04-01/15-1238-Red, para. 54.

²⁹ Request, ICC-02/04-01/15-1238-Red, para. 61.

new and, with all the Acholi information the Defence has or can have at its disposal, the Single Judge fails to see how not translating this brief significantly affects the fair and expeditious conduct of the proceedings.

21. The Single Judge finds that none of the first three issues identified by the Defence affects the outcome of the trial. First, when arguing this point, the Defence repeats again the lack of translations of the transcripts for the First and Third Issue³⁰ which is simply beside the point when discussing the length of the deadlines and their potential effect on the outcome of the trial. The Defence merely speculates as to how the three issues would affect their closing submissions and closing statements and how this, as a result, could then potentially affect the outcome of the judgment. The Single Judge repeats that the closing submissions are 'merely an additional assistance for the Chamber's benefit',³¹ an 'additional tool'³² and have 'no independent evidentiary value'.³³ Accordingly, the conjectures of the Defence do not fulfil the criteria for leave to appeal.
22. In respect of the Fourth Issue, the Single Judge notes that the Defence *does* have the possibility to reply in its closing statements (*see*, paragraph 16 above) and finds therefore that the issue does not arise from the decision.
23. Accordingly and considering the above, the Single Judge also rejects the alternative request for leave to appeal.

³⁰ Request, ICC-02/04-01/15-1238-Red, paras 55 and 69.

³¹ Directions, ICC-02/04-01/15-1226, para. 6.

³² Directions, ICC-02/04-01/15-1226, para. 3.

³³ Directions, ICC-02/04-01/15-1226, para. 6.

FOR THE FOREGOING REASONS, THE SINGLE JUDGE HEREBY

REJECTS the Request.

Done in both English and French, the English version being authoritative.



Judge Bertram Schmitt, Single Judge

Dated 11 May 2018

At The Hague, The Netherlands