

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: **12 December 2016**

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

**Defence Request for Leave to Appeal the Oral Decision of 6 December 2016 on Mr
Ongwen's Understanding of the Nature of the Charges**

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
Benjamin Gumpert, QC

Counsel for the Defence

Krispus Ayena Odongo
Chief Charles Achaleke Taku

Legal Representatives of the Victims

Joseph Akwenyu Manoba
Francisco Cox

Common Legal Representative for Victims

Paolina Massidda
Jane Adong

The Office of Public Counsel for Victims

Paolina Massidda
Caroline Walter
Orchlon Narantsetseg

The Office of Public Counsel for the Defence

Xavier-Jean Keita

Amicus Curiae

REGISTRY

Registrar

Herman Von Hebel

Counsel Support Section

Victims and Witnesses Unit

Detention Section

Paddy Craig
Harry Tjonk

Victims Participation and Reparations Section Other

I. INTRODUCTION

1. Pursuant to Article 82(1)(d) of the Rome Statute, the Defence for Dominic Ongwen ('Defence') requests leave to appeal the oral decision ('Oral Decision') of Trial Chamber IX ('Chamber') on Dominic Ongwen's understanding of the nature of the charges.¹ The Defence argues that the manner of assessing whether Mr Ongwen understands the nature of the charges is an issue that arises from the decision.

II. BACKGROUND

2. On 6 January 2015, Mr Ongwen was transferred into the custody of the International Criminal Court.
3. On 21 January 2015, Mr Ongwen arrived at the International Criminal Court Detention Centre.
4. On 26 January 2015, Mr Ongwen had his initial appearance.²
5. From 21-27 January 2016, Pre-Trial Chamber II held the Confirmation of Charges Hearing.
6. On 23 March 2016, Pre-Trial Chamber II confirmed 70 charges against Mr Ongwen.
7. On 6 December 2016, the Chamber started the trial against Mr Ongwen.

III. SUBMISSIONS

a) The issue for which the Defence seeks leave to appeal

8. The Defence seeks leave to appeal the following issue: *whether the standard for Article 64(8)(a) allows for the Chamber to use historical statements of the Accused for the major basis of determining the Accused understanding of the charges* ('Issue').

b) The Issue arises from the Oral Decision

9. 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".³ Further, an issue is "a subject the resolution of which is essential

¹ ICC-02/04-01/15-T-26-ENG RT 06-12-2016 T, pg. 17, line 21 – pg. 20, line 1.

² See ICC-02/04-01/15-T-4-ENG.

³ ICC-01/04-168, para. 9.

for the determination of the matters arising in the judicial cause under examination” and may be “legal or factual or a mixed one”.⁴ 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.⁵ In other words, the issue “must be one likely to have repercussions on either of these two elements of justice”.⁶

10. The Chamber, in deciding that Mr Ongwen understands the nature of the charges, relied heavily upon Mr Ongwen’s statement during the Confirmation of Charges Hearing.⁷ The Chamber compared the two statements, and stated that it was “not persuaded that Mr Ongwen cannot understand something now he so clearly understood back in January.”⁸ The Defence maintains that the ability to understand the nature of the charges does not have an element of historical reference; it is something that should only be determined with contemporaneous information.⁹ The information told to the Chamber within ICC-02/04-01/15-620-Conf was contemporaneous, and stated by two (2) experts approved by the Registry.

c) The Oral Decision affects the fair and expeditious conduct of the proceedings

11. 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.¹⁰ In particular, it noted that the “expeditious conduct of the proceedings in one form or another constitutes an attribute to a fair trial”.¹¹ The term “proceedings” extends to proceedings prior and subsequent to the current proceedings.¹²
12. Being able to understand the nature of the charges is a fundamental human right enumerated in the Rome Statute.¹³ Without such understanding, an accused would not be able to participate in his or her trial. A lack of understanding, which in the case-at-bar stems from mental diseases/defects, cannot be determined by historical references; it must be determined contemporaneously, without reference to historical statements.

⁴ *Ibid.*

⁵ *Ibid.*, para. 10.

⁶ *Ibid.*

⁷ ICC-02/04-01/15-T-26-ENG RT 06-12-2016 T, pg. 17, line 25 – pg. 18, line 22.

⁸ *Ibid.*, pg. 18, lines 13-14.

⁹ See generally *Pritchard* (1836) 7 C&P 303, available at:

<http://www.commonlii.org/uk/cases/EngR/1836/540.pdf>, cited recently for example in *R v Moyle* [2008] EWCA Crim 3059, available at: <http://www.bailii.org/ew/cases/EWCA/Crim/2008/3059.html>.

¹⁰ ICC-01/04-168, para. 11.

¹¹ *Ibid.*

¹² *Ibid.*, para. 12.

¹³ Article 64(8)(a).

13. The Oral Decision will also affect the expeditiousness of the trial. If Mr Ongwen cannot understand the charges, delays will be had due in part to the Defence's inability to examine witnesses properly. Witnesses conducted during this time will need to be recalled, or at the least, re-interviewed under Decision 339, Annex A, conditions. Such issues will require short recesses to conduct the interviews.

d) The Oral Decision affects the outcome of the trial

14. 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.¹⁴ 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.¹⁵
15. The Oral Decision will affect the outcome of the trial. Starting the trial whilst an accused does not understand the nature of the charges affects an accused's participatory rights enshrined in Article 67 of the Rome Statute. If an accused cannot understand the charges put before him, and in the case-at-bar because of mental diseases/defects, an accused should not be made to stand trial until such time that the diseases/defects have been appropriately dealt with. Using historical statements does not properly reflect any problems which may have arose between 21 January 2016 and 6 December 2016. And as the Defence noted, Mr Ongwen's symptoms of his mental problems have been worse over the recent past.¹⁶

e) An immediate resolution of the Issue will remove all doubt as to the correctness of the Oral Decision

16. 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

¹⁴ ICC-01/04-168., para. 13.

¹⁵ *Ibid.*, para. 13.

¹⁶ ICC-02/04-01/15-620-Conf, paras 17, 27, 29, 30 and 40.

¹⁷ ICC-01/04-168., paras 14-15.

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

17. A determination of the Issue will remove any doubt as to the correctness of the Oral Decision. Continuing the proceedings without Mr Ongwen understanding the nature of the charges will mar the entire proceedings until such time that he is able to understand the nature of the charges. Knowing whether or not the Chamber used the correct standard would remove all doubt as to the fairness of the proceedings.

IV. RELIEF

18. The Defence respectfully requests leave to appeal “whether the standard for Article 64(8)(a) allows for the Chamber to use historical statements of the Accused for the major basis of determining the Accused understanding of the charges.”

Respectfully submitted,



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Hon. Krispus Ayena Odongo
On behalf of Dominic Ongwen

Dated this 12th day of December, 2016
At Kampala, Uganda

¹⁸ *Ibid.*, para. 14.

¹⁹ *Ibid.*, para. 15.