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**International
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Court**

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Date: **30 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

**Defence Request for Leave to Appeal the “Decision on Defence Request for Findings on Fair Trial Violations Related to the Acholi Translation of the Confirmation Decision,”
ICC-02/04-01/15-1147, 24 January 2018**

Source: Defence for Dominic Ongwen

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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I. INTRODUCTION

1. Pursuant to Article 82(1)(d) of the Rome Statute, the *Ongwen* Defence seeks leave to appeal the Trial Chamber IX ('Trial Chamber') decision entitled "Decision on Defence Request for Findings on Fair Trial Violations Related to the Acholi Translation of the Confirmation Decision" ('Impugned Decision').¹
2. The Impugned Decision presents four issues for appeal:
 - a) **Issue 1:** Whether the reading of enumerated counts in a very abbreviated and incomplete form constitutes notice of the charges, for the purposes of Article 67(1)(a) of the Statute;
 - b) **Issue 2:** On what legal basis, if any, can the Chamber decide that seeking a waiver for a summary or limited reading of the charges from the Accused is not necessary? And specifically, is reliance on a previous decision by the Single Judge a sufficient legal basis?
 - c) **Issue 3:** Whether the impugned decision denying Mr Ongwen's "Request for Findings on Fair Trial Violations Related to the Acholi Translation of the Confirmation Decision" violates Article 67(1)(a) of the Statute;
 - d) **Issue 4:** Whether the plea taken in December 2016 is valid, given (a) the Accused's explicit statement that he did not understand the charges against him; and (b) that the Trial Chamber asked the Accused to enter a plea based on a Confirmation of Charges decision ('CoC Decision') which was not fully translated into Acholi, and differed from the original Document Containing the Charges ('DCC').

II. APPLICABLE LAW

3. 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

¹ ICC-02/04-01/15-1147.

fairness of the proceedings or the outcome of the trial”.² The Pre-Trial Chamber is vested with the power to certify the existence of an appealable issue;³ 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.⁴

4. 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 support thereof, in accordance with Regulation 65(1) of the Regulations of the Court (‘RoC’). It shall also specify the reasons warranting immediate resolution by the Appeals Chamber of the matter at issue.⁵
5. 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”.⁶ 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”.⁷ 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.⁸ In other words, the issue “must be one likely to have repercussions on either of [these] [...] two elements of justice”.⁹
6. The Appeals Chamber has defined the term ‘fair’ as being associated with the norms of a fair trial and corresponding human rights, as per Articles 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 of a fair trial”,¹¹ and that these fair trial principles applied at the pre-trial

² ICC-01/04-168, para. 19.

³ ICC-01/04-168, para. 20.

⁴ See *e.g.* ICC-01/09-02/11-253, para. 28.

⁵ Regulation 65(2) of the RoC.

⁶ ICC-01/04-168, para. 9.

⁷ ICC-01/04-168, para. 9.

⁸ ICC-01/04-168, para. 10.

⁹ ICC-01/04-168, para. 11.

¹⁰ ICC-01/04-168, para. 11.

¹¹ ICC-01/04-168, para. 11.

stage.¹² 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”.¹³ 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”.¹⁴ The term ‘proceedings’ extends to proceedings prior and subsequent to the current proceedings.¹⁵

7. 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.¹⁶ The Pre-Trial 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.¹⁷
8. 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”.¹⁸ 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”.¹⁹ The solving of the issue by the Appeals Chamber is aimed to “ensure that the proceedings follow the right course”.²⁰

III. SUBMISSIONS

a) *Issue 1: Whether the reading of enumerated counts in a very abbreviated and incomplete form constitutes notice of the charges, for the purposes of Article 67(1)(a) of the Statute*

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. 12.

¹⁶ ICC-01/04-168, para. 13.

¹⁷ ICC-01/04-168, para. 13.

¹⁸ ICC-01/04-168, para. 14-15.

¹⁹ ICC-01/04-168, para. 14.

²⁰ ICC-01/04-168, para. 15.

9. Prior to the commencement of trial, before taking Mr Ongwen's plea on 6 December 2016, Presiding Judge Schmitt asked the Court Officer to read portions of the confirmed charges from the CoC Decision, identified in paragraph 6 of the earlier Single Judge's Decision, entitled "Initial Directions on the Conduct of Proceedings".²¹
10. In particular, the Single Judge held that "... the Court Officer will read the numbered counts, minus the statutory provisions referenced, which are contained in the confirmation decision's operative part²² under the 'legal characterisation of the facts' sub-headings."²³ An example was given in footnote 7: "[...] all that needs to be read out is '1) Attacks against the civilian population as such as a war crime, on or about 10 October 2003, at or near Pajule IDP camp.'"²⁴
11. Although the "Legal characterisation of the facts" subheadings include modes of liability, these were not read out. In the example in footnote 7 about attacks as a war crime, Mr Ongwen was charged as an indirect co-perpetrator.
12. But, contrary to the Decision's holding, the Court Officer did not read out any modes of liability confirmed in the CoC Decision.²⁵
13. Even the CoC Decision itself, in the section which includes the confirmed charges from the DCC, states that "The statements of material facts and circumstances and legal characterisations in each category should be read in conjunction with this section."²⁶
14. Hence, at the December hearing, Mr Ongwen was not given notice of, nor was he given the opportunity to enter a plea in respect to the modes of liability for each of the charges, in violation of his fair trial rights.
15. Most importantly, Mr Ongwen was not asked by Presiding Judge Schmitt if he waived his right to a reading of the full charges – the crimes and modes of liability – against him.

²¹ ICC-02/04-01/15-497, para. 6 reads: As for reading the charges to the accused at the commencement of trial, the Presiding Judge considers that extracts of the confirmed charges are sufficient for this purpose. Accordingly, the Court Officer will read the numbered counts, minus statutory provisions referenced, which are contained in the confirmation decision's operative part under the 'legal characterisation of the facts' sub-headings. No waiver or written certification that this is sufficient is required; the accused can confirm at the commencement of trial if he understands the charges or if any further reading is necessary. (footnotes omitted)

²² The Defence reserves its right to object further to what constitutes the 'operative part' of the CoC Decision; in fact, this issue is raised by the Defence in its submission that the Separate Opinion of J. de Brichambaut to the CoC Decision is part of the CoC Decision and should be translated.

²³ ICC-02/04-01/15-497, para. 6.

²⁴ ICC-02/04-01/15-497, footnote 7.

²⁵ ICC-02/04-01/15-T-26-ENG ET, pp. 9-16.

²⁶ CoC Decision, ICC-02/04-01/15-422-Red, p. 72, para 8.

16. There is also an issue as to what constitutes the “operative part of the CoC.” The Defence submits that the confirmed modes of liability are included in the “operative part” of the CoC Decision because they are “part and parcel” of the charges to be notified to an Accused under Article 67(1)(a) of the Statute. The Prosecution is under the obligation to prove every element of the crime and mode of liability charged beyond a reasonable doubt. Thus, the failure to include these modes of liability within the reading of each of the counts violated Mr Ongwen’s fair trial right to notice.
17. But, even accepting, *arguendo*, the Trial Chamber’s ruling in respect to “operative part,” the Impugned Decision does not appear to require the operative part to conform to the DCC.
18. The Trial Chamber states that the “operative part of the Confirmation Decision is almost verbatim recitation of the charges as they appeared in the document containing charges,”²⁷ and that “Mr Ongwen received an Acholi translation of the text which mirrors the operative part of the Confirmation Decision.”²⁸
19. The use of the terms “mirror” and “almost verbatim” indicate that Mr Ongwen’s plea was not taken on an identical document which he had received prior to the CoC hearings.
20. But, Presiding Judge Schmitt at the December proceedings, where the plea was entered into the record, did not present the changes in the sections of the DCC that were made in the CoC Decision. No modes of liability and no factual and legal characterisations were read to Mr Ongwen before the Presiding Judge took the plea. The Presiding Judge Schmitt only asked that the charge or count be read, with no reading of anything else, in violation of this provision in the CoC Decision. Thus, the abbreviated reading did not fulfil the requirements of the CoC Decision, by which the Trial Chamber is bound.²⁹
21. But nothing was read to Mr Ongwen at the plea proceeding by the Trial Chamber indicating that there had been changes in the CoC Decision, and what these changes were.³⁰

²⁷ Impugned Decision, para. 7.

²⁸ Impugned Decision, para. 20.

²⁹ *Bemba et al.*, Judgment pursuant to Article 74 of the Statute, 19 October 2016, ICC-01/05-01/13-1989-Red, para. 100: (“The Chamber recalls that it is bound by the terms of the Confirmation Decision”).

³⁰ Paragraph 158 of the CoC Decision is referenced at footnote 11 of the Impugned Decision to explain that the changes in the CoC Decision were minimal. The cited CoC Decision, ICC-02/04-01/15-422-Red is redacted, making impossible to understand and assess para 158(i) and(ii).

22. The absence of a full translation³¹ of the CoC Decision at the time the plea was entered compounds the violations of fair trial. A translation of the CoC Decision was not filed until December 2017, one year after the proceeding of December 2016 where Mr Ongwen's plea was entered.
23. In addition, at the end of the CoC Decision, the PTC II states that it declines to confirm the remainder of the charges,³² indicating that the CoC did not confirm the DCC in its entirety.
24. Thus, any translation which Mr Ongwen may have read prior to the January 2016 hearing was based on an old version of the DCC which had been changed in the CoC Decision. The plea in December 2016 was not entered based on the new and changed version of the DCC, which the CoC Decision confirmed.
25. In sum, the lack of notice, the absence of a waiver and the absence of an accurate translation of the full CoC decision being provided to Mr Ongwen on a timely basis, *i.e.*, pre-December 2016 plea proceeding, are fair trial violations under Article 67(1)(a) of the Statute, which also invalidate the plea proceedings. Mr Ongwen was not provided with notice as to what charges and modes of liability he was entering a plea, in violation of Article 67(1)(a) and his plea was illegal.

b) Issue 2: On what legal basis, if any, can the Single Judge decide that seeking a waiver of a summary or limited reading of the charges from the Accused is not necessary? And specifically, is reliance on a previous decision by the Single Judge a sufficient legal basis?

26. On 16 January 2016, the CoC hearing, pursuant to Article 61(1) of the Statute, began in Pre-Trial Chamber II ('PTC II'). The Presiding Judge Tarfusser, pursuant to Rule 122(1) of the RPE, before a reading of the charges as presented by the Prosecutor, asked whether Mr Ongwen waived his right to have the charges read orally to him.³³
27. The CoC Decision was filed on 23 March 2016 by the PTC II.

³¹ The Defence maintains its position that a complete or full translation of the CoC Decision includes the Separate Opinion of J. de Brichambaut. The Defence has litigated this issue on other pleadings.

³² CoC Decision, ICC-02/04-01/15-422-Red, p. 104.

³³ ICC-02/04-01/15-T-20-ENG, 21 January 2016, pp. 5-9.

28. At the commencement of trial, on 6 December 2016, pursuant to Article 64(8)(a) of the Statute,³⁴ the Presiding Judge Schmitt of the Chamber asked the Court Officer to read the confirmed charges in the CoC Decision.³⁵
29. The Presiding Judge subsequently took a plea from Mr Ongwen, based on the very abbreviated reading of the counts and with no reading of the modes of liability.
30. But, most importantly, in contrast to the procedures in the PTC II, the Presiding Judge did not ask Mr Ongwen whether he waived his right to the reading of the charges, which represented the full DCC contained in the CoC Decision, and whether he was agreeing to a reading only of the “operative part” of the CoC.
31. The Presiding Judge Schmitt took a plea from the Accused on the confirmed charges, pursuant to his previous decision on the conduct of proceedings, which held that no waiver or written certification was required in respect to the reading of confirmation decision’s operative part under the ‘legal characterisation of the facts’ sub-heading.³⁶ This previous decision, “Initial Directions on the Conduct of the Proceedings”, paragraph 6, included no legal precedent for the holding on waiver. Similarly, the Impugned Decision of 24 January 2018 for which the Defence seeks to leave to appeal provides no legal precedent for the holding on waiver.
32. The Defence submits that the failure to ask for a waiver from Mr Ongwen and the Defence of the full reading of the charges at the plea proceeding violated Mr Ongwen’s fair trial rights.

c) Issue 3: Whether the impugned decision denying Mr Ongwen’s “Request for Findings on Fair Trial Violations Related to the Acholi Translation of the Confirmation Decision” violates Article 67(1)(a)

33. The Defence submits that the Impugned Decision, for the reasons stated above under **Issue 1** and **Issue 2** in respect to lack of notice and waiver, violates Mr Ongwen’s fair trial rights. These violations, in turn, violate his Article 67(1)(e) right to present his defence in this case.

d) Issue 4: Whether the plea taken in December 2016 is valid, given (a) the Accused’s explicit statement that he did not understand the charges against him and that (b)

³⁴ Article 64(8)(a) of the Statute states: At the commencement of the trial, the Trial Chamber shall have read to the accused the charges previously confirmed by the Pre-Trial Chamber.

³⁵ ICC-02/04-01/15-T-26-ENG ET, pp. 9-16.

³⁶ ICC-02/04-01/15-497, para. 6.

the Trial Chamber asked the Accused to enter a plea based on a CoC Decision which was not fully translated into Acholi, and differed from the original DCC

34. The Impugned Decision is based on the Trial Chamber's determination that Mr Ongwen understood the charges against him, despite the Accused's explicit statement that he did not. At the December 2016 hearing, during the portion dealing with the plea ('plea proceedings') this exchange occurred:

Presiding Judge Schmitt: You say you do recall [at the January Confirmation hearing] that you answered that you do not understand the charges. Do you recall saying – give it a second thought – that you have, and I quote, said that you “read and understood the document containing the charges”?

The Accused (interpretation) – I did understand the document containing the –I do understand – I did understand the document containing the charges but not the charges, because the charges – the charges I do understand as being brought against LRA but not me, because I'm not the LRA. The LRA is Joseph Kony who is the leader of the LRA.³⁷

35. Mr Ongwen's statement was clear: he understood the translation, but did not understand the charges in the translated document as being charges against him.
36. This means that Mr Ongwen did not understand the charges against him.
37. Mr Ongwen's statement of not understanding should, minimally, have triggered the provisions in the Decision on “Initial Directions on the Conduct of Proceedings,” paragraph 6 which identified what had to be done if the Accused did not understand the charges:

[...] No waiver or written certification that this is sufficient is required; the accused can confirm at the commencement of trial if he understands or if any further reading is necessary.³⁸

38. In other words, if the Accused indicated that he did not understand, he would be asked if a further reading of the charges was necessary.
39. Although Mr Ongwen indicated he did not understand, the Trial Chamber, nevertheless, failed to proceed to this next step, and did not ask him whether any further reading of the charges was necessary.³⁹

³⁷ ICC-02/04-01/15-T-26-ENG ET, pp. 16 (ll. 18-25) and 17(ll. 1-16)

³⁸ ICC-02/04-01/15-497, para. 6.

³⁹ ICC-02/04-01/15-497, para. 6.

40. Instead, the Trial Chamber was satisfied that Mr Ongwen understood the charges against him.⁴⁰
41. The Presiding Judge Schmitt characterised Mr Ongwen's remarks⁴¹ as a "dispute as to [his] responsibility for these alleged acts [...] to be discussed during trial," holding that it was not part of Article 64(8)(a) of the Statute determination.⁴²
42. The Defence submits that this is a mischaracterization and objects to it.
43. The Defence submits that the Trial Chamber erroneously took Mr Ongwen's statement to mean that he understood the charges against him on which the trial would proceed. This conclusion was based on many different grounds,⁴³ and at that time, the Defence objected to the oral decision of the Presiding Judge Schmitt to proceed, and the Trial Chamber rejected the Defence objection and the Defence's Leave to Appeal the Oral Decision.⁴⁴
44. As discussed *supra.*, Mr Ongwen had not been provided with a translation of the CoC Decision in Acholi prior to the plea proceeding in December 2016, and the CoC Decision included a DCC which was changed from the one on which the January 2016 CoC hearing was based.
45. When these circumstances are combined with Mr Ongwen's statement that he did not understand the charges against him, for the Trial Chamber to proceed to ask him to enter a plea was a violation of his fair trial rights.

1. The issue identified by the Defence meet the criteria of Article 82(1)(d) of the Statute

46. These appeal issues have arisen from the Impugned Decision, in the context of an on-going trial in which a single Accused is charged with 70 crimes and 7 modes of liability. An appellate

⁴⁰ ICC-02/04-01/15-T-26-ENG ET, pp. 17-18.

⁴¹ ICC-02/04-01/15-T-26-ENG ET, pp. 19-20.

⁴² ICC-02/04-01/15-T-26-ENG ET, pp. 19-20.

⁴³ ICC-02/04-01/15-T-26-ENG ET, pp. 17-20. The Defence reserves the right to object to all the grounds of the Oral Decision.

⁴⁴ Defence Request for Leave to Appeal the Oral Decision of 6 December 2016 on Mr Ongwen's Understanding of the Nature of the Charges, 12 December 2016, ICC-02/04-1/15-632; Decision on Defence Request for Leave to Appeal the Oral Decision of 6 December 2016 on Mr Ongwen's Understanding of the Nature of the Charges, 2 January 2017, ICC-02/04-1/15-645. The Defence argued that it was incorrect for the Trial Chamber to rely on Mr Ongwen's statement during the CoC hearings that he understood the charges. It sought leave to appeal on the issue of "whether the standard for Article 68(4)(a) allows for the Chamber to use historical statements of the Accused for the major basis of determining the Accused's understanding of the charges."⁴⁴ In its Decision, the Trial Chamber stated that it "did not use the accused's prior statement as the 'major basis' for its findings" and that the issue did not arise from the Impugned Decision, holding that the requirements of Article 82(1)(d) were not fulfilled.

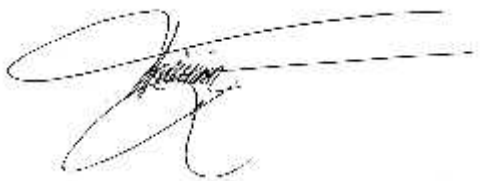
decision impacts on the interpretation of the fair trial rights enumerated in Article 67 of the Statute.

47. At stake are issues including what constitutes notice and its judicial implementation; what procedures are required for a valid plea; when are waivers necessary, especially where only abbreviated charges are read, and where an Accused states he does not understand the charges. Ultimately, the question is: is it legal to proceed to trial on an invalid plea?
48. The Defence submits that the resolution of these issues is necessary for the fairness of the proceedings, and to avert further prejudice to Mr Ongwen. The immediacy of resolution, pursuant to Regulation 65(2) of the RoC, is dictated by the fact that this is an on-going case, and the issues impact on the legitimacy of the whole proceedings. A 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.
49. Since Article 67 of the Statute is based on fundamental international instruments protecting the right of fair trial, which is a human right, appellate resolution of these issues would provide legal guidance for the *Ongwen* case and for future cases.

IV. REMEDY SOUGHT

50. For the reasons stated above, the Defence respectfully requests leave to appeal the Trial Chamber's Impugned Decision.

Respectfully submitted,



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Hon. Krispus Ayena Odongo
On behalf of Dominic Ongwen

Dated this 30th day of January, 2018
At The Hague, Netherlands