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Original: **English**

No.: **ICC-02/04-01/15**
Date: **30 April 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

Prosecution's Response to Defence Request for Reconsideration or Leave to Appeal ICC-02/04-01/15-1226

Source: **The Office of the Prosecutor**

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

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Introduction

1. The Defence Request for Reconsideration or Leave to Appeal[1] ("Request") the "Directions on Closing Briefs and Closing Statements"[2] ("Decision") should be denied. No exceptional circumstances exist to warrant a reconsideration and none of the four issues, as framed by the Defence, are appealable within the meaning of article 82(1)(d) of the Statute.

Submissions

A. No exceptional circumstances exist to warrant a reconsideration

2. The Defence has not shown any error of reasoning in the Chamber's Decision. Nor has it demonstrated a necessity to have this Decision reconsidered in order to prevent an injustice. Their main recycled argument pertains to an assertion that Mr Ongwen lacks the required understanding of the English language. Because of this, they argue that he has the right to have the closing briefs translated into Acholi and needs more time to prepare his closing brief and statement. Their Request, they prefix, "is made notwithstanding the Defence's assertions that Mr Ongwen does not understand the charges pursuant to Article 64(8)(a) of the Rome Statute and that he suffers, and did suffer, from a mental disease or defect during the alleged crimes."[3]

3. The Chamber has clearly set out the reasons why the rights of the Accused under article 67(1)(f) of the Statute are not violated. It has recalled its previous jurisprudence, following extensive submissions by the Defence on the issue. The Chamber reiterated its finding that "the right to translation is not without limitations and is confined to translations necessary to meet the requirements of fairness".[4]

[1] ICC-02/04-01/15-1238-Red ("Request").
[2] ICC-02/04-01/15-1226 ("Decision").
[3] Request, para. 3.
[4] Decision, para. 5.

4. Given the nature and the manner in which the briefs will be filed, as well as the scope of the Accused's awareness of the case,[5] the Chamber rightly considered that Mr Ongwen's rights are fully preserved.

5. The Defence argues that because the transcripts are not written in Acholi, Mr Ongwen's ability to participate in the preparation of the closing brief is significantly diminished.[6] Contrary to what the Defence claims, the Chamber does not require "a perfect memory of a trial which will have lasted for over three years" from Mr Ongwen.[7] As the Defence acknowledges, Mr Ongwen was present "hearing the testimony in Acholi during court"[8] and he has "Acholi versions of witness statements and interview transcripts".[9] Additionally, the Defence appears not to have considered the possibility of a request for Mr Ongwen to obtain Acholi audio recordings of the testimonies, even though the Prosecution submits that this is not required for the preparation of the brief.[10]

6. The Defence's argument that Mr Ongwen's fair trial right is violated because "the Prosecution has over a year to write its closing brief…. [and] [t]he Defence, as it shall be conducting its own case-in-chief during that time, does not have that luxury" is unpersuasive. The Defence is aware of the evidence presented so far in these proceedings. It has been fully appraised of the nature and order of the evidence submitted. It has made informed submissions on the evidence and carried out its own examinations of the trial witnesses as and when required throughout these proceedings.

[5] Decision, para. 7.
[6] Request, paras. 21-26.
[7] Request, para. 24.
[8] Request, para. 24.
[9] Request, para. 23.
[10] The Registry has audio recordings of all witness testimonies given in Acholi, as well as the Acholi interpretation by the interpreters. In addition, when a witness has given testimony with voice distortion activated, the clear voice is also separately recorded on the isolated witness feed.

7. As witnesses in this trial continue to appear, irrespective of whether they are called by the Defence or the LRVs, the Prosecution, just like the Defence, will have to prepare and carry out its examination of such witnesses and, subsequently, consider the impact of their testimonies and/or that of any other type of evidence the Defence, the victims and the Chamber may present in these proceedings.[11] There is, therefore, no violation of their right to prepare 'in full equality' with Prosecution.

8. Contrary to Defence's assertions, Mr Ongwen does not have the right to have the briefs submitted concurrently in English and Acholi.[12] Their disagreement with the Chamber's ruling is unsubstantiated and at odds with the Court's legal framework and established jurisprudence.[13] Even if, as they argue, they would need to adapt their closing statements to arguments proffered in the closing briefs, they would still be able to, as ordered by the Chamber, liaise with the Registry to require translation of discrete parts.[14] The Prosecution submits that, considering the Chamber's ruling on the nature and manner in which the briefs will be filed, it is unlikely that the Defence will require significant translations. The briefs, as the Chamber rightly points out, will not "contain anything substantially new". In addition, the "accused is already aware of the case against him" and his legal team fully understands the language in which the briefs will be filed.[15]

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[11] This is particularly so due to the Prosecution's duty to establish the truth pursuant to article 54(1)(a).
[12] The ICC legal texts do not require translation of the closing briefs. *See* ICC-02/11-01/15-1141, paras. 7-8 (referring to ICC-02/11-01/15-224 and noting that "the statutory framework only required that the document containing the charges, the decision confirming the charges, the list of the evidence relied upon by the Prosecutor and the witnesses' statements be made available to the accused in a language he or she fully understands and speaks for him or her to be informed in detail of the nature and content of the charges within the meaning of Article 67(1)(a) of the Statute. The Chamber also clarified that neither the statutory framework, nor the case-law of the ECHR supported the contention that failing to provide the translation of a document of the type of the pre-trial brief would amount to infringing the right set forth in that provision; even less so when–as it was and still is the case in these proceedings—the accused can rely on counsel able to function effectively in both working languages of the Court and therefore able to address any doubt or concern that the accused may have.")
[13] Request, paras. 31-37.
[14] Decision, para. 8.
[15] Decision, para. 7.

9. The Defence argues that "it has a fundamental right under Rule 91(2) RPE to reply to any oral or written observations submitted by the LRVs".[16] This argument too is unpersuasive. First, the Decision remains silent on this matter. Second, even if, *in arguendo*, the closing brief can be considered "written observation" within the terms of rule 91(2), the Defence can respond to the LRVs' closing briefs during their closing statements.

B. The four issues, as framed by the Defence, do not arise from the Decision

10. The Defence requests, in the alternative, leave to appeal the Decision on four issues.[17] The Prosecution submits that none of them arise from the Decision. The Defence's arguments, centred mainly on the time allotted for the preparation of the briefs or of the closing statements and Mr Ongwen's right to Acholi translations of the closing briefs, are simply a disagreement with the Chamber's ruling on the conduct of the proceedings and fair trial rights. They also misunderstand the purpose of the closing briefs, which have no evidentiary value nor do they contain anything substantially new.

11. The Chamber has clearly set out the nature, scope and modalities of the briefs. The time allotted, starting as of the date of the Decision, 13 April 2018, until six weeks after the declaration of the closure of the submission of evidence, is more than sufficient for all the Parties and participants to adequately prepare their briefs, if they choose to file any. The allotted time for the closing statements, which the Defence requests to be increased from two to four weeks,[18] is also adequate given the Chamber's instructions on the nature of the briefs, the Accused's awareness of the case and his legal team's understanding of the language in which the briefs will be filed.

[16] Request, paras. 41-43.
[17] Request, para. 50.
[18] Request, paras. 38-40.

12. With regard to the Defence's argument for Mr Ongwen's right to Acholi translations, the Prosecution incorporates by reference its submissions in paragraphs 3 and 4. The Defence's arguments are a mere disagreement with the Chamber's findings in the Decision as well as its previous rulings on the same issue as referenced therein.[19]

13. Regarding the fourth issue, the Prosecution incorporates by reference its submissions in paragraph 9.

C. The four issues do not meet the remaining article 82(1)(d) criteria

14. Article 82(1)(d) criteria are cumulative: a failure to fulfil any one of the criteria is fatal to any application for leave to appeal.[20] As none of the issues arise from the Decision, the Request should be dismissed on this basis alone. But even if any of them arose, they do not meet the remaining criteria of article 82(1)(d) of the Statute, namely, they do not significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, nor would an immediate resolution by the Appeals Chamber materially advance the proceedings.

15. Notably, the right to translations is not without limitations.[21] Mr Ongwen's rights are fully considered and preserved in the Chamber's Decision. Because of the Decision, the Defence is given sufficient time (the same time, in fact, as the Prosecution) to organise and plan their closing brief, as well as their closing statement.

16. More specifically, the fourth issue—if it would indeed be considered as arising from the Decision—does not significantly affect the fair and expeditious conduct of the proceedings because the Defence can still reply to the LRVs' closing briefs

[19] Decision, para. 5.
[20] ICC-01/05-01/08-3273, para. 8.
[21] *See above* fn. 12.

during its closing statement. Additionally, this issue does not significantly affect the outcome of the trial. The LRVs' closing briefs, just like those of the Parties, have no independent evidentiary value. As a summary and reiteration of their views and positions throughout the proceedings, to which the Defence has replied and can continue to do so as and when required, there is no reason to believe that they will contain anything substantially new. The LRVs' briefs too, just like those of the Parties, will merely be 'an additional assistance for the Chamber's benefit'.[22]

Conclusion

17. For the reasons set out above, the Defence Request should be rejected.

Fatou Bensouda, Prosecutor

Dated 30th day of April 2018

At The Hague, The Netherlands

[22] Decision, para. 6.