

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: **21 December 2017**

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 Single Judge's "Decision on Request for Reports on the Resources of the Parties to the Case and Order for Additional Resources to the Defence"

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
Beth S. Lyons

Legal Representatives of the Victims

Joseph Akwenyu Manoba
Francisco Cox

Common Legal Representative for Victims

Paolina Massidda
Jane Adong

Unrepresented Victims

**Unrepresented
(Participation/Reparation)**

Applicants

The Office of Public Counsel for Victims

Paolina Massidda
Orchlon Narantsetseg
Caroline Walter

States' Representatives

**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

Nigel Verrill

Detention Section

**Victims Participation and Reparations Other
Section**

I. INTRODUCTION

1. Pursuant to Article 82(1)(d) of the Rome Statute, the *Ongwen* Defence seeks leave to appeal the Single Judge's [of Trial Chamber IX ("Trial Chamber")] Decision entitled "Decision on Request for Reports on the Resources of the Parties to the Case and Order for Additional Resources to the Defence," ('Decision').¹
2. The Decision presents three issues for appeal:
 - a) **Issue 1:** The first and fundamental issue presented is whether the Trial Chamber, or the Registry, is the appropriate entity under the Rome Statute to decide whether the fair trial rights of the Accused are violated, and if yes, the remedy to be implemented for the violation(s);
 - b) **Issue 2:** The second and related issue is whether, in respect to the resolution of fair trial violations within the Court's legal assistance program, the Trial Chamber's jurisdiction is conferred by Regulation 83(4) of the Regulations of the Court ('RoC') or by Article 64(2) of the Statute;
 - c) **Issue 3:** The third and related issue is whether the failure of the Trial Chamber to make an initial finding in respect to fair trial violations assists in ensuring that the trial is "fair and expeditious and is conducted with full respect for the rights of the accused," pursuant to Article 64(2) of the Statute, or does the procedure ordered in the Decision impede the implementation of the rights to present a defence?
3. Pursuant to Regulation 65(2) of the RoC, the Defence submits that these issues warrant immediate resolution by the Appeals Chamber, especially in light of the Single Judge's "Decision on Defence Observations on the Preliminary Directions for any LRV or Defence Evidence Presentation and Request for Guidance on Procedure for No-Case-to-Answer Motion".²

¹ ICC-02/04-01/15-1114.

² ICC-02/04-01/15-1074.

4. In this Decision, the Trial Chamber stated that “the Defence also has the time between this date [end of Prosecution evidence block on 1 December 2017] and the start of the next hearing block on 15 January 2018 to continue its investigations and preparations.”³
5. The severe inequalities in resources, personnel, budget, etc., and the resolution of these fair trial violations articulated in the “Defence Observations on Fair Trial and Request for Orders on Prosecution Resources and Additional Defence Resources” (‘Observations’)⁴ directly and detrimentally affect the Defence’s activities, including in this December-January period cited by the Trial Chamber.
6. In sum, a decision on the appeal issues presented by the Decision would significantly affect the fair and expeditious conduct of the proceedings in this case, as well as the outcome of the trial. In addition, a decision would materially advance the proceedings, as well as provide legal guidance for future cases when these issues arise.

II. APPLICABLE LAW

7. Pursuant to Article 82(1) of the Statute, either party may appeal a decision that involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings. The purpose of such procedure is to “pre-empt the repercussions of erroneous decisions on the fairness of the proceedings or the outcome of the trial”.⁵ The Pre-Trial Chamber is vested with the power to certify the existence of an appealable issue;⁶ however, when determining whether leave to appeal should be granted, the Pre-Trial Chamber must not justify or defend the correctness of its decision, but instead determine whether the issues presented significantly affect the fairness of the proceedings.⁷
8. According to Rule 155 (1) of the Rules of Procedure and Evidence (‘RPE’), a party shall make a written application for leave to appeal to the Chamber that gave the decision, setting out the reasons for the request for leave to appeal. The application for leave to appeal shall state the name and number of the case or situation and shall specify the legal and/or factual reasons in

³ ICC-02/04-01/15-1074, para. 19.

⁴ ICC-02/04-01/15-1098.

⁵ ICC-01/04-168, para. 19.

⁶ ICC-01/04-168, para. 20.

⁷ See *e.g.* ICC-01/09-02/11-253, para. 28.

support thereof, in accordance with Regulation 65(1) of the RoC. It shall also specify the reasons warranting immediate resolution by the Appeals Chamber of the matter at issue.⁸

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”.⁹ Further, an ‘issue’ is “a subject the resolution of which is essential for the determination of matters arising in the judicial cause under examination” and may be “legal or factual or a mixed one”.¹⁰ 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.¹¹ In other words, the issue “must be one likely to have repercussions on either of [these] [...] two elements of justice”.¹²
10. 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.¹³ In particular, it noted that the “expeditious conduct of the proceedings in one form or another constitutes an attribute of a fair trial”,¹⁴ and that these fair trial principles applied at the pre-trial stage.¹⁵ In the words of the Appeals Chamber, “breach of or deviation from the rules of a fair trial at the pre-trial stage of the proceedings may have implications on the proceedings and may affect the outcome of the trial”.¹⁶ In other words, the question of “purging the pre-trial process of errors consequential [in the sense of fair trial] is designed as a safeguard for the integrity of the proceedings” is “at the core of Article 82 (1) (d) of the Statute”.¹⁷ The term ‘proceedings’ extends to proceedings prior and subsequent to the current proceedings.¹⁸
11. 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.¹⁹ The Pre-Trial Chamber, when deciding on a request for leave to appeal, “must ponder the

⁸ Regulation 65(2) of the RoC.

⁹ ICC-01/04-168, para. 9.

¹⁰ ICC-01/04-168, para. 9.

¹¹ ICC-01/04-168, para. 10.

¹² ICC-01/04-168, para. 11.

¹³ ICC-01/04-168, para. 11.

¹⁴ ICC-01/04-168, para. 11.

¹⁵ ICC-01/04-168, para. 11.

¹⁶ ICC-01/04-168, para. 11.

¹⁷ ICC-01/04-168, para. 11.

¹⁸ ICC-01/04-168, para. 12.

¹⁹ ICC-01/04-168, para. 13.

possible implications of a given issue being wrongly decided on the outcome of the case,” thereby forecasting the consequences of such an occurrence.²⁰

12. 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”.²¹ 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 process of possible mistakes that might taint either the fairness of the proceedings or mar [sic] the outcome of the trial”.²² The solving of the issue by the Appeals Chamber is aimed to “ensure that the proceedings follow the right course”.²³

III. SUBMISSIONS

13. The issues in the Defence Observations meet the criteria of Article 82(1) (d) of the Statute. As argued in the Defence Observations, the inequalities in respect to the Prosecution and the Defence severely prejudice Mr Ongwen’s fair trial rights. The Defence has pointed to the inequality in personnel, and access to resources for the Defence team, as well as for its most vulnerable witnesses. The inequities in respect to investigation can be summed up as the Prosecution having more than a decade ‘head-start’ on the Defence, in addition to more funding, personnel and also assistance from a State Party. Based on these points, which were gleaned by the Defence from publicly available Office of the Prosecutor documents and courtroom observations, the Defence concludes that there is a severe inequality, which prejudices Mr Ongwen’s fair trial rights.
14. These fair trial violations are ‘center stage’, and their harm and prejudice are compounded by the number of charges and modes of liability confirmed in the Confirmation of Charges decision, and the lack of notice, pursuant to Article 67 of the Statute.

²⁰ ICC-01/04-168, para. 13.

²¹ ICC-01/04-168, para. 14-15.

²² ICC-01/04-168, para. 14.

²³ ICC-01/04-168, para. 15.

15. The *Ongwen* case, with 70 charges and 7 modes of liability charged against Mr Ongwen, in this single-accused case, is the largest case in the history of the ICC. The magnitude of the case against Mr Ongwen is only multiplied by the inequalities of resources, budget and personnel, of the Defence (compared to the Prosecution), and the resulting prejudice to Mr Ongwen's fair trial rights.

Issue 1: Whether the Trial Chamber, or the Registry, is the appropriate entity under the Rome Statute to decide whether the fair trial rights of the Accused are violated, and if yes, the remedy to be implemented for the violation(s)

16. The Decision orders that, as a threshold matter, the Defence should apply to the Registry for additional resources, pursuant to the procedures in Regulation 83 of the RoC. This process is one in which the Trial Chamber effectively abstains from its initial legal responsibilities to resolve fair trial violations, and shifts the resolution of the requests for additional resources to the Registry, which is not empowered to make decisions on the law.
17. For example, let's say that the Defence requested thirty-one missions in one year, starting in 2018 to achieve equality with the thirty-one missions conducted by the Prosecution in 2016-2017.²⁴
18. Under the Decision, the Defence should go first to the Registry and present a request for additional missions, and resources for investigation. The Trial Chamber would rule on a denial of the Defence's Observations, should this be necessary.²⁵
19. But, there is no way that the Registry, absent a legal finding of a fair trial violation from the Trial Chamber, could remedy the violation. It is not empowered to adjudicate fair trial violations and order remedies for these violations.
20. Hence, the Single Judge's Decision totally omits a decision of the Trial Chamber as the legal predicate for any actions of the Registry in respect to its responsibilities relating to the rights of the Defence. In fact, Rule 20 of the RPE on the Registrar's responsibilities includes conduct such as "facilitate," "provide support, assistance and information," "assist" and "advise". There is no responsibility listed for the Registrar or Registry to adjudicate fair trial violations.

²⁴ Defence Observations, para. 12: (Referencing ICC-ASP/16/9, 2 November 2017, p. 12, para. 93.).

²⁵ Decision, para. 7.

21. Adjudication of fair trial violations is under the functions and powers of the Trial Chamber, in Article 64(2) of the Statute, which states that the Trial Chamber “shall ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused [...]”

Issue 2: Whether, in respect to the resolution of fair trial violations within the Court’s legal assistance program, the Trial Chamber’s jurisdiction is conferred by Regulation 83(4) of the RoC or by Article 64(2) of the Statute

22. The Defence submits that Article 64(2) of the Statute confers jurisdiction on the Trial Chamber to resolve the fair trial violations it raised in its pleading. The Regulations, including those in Regulation 83 of the RoC, have to be read subject to the Rome Statute. In fact, Regulation 1(1) of the RoC reads “These regulations have been adopted pursuant to article 52 and shall be read subject to the Statute and the Rules.”
23. This supports the Defence view that the Trial Chamber should first make a finding in respect to fair trial violations, and then proceed to address implementation of remedies.
24. The Decision appears to skip the first step of judicial decision-making. The Decision is titled “Decision on Request for Reports on the Resources of the Parties to the Case and Order for Additional Resources for the Defence”. There is nothing in the Decision’s title about fair trial issues. In contrast, the Defence Observations were entitled “Defence Observations on Fair Trial and Request for Orders on Prosecution Resources and Additional Defence Resources.”
25. Nor does the Decision make any findings on the Defence arguments regarding fair trial violations, in which the Defence identifies severe inequalities in terms of resources, budget, personnel, investigations, etc., as well as lack of notice, pursuant to Article 67 of the Statute.
26. The Decision appears to reduce the Defence Observations to a request for resources, and ignores all other fair trial violations. The inequality in resources for investigation is one of the inequities raised by the Defence, but the Defence has also raised violations of Article 67(1) (a) and (f) of the Statute – the lack of specific notice to the Accused of the charges and modes of liability confirmed against him, in a language he fully understands and speaks.
27. All of the fair trial violations identified by the Defence are inextricably linked to Article 67(1) (e) of the Statute – the right to present a defence. At the end of the day, the issues are whether Mr Ongwen has had the right to present a defence – including at all phases of the proceedings. This is the heart of fair trial. Moreover, this is the legal context in which to evaluate ***Issue 3:***

Whether the failure of the Trial Chamber to make an initial finding in respect to fair trial violations assists in ensuring that the trial is “fair and expeditious and is conducted with the full respect for the rights of the accused,” pursuant to Article 64(2) of the Statute, or does the procedure ordered in the Decision impede the implementation of the rights to present a defence?

28. Lastly, the Defence notes that the Decision’s solution – to first approach the Registry – echoes the Single Judge’s “Decision on Defence Observations on the Preliminary Directions for any LRV and Defence Evidence Presentation and Request for Guidance on Procedure for No-Case-to-Answer Motion,” in which the Single Judge finds that “many of these [resource] matters are matters to be properly discussed with the Registry.”²⁶

IV. REMEDY SOUGHT

29. For the reasons stated above, the Defence respectfully requests leave to appeal the Single Judge’s Decision.

Respectfully submitted,



.....
Hon. Krispus Ayena Odongo
On behalf of Dominic Ongwen

Dated this 21st day of December, 2017

At Kampala, Uganda

²⁶ ICC-02/04-01/15-1074, para. 15.