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

Date: 5 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

**Decision on the Defence Request for Leave to Appeal the Decision on Request for
Reconsideration of Decision 1147**

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

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Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
Defence**

States Representatives

**Other
Appeals Chamber**

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**Victims Participation and Reparations
Section**

Other

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'), issues the following 'Decision on the Defence Request for Leave to Appeal the Decision on Request for Reconsideration of Decision 1147'.

I. Procedural history

1. On 8 January 2018, the Defence for Mr Ongwen ('Defence') filed a request for a finding of and remedies on violation of fair trial rights.¹
2. Later this same day, the Chamber sought an addendum from the Defence by 10 January 2018 and required that '[a]ny responses to request 1127 or this addendum shall be filed within 10 days of notification of the addendum.'²
3. On 10 January 2018, the Defence filed the requested addendum ('Initial Request').³
4. On 17 January 2018, the Prosecution filed its response to the Initial Request.⁴
5. On 22 January 2018, the Legal Representatives for Victims ('LRVs') jointly responded to the Initial Request ('Victims Response').⁵
6. On 24 January 2018, the Chamber rejected the Initial Request ('Initial Decision').⁶

¹ Defence Request for Findings on Fair Trial Violations and Remedy, Pursuant to Articles 67 and 64 of the Rome Statute, 8 January 2018, ICC-02/04-01/15-1127.

² Email from Trial Chamber IX to the Defence and other participants, 8 January 2018 at 16:57.

³ Addendum to 'Defence Request for Findings on Fair Trial Violations and Remedy, Pursuant to Articles 67 and 64 of the Rome Statute' (ICC-02/04-01/15-1127), filed 8 January 2018, ICC-02/04-01/15-1129.

⁴ Prosecution Response to "Defence Request for Findings on Fair Trial Violations and Remedy, Pursuant to Articles 67 and 64 of the Rome Statute.", 17 January 2018, ICC-02/04-01/15-1140.

⁵ Victims' Joint Response to "Defence Request for Findings of Fair Trial Violations and Remedy, Pursuant to Articles 67 and 64 of the Rome Statute" (ICC-02/04-01/15-1127), ICC-02/04-01/15-1144.

⁶ 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. A Defence request for leave to appeal this decision will be resolved separately in due course.

7. On 25 January 2018, the Defence filed a motion reacting to the Victims Response ('Reconsideration Request').⁷
8. On 26 January 2018, the Chamber issued its decision rejecting the Reconsideration Request ('Impugned Decision').⁸
9. On 2 February 2018, the Defence filed a request for leave to appeal the Impugned Decision ('Request for Leave to Appeal').⁹

II. Relief sought and analysis by the Chamber

10. The Defence seeks leave to appeal with regard to two issues:
 - i. 'First Issue': '[w]hether 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 reconsider its Impugned Decision consistent with the fair trial rights of the Accused, pursuant to Article 67 of the Statute.'¹⁰
 - ii. 'Second Issue': '[w]hether 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.'¹¹
11. As a preliminary matter, the Chamber notes, that the time limit for the response to the Request for Leave to Appeal has not passed. However, in the present case the Chamber does not consider it necessary to await responses for the

⁷ Defence Reply to Victims' Joint Response to "Defence Request for Findings on Fair Trial Violations and Remedy, Pursuant to Articles 67 and 64 of the Rome Statute," pursuant to Rule 91(2), ICC-02/04-01/15-1149.

⁸ Decision on Defence Request for Reconsideration of Decision ICC-02/04-01/15-1147 and Objections to Victim Participation, ICC-02/04-01/15-1152.

⁹ 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", ICC-02/04-01/15-1163.

¹⁰ Request for Leave to Appeal, ICC-02/04-01/15-1163, para. 11.

¹¹ Request for Leave to Appeal, ICC-02/04-01/15-1163, para. 12.

resolution of the motion before it and can decide on the request before this deadline has passed.

12. The Chamber recalls the interpretation of Article 82(1)(d) of the Statute as set out in previous decisions in the present case.¹²
13. In respect of the First Issue, the Defence submits that the Impugned Decision violates the fair trial rights of the accused ‘specifically the right to exhaust all remedies at the trial level before he raises issues on appeal’.¹³ The Defence argues that the question whether the Initial Decision relied on the Victims Response ‘is not the threshold issue. The threshold issue is whether the Defence’s procedural right to reply [...] was violated by the Impugned Decision [...], by issuing the Impugned Decision [*sic*] one day prior to the date on which the Defence Reply [...] would have been due.’¹⁴
14. The Chamber notes that, as shown in the previous paragraph, the Defence conflates the Initial Decision – which was issued before the Defence filed its response to the Victims Response – and the Impugned Decision – which was issued in response to the Reconsideration Request.¹⁵ The Impugned Decision ruled on the reconsideration of the Initial Decision, however, the First Issue and arguments raised by the Defence are aimed at the Initial Decision. Accordingly, the Chamber finds that the First Issue does not arise from the Impugned Decision and rejects the Request for Leave to Appeal in this regard.

¹² See, for example, 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; 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.

¹³ Request for Leave to Appeal, ICC-02/04-01/15-1163, para. 17.

¹⁴ Request for Leave to Appeal, ICC-02/04-01/15-1163, para. 15.

¹⁵ The same conflation can be found in the formulation of the first issue, which states: ‘Whether [...] b) was the Impugned Decision of the Trial Chamber not to accept the timely Defence Reply [...] and not to re-consider its Impugned Decision [*sic*] consistent with the fair trial rights of the Accused [...]’ (paragraph 11 of the Request for Leave to Appeal).

15. With regard to the Second Issue the Chamber notes that the Defence defines the appealable issue as '[w]ether the Impugned Decision, holding that the Victims' Joint Response complied with the legal criteria of Article 68(3) of the Statute [...], is consistent with Article 68(3) of the Statute.'¹⁶ The Chamber notes that, again, arguments are raised with regard to the applicability of Rule 91(2) of the Rules, conflating the Initial Decision and the Impugned Decision.¹⁷
16. Even if the Chamber considers this to be an issue despite the somewhat circular wording, the Impugned Decision stated that the Chamber did not take the Victims Response into account and '...on this occasion, did not end up relying upon the Victims Response.'¹⁸ The Chamber fails to see how the alleged failure to comply with the statutory procedure for a response which was not used can significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial. Consequently, the Chamber also rejects the Request for Leave to Appeal in respect of the Second Issue.

¹⁶ Request for Leave to Appeal, ICC-02/04-01/15-1163, para. 12.

¹⁷ Request for Leave to Appeal, ICC-02/04-01/15-1163, para. 23.

¹⁸ Impugned Decision, ICC-02/04-01/15-1152, para. 6.

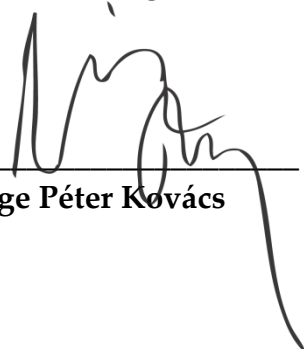
FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

REJECTS the Request for Leave to Appeal.

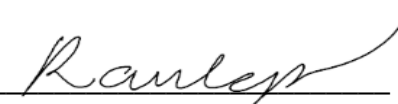
Done in both English and French, the English version being authoritative.



Judge Bertram Schmitt, Presiding Judge



Judge Péter Kovács



Judge Raul C. Pangalangan

Dated 5 February 2018

At The Hague, The Netherlands