

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: **ICC-02/04-01/15**
Date: **2 February 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
Reconsideration of Decision ICC-02/04-01/15-1147 and Objections to Victim
Participation”**

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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**Unrepresented
(Participation/Reparation)**

Applicants

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**Victims Participation and Reparations Other
Section**

I. INTRODUCTION

1. Pursuant to Article 82(1)(d) of the Rome Statute ('Statute'), the Defence for Dominic Ongwen ('Defence') requests leave to appeal the "Decision on Defence Request for Reconsideration of Decision ICC-02/04-1/15-1147 and Objections to Victim Participation" ('Impugned Decision') of Trial Chamber IX ('Trial Chamber').¹

II. PROCEDURAL HISTORY

2. On 8 January 2018, the Defence filed its "Defence Request for Findings on Fair Trial Violations and Remedy, Pursuant to Articles 67 and 64 of the Rome Statute" ('Defence Request').²
3. On 10 January 2018, the Defence, at the request of the Trial Chamber, filed its Addendum to the Defence Request ('Addendum to Defence Request').³
4. On 17 January 2018, the Prosecution filed its Response to the Defence Request ('Prosecution Response').⁴
5. On 19 January 2018, the Defence filed its Defence Request for Leave to Reply to Prosecution's Response ('Defence Leave to Reply').⁵
6. On 22 January 2018, the Legal Representatives of Victims and Office of Public Counsel for Victims filed Victims' Joint Response to the Defence Request ('Victims' Joint Response').⁶
7. On 24 January 2018, Trial Chamber IX issued its "Decision on Defence on Findings on Fair Trial Violations Related to the Acholi Translation of the Confirmation Decision."⁷
8. On 25 January 2018, the Defence filed its Defence Reply to Victims' Joint Response to Defence Request ('Defence Reply to Victims' Joint Response').⁸

¹ ICC-02/04-01/15-1152 ('Impugned Decision').

² ICC-02/04-01/15-1127 ('Defence Request').

³ ICC-02/04-01/15-1129 ('Addendum to Defence Request').

⁴ ICC-02/04-01/15-1140 ('Prosecution Response').

⁵ ICC-02/04-01/15-1143 ('Defence Leave to Reply').

⁶ ICC-02/04-01/15-1144 ('Victims' Joint Response').

⁷ ICC-02/04-01/15-1147.

⁸ ICC-02/04-01/15-1149 ('Defence Reply to Victims' Joint Response').

9. On 26 January 2018, the Trial Chamber issued its Impugned Decision.⁹

III. SUBMISSIONS

A. The issues for which the Defence seeks leave to appeal

10. The Defence seeks leave to appeal on two issues:
11. **Issue 1:** Whether a) the right of the Defence to reply to observations by the legal representatives, pursuant to Rule 91(2) of the Rules of Procedure and Evidence ('RPE') can be derogated, and b) was the Impugned Decision of the Trial Chamber not to accept the timely Defence Reply to Victims' Joint Response Defence Reply and not to re-consider its Impugned Decision consistent with the fair trial rights of the Accused, pursuant to Article 67 of the Statute.
12. **Issue 2:** Whether the Impugned Decision, holding that the Victims' Joint Response complied with the legal criteria of Article 68(3) of the Statute and rejecting the Defence objections to the parameters and limits of victim participation in the conduct of proceedings, is consistent with Article 68(3) of the Statute.

B. The issues arise from the Impugned Decision

13. 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".¹⁰ Further, an 'issue' is "a subject the resolution of which is essential for the determination of the matters arising in the judicial cause under examination" and may be "legal or factual or a mixed one".¹¹ 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.¹² In other words, the 'issue' "must be one likely to have repercussions on either of these two elements of justice".¹³

⁹ ICC-02/04-01/15-1152 ('Impugned Decision').

¹⁰ ICC-01/04-168, para. 9.

¹¹ ICC-01/04-168, para. 9.

¹² ICC-01/04-168, para. 10.

¹³ ICC-01/04-168, para. 10.

1. Issue 1

14. The Defence Reply to Victims' Joint Response was submitted, pursuant to Rule 91(2) of the RPE. The Impugned Decision is silent on the application and implementation of this Rule. The Impugned Decision indicates that the Victims' Joint Response was not relied upon and did not affect the Trial Chamber's reasoning.¹⁴ The Trial Chamber "reach[ed] its conclusions independently of these victims' submissions."¹⁵
15. Whether or not the Chamber relied upon or did not rely upon the Victims' Joint Response is not the threshold issue. The threshold issue is whether the Defence's procedural right to reply, pursuant to Rule 91(2) of the RPE was violated by the Impugned Decision, by issuing the Impugned Decision one day prior to the date on which the Defence Reply to the Victims' Joint Response would have been due. Moreover, the Trial Chamber did not issue an order shortening the time within which to reply to Victims' Joint Response.
16. The Impugned Decision does not include any urgent or extenuating circumstances to necessitate the Chamber's premature filing, without permitting the Defence to file its intended reply to the Victims' Joint Response.
17. This failure to permit the Defence to file its intended reply to the Victims' Joint Response violated fair trial rights of Mr Ongwen, specifically the right to exhaust all remedies at the trial level before he raises the issue on appeal. He was deprived of his right to present his defence, pursuant to Article 67(1)(e) of the Statute.

2. Issue 2

18. The issue of the parameters and limits of victim participation is addressed in the Impugned Decision, at paragraphs 6 and 7. Hence, this issue arises directly from the Impugned Decision.

C. The Impugned Decision affects the fair and expeditious conduct of the proceedings

19. 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 Article 67(1) of the Statute. In particular, it noted that the "expeditious conduct of the proceedings in one form or another

¹⁴ Impugned Decision, paras 6 and 7.

¹⁵ Impugned Decision, para. 6.

constitutes an attribute to a fair trial”.¹⁶ The term ‘proceedings’ extends to proceedings prior and subsequent to the current proceedings.¹⁷

1. Issue 1

20. The implementation of the right to reply, pursuant to Rule 91(2) of the RPE is an issue of procedural fairness to the Defence. When the right is violated, the fair trial rights of Mr Ongwen are violated. This affects the fair conduct of proceedings, both at the trial and appellate levels.

2. Issue 2

21. On the issue of victim participation, the Impugned Decision wrongly construes that the Defence objections to the role of victims in the proceedings in this trial means that the Defence is opposed to victim participation. The Defence point being raised is Article 68(3) of the Statute, which defines the legal criteria for the limited participation of victims which and has to be balanced against the rights of the Accused for a fair trial.
22. The resolution of *Issue 1* and *Issue 2* raised by the Impugned Decision will also affect the expeditiousness of the trial.
23. In a case where 70 charges and 7 modes of liability have been confirmed against Mr Ongwen there is bound to be a plethora of litigation as both the Defence and Prosecution fulfil their respective obligations and duties. However, where a plain reading of a rule is possible, it can be labour-saving not to have to litigate it. On its face, the Defence submits that Rule 91(2) of the RPE is clear in respect to the right to reply.
24. To the extent that both *Issue 1* and *Issue 2* can be resolved, it may diminish the need for continuous litigation, particularly in respect to the now unsettled principles of Article 68(3) of the Statute in our case.

D. The Impugned Decision affects the outcome of the trial

25. 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.¹⁸

¹⁶ ICC-01/04-168, para. 11.

¹⁷ ICC-01/04-168, para. 12.

The 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.¹⁹

26. The Impugned Decision will affect the outcome of the trial. The issue of the limits of victim participation has been and continues to be ubiquitous in this trial. The Impugned Decision rejected the Defence’s arguments that the Victims’ Joint Response failed to meet the legal criteria of Article 68(3) of the Statute, and the Defence’s objections to the victims’ role in the conduct of proceedings.

E. An immediate resolution of the two issues may materially advance the proceedings

27. 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 Chambers 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 rights lines”.²⁰ 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 the outcome of the trial”.²¹
28. The Defence emphasizes that an immediate resolution of these two issues would affect the outcome of the trial, by possibly averting mistakes that might taint the fairness of the proceedings.
29. At the end of the day, the legitimacy of a judicial verdict rests on the legality of the processes which produced it.
30. Both issues focus on important legalities in the judicial process, and should be resolved at the appellate level.

¹⁸ ICC-01/04-168, para. 13.

¹⁹ ICC-01/04-168, para. 13.

²⁰ ICC-01/04-168, paras 14-15.

²¹ ICC-01/04-168, para. 14.

IV. REMEDY SOUGHT

31. For the reasons stated above, the Defence respectfully requests that leave is granted by the Trial Chamber to appeal these two issues:

Issue 1: Whether a) the right of the Defence to reply to observations by the legal representatives pursuant to Rule 91(2) of the RPE can be derogated; and b) was the Impugned Decision of the Trial Chamber not to accept the timely Defence Reply to Victims' Joint Response and not to re-consider its Impugned Decision consistent with the fair trial rights of the Accused, pursuant to Article 67 of the Statute;

Issue 2: Whether the Impugned Decision, holding that the Victims' Joint Response complied with the legal criteria of Article 68(3) of the Statute and rejecting the Defence objections to the parameters and limits of victim participation in the conduct of proceedings, is consistent with Article 68(3) of the Statute.

Respectfully submitted,



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Hon. Krispus Ayena Odongo
On behalf of Dominic Ongwen

Dated this 2nd day of February, 2018
At The Hague, Netherlands