

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 22 May 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 Leave to Appeal Decision 1248

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

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Trial Chamber IX ('Chamber') of the International Criminal Court ('Court'), in the case of *The Prosecutor v. Dominic Ongwen*, having regard to Article 82(1)(d) of the Rome Statute ('Statute'), Rule 91(2) of the Rules of Procedure and Evidence ('Rules') and Regulation 24 of the Regulations of the Court ('Regulations') issues the following 'Decision on Defence Request for Leave to Appeal Decision 1248'.

I. Procedural history and submissions

1. On 24 April 2018, the defence for Mr Ongwen ('Defence') submitted an urgent request ('Initial Request')¹ seeking the delay of at least one month to the opening of the evidence presentation by the Legal Representative for Victims ('LRV') and the Common Legal Representative for Victims ('CLR V', together 'Legal Representatives'). The evidence presentation was due to commence on 1 May 2018 (i.e. three working days later).² The Defence argued that the extension was necessary to ensure compliance with the accused's rights under Articles 67(1)(b), 67(1)(e) and 64(2) of the Statute,³ which includes the right to have adequate time for preparation for the Legal Representatives' evidence presentation.
2. On 26 April 2018, the Prosecution⁴ and the Legal Representatives⁵ filed their responses seeking a rejection of the Initial Request ('Responses to the Initial Request').

¹ Defence Urgent Request for Delay in Opening of LRV and CLR V Cases Pursuant to Articles 67(1)(b) and 67(1)(e) of the Rome Statute, ICC-02/04-01/15-1239, para. 26; Email communication from Trial Chamber IX Communications to parties and participants, 24 April 2018 at 17:34 shortened the response deadline to 26 April 2018.

² On 27 March 2018, the Chamber confirmed the hearing schedule, with the Legal Representatives' evidence presentation starting from 1 May 2018. Email from Trial Chamber IX to the parties and participants, 27 March 2018 at 15:28.

³ Initial Request, ICC-02/04-01/15-1239, paras 12-25.

⁴ Prosecution's Response to the Defence Urgent Request for Delay in Opening of LRV and CLR V Cases, ICC-02/04-01/15-1245.

⁵ CLR Response to the "Defence Urgent Request for Delay in Opening of LRV and CLR V Cases, Pursuant to Articles 67(1)(b) and 67(1)(e) of the Rome Statute", ICC-02/04-01/15-1246; Victims' response to "Defence Urgent Request for Delay in Opening of LRV and CLR V Cases, Pursuant to Articles 67(1)(b) and 67(1)(e) of the Rome Statute", ICC-02/04-01/15-1247.

3. On the same day, the Chamber rejected the Initial Request taking into account the purpose of this part of the proceedings, the restrictions on the evidence the Legal Representatives are allowed to elicit and the quantity, purpose and content of the disclosed materials ('Impugned Decision').⁶ The Chamber found that the Defence had been given adequate time to prepare itself for the Legal Representatives' evidence presentation.⁷
4. On 4 May 2018, the Defence filed a request for leave to appeal the Impugned Decision on two issues ('Request for Leave to Appeal'):⁸
 - (i) 'First Issue': '[w]hether [the Impugned Decision] violates Mr Ongwen's fair trial rights under Articles 67(1)(b), 67(1)(e) and 64(2) of the Statute; and b) whether [the Impugned Decision] complies with the Trial Chamber's previous decision ICC-02/04-01/15-1199';⁹ and
 - (ii) 'Second Issue': '[w]hether the Trial Chamber acted *ultra vires* for disregarding the Defence procedural right to prepare and file a request for leave to reply to a response from the Prosecution within three days of notification pursuant to Regulations 24(5), 31 and 34(c) of the Regulations [...] and the Defence's procedural right to reply to submissions from the CLRV and LRV pursuant to Rule 91(2) of the [Rules].'¹⁰
5. In relation to the First Issue, the Defence submits that the Impugned Decision fails to address its submissions regarding the limited Acholi translations of expert reports provided by the CLRV, Mr Ongwen's disadvantage in

⁶ Decision on Defence Urgent Request for Delay in Opening of LRV and CLRV Evidence Presentation, 26 April 2018, ICC-02/04-01/15-1248.

⁷ Impugned Decision, ICC-02/04-01/15-1248, para. 16.

⁸ Defence Request for Leave to Appeal the "Decision on Defence Urgent Request for Delay in Opening of LRV and CLRV Evidence Presentation", ICC-02/04-01/15-1253.

⁹ Request for Leave to Appeal, ICC-02/04-01/15-1253, para. 14.

¹⁰ Request for Leave to Appeal, ICC-02/04-01/15-1253, para. 24.

reviewing the materials and the inadequate time given to confer with and get instructions from Mr Ongwen.¹¹ The second aspect of the issue alleges that the CLRV, by providing inadequate summaries, failed to comply with a previous decision relating to the Legal Representatives' evidence presentation ordering the CLRV to provide Acholi translations of witness summaries ('Decision on the Legal Representatives Request to Present Evidence').¹² As a result, it is submitted that the Impugned Decision fails to comply with the Decision on the Legal Representatives Request to Present Evidence.¹³

6. In relation to the Second Issue, the Defence argues that the Chamber, by issuing the Impugned Decision three hours after receiving the Responses to the Initial Request, denied the Defence its procedural right to file a request for leave to reply to the Prosecution's response (under Regulations 24(5) and 34(c) of the Regulations) and its right to reply to the responses by the Legal Representatives (as per Rule 91(2) of the Rules).¹⁴
7. The Defence submits that both issues affect the fair and expeditious conduct of the proceeding and the outcome of the trial.¹⁵ In addition, it is also submitted that an immediate resolution of the issues by the Appeals Chamber may materially advance the proceedings.¹⁶
8. On 9 May 2018, the CLRV filed its response seeking the rejection of the Request for Leave to Appeal ('CLRv Response').¹⁷ The CLRv submit that the Request for Leave to Appeal is moot to begin with as the presentation of

¹¹ Request for Leave to Appeal, ICC-02/04-01/15-1253, para. 18.

¹² Request for Leave to Appeal, ICC-02/04-01/15-1253, paras 21- 22; *See* Decision on the Legal Representative for Victims Requests to Present Evidence and Views and Concerns and related requests, 6 March 2018, ICC-02/04-01/15-1199, paras 79-80.

¹³ Request for Leave to Appeal, ICC-02/04-01/15-1253, para. 24.

¹⁴ Request for Leave to Appeal, ICC-02/04-01/15-1253, paras 26-28.

¹⁵ Request for Leave to Appeal, ICC-02/04-01/15-1253, paras 30-33.

¹⁶ Request for Leave to Appeal, ICC-02/04-01/15-1253, paras 34-35.

¹⁷ CLRv Response to the "Defence Request for Leave to Appeal the 'Decision on Defence Urgent Request for Delay in Opening of LRV and CLRv Evidence Presentation'", ICC-02/04-01/15-1257.

evidence by the Legal Representatives has already begun and is halfway finished. The Defence had an opportunity to lodge its appeal prior to the start of the victims' evidence presentation but failed to do so.¹⁸ In addition, it is argued that the issues raised by the Defence do not meet the legal criteria for leave to appeal. The CLRV submit that the First Issue amounts to a mere disagreement with the ruling in the Impugned Decision.¹⁹ In relation to the Second Issue, the Defence does not have an 'unfettered and automatic procedural right to reply to all documents including responses' filed by the Legal Representatives. Therefore, the Defence fails to show the existence of an appealable issue.²⁰

9. On 11 May 2018, the Prosecution submitted its response also seeking a rejection of the Request for Leave to Appeal ('Prosecution Response').²¹ The Prosecution submits that both aspects of the First Issue amount to a conflict of opinion or a mere disagreement with the Impugned Decision and also fail to meet the remaining criteria under Article 82(1)(d).²² It is further alleged that the Second Issue is founded upon a faulty interpretation of the law and therefore does not arise from the Impugned Decision. According to the Prosecution, the Second Issue also does not significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial.²³

II. Applicable law and analysis

10. The Chamber is required under Article 82(1)(d) to assess: (i) whether the matter is an appealable issue; (ii) whether the issue would significantly affect either the fair and expeditious conduct of the proceedings or the outcome of

¹⁸ CLRV Response, ICC-02/04-01/15-1257, paras 10-11.

¹⁹ CLRV Response, ICC-02/04-01/15-1257, paras 19-20.

²⁰ CLRV Response, ICC-02/04-01/15-1257, paras 21-22.

²¹ Prosecution's Response to Defence Request for Leave to Appeal Decision ICC-02/04-01/15-1248, ICC-02/04-01/15-1258.

²² Prosecution Response, ICC-02/04-01/15-1258, paras 2-8.

²³ Prosecution Response, ICC-02/04-01/15-1258, paras 9-15.

the trial; and (iii) whether, in the opinion of the Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings. Due to the cumulative nature of the leave to appeal criteria set out in Article 82(1)(d), the failure to satisfy any one of the criteria stipulated must result in the rejection of a request for leave to appeal. The Chamber recalls the interpretation of Article 82(1)(d) of the Statute as set out in detail in previous decisions.²⁴ It is important to highlight that the issue in question must arise from the Impugned Decision.

11. The Chamber is of the view that neither the First nor the Second Issue constitutes an appealable issue arising from the Impugned Decision. While this is sufficient to reject the Request for Leave to Appeal, the Chamber makes additional observations in relation to the other criteria under Article 82(1)(d) as deemed necessary.

A. First Issue

(i) First aspect – whether the Impugned Decision violates the accused’s fair trial rights under Articles 67(1)(b), 67(1)(e) and 64(2) of the Statute

12. The first aspect of the issue, as formulated by the Defence, asserts that the Impugned Decision violates the accused’s fair trial rights; a generic statement that fails to highlight any specific error. The Impugned Decision considered the very question of whether a delay to the opening of the Legal Representatives’ evidence presentation was necessary in order to ensure protection of the accused’s rights. Therefore, the Chamber cannot grant leave to appeal on a generically formulated issue challenging, in effect, the entirety of the Impugned Decision without any further specificity.

²⁴ 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.

13. Additionally, in its explanation the Defence misrepresents the Chamber's analysis. It is alleged that the Chamber failed to address Defence submissions regarding the provision of limited Acholi translations of expert reports by the CLRV and its potential adverse impact upon the time it would take the accused to review the materials and for counsel to confer with him.²⁵ The Impugned Decision took into account, *inter alia*, the purpose, content and quantity of the disclosed materials.²⁶ Specific reference in the Impugned Decision to the relevant portions of the Initial Request is further indicative of the fact that the Chamber took these into consideration.²⁷ Therefore, even if the Chamber reformulated the first aspect, in accordance with the underlying arguments raised by the Defence, in order to articulate a specific issue — the first aspect does not arise from the Impugned Decision and as a result would fail to qualify as an appealable issue within the meaning of Article 82(1)(d) of the Statute.

(ii) Second aspect – whether the Impugned Decision complies with the Trial Chamber's previous decision

14. The second aspect deals with the inadequacy of the summaries provided by the CLRV, allegedly in breach of the Decision on the Legal Representatives Request to Present Evidence.²⁸ While the summaries provided by the CLRV are not ideal, the Chamber did not consider these to be inadequate or insufficient and therefore in breach of the Chamber's previous decision.²⁹ This

²⁵ Request for Leave to Appeal, ICC-02/04-01/15-1253, paras 19, 20 and 23.

²⁶ Impugned Decision, ICC-02/04-01/15-1248, paras 12 and 16.

²⁷ Impugned Decision, ICC-02/04-01/15-1248, para. 12 and FN 21.

²⁸ Request for Leave to Appeal, ICC-02/04-01/15-1253, para. 22.

²⁹ The Defence added to this argument in Court by seeking an Acholi translation of the expert reports. *See* Transcript of Hearing on 14 May 2018, ICC-02/04-01/15-T-175-CONF-ENG-ET, page 7, line 3 to page 8 line 13; *See also* Defence Request for Leave to Appeal the Trial Chamber's Oral Decision on the Exclusion of Certain Parts of the CLRV Expert Report, 17 May 2018, ICC-02/04-01/15-1261, para. 4; This issue has been addressed in the Decision on the Legal Representatives Request to Present Evidence, establishing the translation regime for this part of the proceedings. The Defence has failed to raise any arguments justifying reconsideration and therefore a further ruling is not deemed necessary. *See* Decision on the Legal Representatives Request to Present Evidence, ICC-02/04-01/15-1199, paras 22-25 and 79-80; *See also* the

is evidenced by the fact that the Chamber continued with the Legal Representatives' evidence presentation as scheduled even after receipt of the summaries. In any case, this is an entirely new issue, separate and distinct from the question of whether the limited Acholi translations meant that the Defence should have been given more time to prepare and confer with the accused.³⁰ As the second aspect of the issue was not raised in the Initial Request, it does not arise from the Impugned Decision and therefore does not constitute an appealable issue.

15. As previously stipulated, while the above is sufficient to reject the Request for Leave to Appeal on the First Issue, the Chamber additionally notes that an immediate resolution of this issue by the Appeals Chamber would not serve to 'materially advance' the proceedings. The Legal Representatives' evidence presentation is nearly complete, and was more than halfway complete at the filing of the Request for Leave to Appeal. The Chamber reiterates that the Defence can, as an exceptional measure, request to recall witnesses should the need to do so truly arise. Therefore, given these circumstances, awaiting a resolution by the Appeals Chamber serves no purpose in ensuring the material advancement of the proceedings.

B. Second Issue

16. The Second Issue is founded upon an inaccurate interpretation of the law and therefore does not arise from the Impugned Decision. The Chamber is also of the view that the Second Issue does not significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial.

oral decision on the exclusion of certain parts of the CLRV expert report: Transcript of Hearing on 14 May 2018, ICC-02/04-01/15-T-175-CONF-ENG-ET, page 11 line 14 to page 13 line 1.

³⁰ See Initial Request, ICC-02/04-01/15-1239, paras 22-24 and FN 24.

17. The Defence continues what has become a pattern of mistaken legal arguments regarding responses and replies. Therefore, the Chamber finds it necessary at this juncture to address this point conclusively.
18. It is important to be cognisant of Regulation 24 of the Regulations when interpreting Rule 91(2) of the Rules. Regulations 24(4) and 24(5) of the Regulations, together, stipulate that Chamber's leave must be sought in order to reply to a response — including a response by the Legal Representatives.³¹ As highlighted by the Prosecution³² and the CLRV,³³ this is *lex specialis* to the general provision stipulated in Rule 91(2) of the Rules. Rule 91(2) of the Rules reflects the parties' general right to reply when a legal representative for victims makes submissions. But when such submissions are in the procedural posture of a response to another participant's request, then Regulation 24 of the Regulations governs the specific procedure which must be followed.
19. As clearly stated by the Appeals Chamber, Regulation 24(4) of the Regulations 'precludes the possibility of an automatic response by the parties to the victims' response, except with the leave of the [...] Chamber'.³⁴ An interpretation whereby the Defence has an unfettered and automatic right to reply to a response by the Legal Representatives would irreconcilably conflict with this pronouncement and the Regulations explicitly dealing with this situation (Regulations 24(4) and (5) of the Regulations).³⁵ Although the

³¹ See also Regulation 24(2) of the Regulations.

³² Prosecution Response, ICC-02/04-01/15-1258, para. 11.

³³ CLRV Response, ICC-02/04-01/15-1257, paras 21-22.

³⁴ Appeals Chamber, *Prosecutor v. Laurent Gbagbo and Charles Blé Goudé*, Judgment on the appeal of Mr Laurent Gbagbo against the decision of Trial Chamber I of 8 July 2015 entitled "Ninth decision on the review of Mr Laurent Gbagbo's detention pursuant to Article 60(3) of the Statute", 8 September 2015, ICC-02/11-01/15-208, para. 22.

³⁵ The Chamber has previously incorporated by reference the procedure for victim participation set out by the Pre-Trial Chamber, but limited only to participatory rights of the victims without adoption of any procedural rights stipulated by the Pre-Trial Chamber under Rule 91(2) of the Rules. See Decision on Requests Concerning Organisation of Victim Representation, 17 June 2016, ICC-02/04-01/15-476, para. 11, *incorporating* Decision on contested victims' applications for participation, legal representation of victims and their procedural rights, 27 November 2015, ICC-02/04-01/15-350, paras 25-35.

Regulations are to be read subject to the Rules,³⁶ the Chamber agrees with the Appeals Chamber that requiring leave in such situations is the preferred interpretation as this avoids any statutory conflict and preserves the meaning of both Rule 91(2) of the Rules and Regulation 24 of the Regulations.

20. It follows that it is at the Chamber's discretion as to whether such leave to reply will be granted. It is equally within the Chamber's discretion to conclude that a reply would not be of assistance in reaching a decision and instead issue its decision forthwith particularly when time is of the essence, which was the case in this particular instance. Therefore, the Chamber did not act *ultra vires* in doing so. The Chamber reiterates that the urgency to issue the Impugned Decision was created by the Defence filing its Initial Request so soon prior to the start of the victims' case, when it had ample opportunity to do so in a more timely manner. For these reasons the Second Issue does not arise from the Impugned decision and as a result fails to constitute an appealable issue.

21. Furthermore, the Chamber is of the view that the Second Issue does not significantly affect the fair and expeditious conduct of the proceedings. The Defence has failed to establish any undue prejudice resulting from the alleged deprivation of its 'procedural right' to seek leave to reply to the Prosecution's response, or to reply directly to the Legal Representatives responses to the Initial Request. The Defence does not shed any light on what the content of its reply would have been or how this might have influenced the Chamber's conclusion in the Impugned Decision. Also, the Defence provides no insight into how the Chamber's prompt issuance of the Impugned Decision significantly affects the expeditiousness of the trial — particularly when the Legal Representatives' evidence presentation is close to being concluded.

³⁶ Regulation 1(1) of the Regulations.

22. Finally, the Chamber fails to see how this issue significantly affects the outcome of the trial. The Defence submits that the resolution of the 'Defence's procedural right to file a leave to reply to a response [...] could, self-evidently, have an impact on the outcome of the [...] trial.'³⁷ The Defence seems to argue that a general resolution of this legal question could impact the outcome of the trial, but fails to elaborate any further. The Chamber disagrees with the Defence that this is 'self-evident'. Accordingly, the Request for Leave to Appeal is also rejected in respect of the Second Issue.

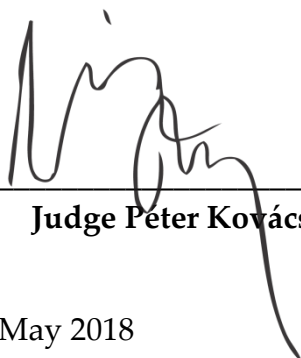
FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

REJECTS the Request for Leave to Appeal.

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



Judge Bertram Schmitt, Presiding Judge



Judge Peter Kovács



Judge Raul C. Pangalangan

Dated 22 May 2018

At The Hague, The Netherlands

³⁷ Request for Leave to Appeal, ICC-02/04-01/15-1253, para. 33.