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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

CLR Response to the "Public Redacted Version of 'Defence Request for Reconsideration or Leave to Appeal ICC-02/04-01/15-1226', filed on 23 April 2018"

Source: **Office of Public Counsel for Victims**

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

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I. INTRODUCTION

1. The Common Legal Representative of the victims[1] submits that the "Public Redacted Version of 'Defence Request for Reconsideration or Leave to Appeal ICC-02/04-01/15-1226', filed on 23 April 2018" (the "Request")[2] fails to meet the specific requirements for both reconsideration of and leave to appeal the Directions on Closing Briefs and Closing Statements (the "Decision").[3] Consequently, the Request should be rejected.

II. PROCEDURAL BACKGROUND

2. On 13 April 2018, the Trial Chamber IX (the "Chamber") rendered the Decision and decided, *inter alia*, to: (i) invite the filing of the closing briefs, if any, six weeks after the declaration of the closure of the submission of evidence; (ii) grant the Prosecution and the Defence a 200 page limit, and the Legal Representatives a 120 page limit for their respective closing briefs; and (iii) order that the closing statements will be held two weeks after the filing of the closing briefs.[4]

3. On 23 April 2018, the Defence filed its Request.[5]

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[1] See the "Decision on contested victims' applications for participation, legal representation of victims and their procedural rights" (Pre-Trial Chamber II, Single Judge), No. ICC-02/04-01/15-350, 27 November 2015, p. 19; the "Decision on issues concerning victims' participation" (Pre-Trial Chamber II, Single Judge), No. ICC-02/04-01/15-369, 15 December 2015, pp. 10-11; the "Second decision on contested victims' applications for participation and legal representation of victims" (Pre-Trial Chamber II, Single Judge), No. ICC-02/04-01/15-384, 24 December 2015, pp. 20-22; and the "Decision on the 'Request for a determination concerning legal aid' submitted by the legal representatives of victims" (Trial Chamber IX, Single Judge), No. ICC-02/04-01/15-445, 26 May 2016, para. 13.

[2] See the "Public Redacted Version of 'Defence Request for Reconsideration or Leave to Appeal ICC-02/04-01/15-1226', filed on 23 April 2018", No. ICC-02/04-01/15-1228, 23 April 2018 (the "Request").

[3] See the "Directions on Closing Briefs and Closing Statements" (Trial Chamber IX, Single Judge), No. ICC-02/04-01/15-1226, 13 April 2018 (the "Decision").

[4] *Idem.*

[5] See the Request, *supra* note 2.

III. SUBMISSIONS

4. In its Request, the Defence principally argues that the timing for closing briefs and statements set by the Chamber in its Decision is prejudicial to Mr Ongwen and violates his rights to a fair trial. Consequently, the Defence seeks reconsideration of the schedule set in the Decision or, in the alternative, leave to appeal the Decision pursuant to article 82(1)(d) of the Rome Statute.[6]

A. Request Seeking Reconsideration

5. The Common Legal Representative recalls that the Chamber has consistently ruled that "*reconsideration is exceptional and should only be done if a clear error of reasoning has been demonstrated or if it is necessary to do so to prevent an injustice*".[7] Additionally, "*new facts and arguments arising since the decision was rendered may be relevant to this assessment*".[8]

6. In the Request, the Defence asks the Chamber to reconsider the Decision to provide for: (a) four months between the closing of the presentation of evidence and the submission of the closing briefs; (b) the Acholi translations of the closing briefs filed concurrently with the English versions; (c) four weeks between the submission of the closing briefs and the closing statements; and (d) the right to reply to the closing briefs to be filed by the Legal Representatives.[9]

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[6] *Idem*.

[7] See the "Decision on Request for Reconsideration of the Order to Disclose Requests for Assistance" (Trial Chamber IX), No. ICC-02/04-01/15-468, 15 June 2016, para. 4. See also the "Decision on the Defence Request for Partial Reconsideration of the Decision under Rule 68(2)(b) of the Rules of Procedure and Evidence" (Trial Chamber IX), No. ICC-02/04-01/15-711, 23 February 2017, para. 4; the "Decision on Defence Request for Reconsideration of Decision ICC-02/04-01/15-1147 and Objections to Victim Participation" (Trial Chamber IX), No. ICC-02/04-01/15-1152, 26 January 2018, para. 6; and the "Decision on the Legal Representative Request for Reconsideration of the Decision on Witnesses to be Called by the Victims Representatives" (Trial Chamber IX), No. ICC-02/04-01/15-1210-Conf, 26 March 2018, para. 6.

[8] *Idem*.

[9] See the Request, *supra* note 2, para. 1.

7. As for the allocation of four months between the closing of the presentation of evidence and the submission of the closing briefs, the Common Legal Representative submits that the Decision explicitly states that the purpose of said briefs is "*to provide a succinct summary of their views, positions and arguments on the confirmed charges and the evidence presented during trial. They are not meant to be a discussion between the parties and participants on how they assess the evidence but simply an additional tool for the assessment by the Chamber. It is therefore not necessary to receive the closing submission of another party or participant beforehand*".[10] Therefore, the parties and participants are expected to provide only a summary of their arguments in order to assist the Chamber in its evaluation of the evidence. The Defence shall have an unfettered opportunity to provide the Chamber with its own assessment of the evidence. However, there is no absolute right for the Defence to comment on the other parties' and participants' arguments on the assessment of the evidence and thus not being able to make remarks on the latter's submissions does not necessarily mean that the rights of the Accused will automatically be violated.

8. As for the provision of Acholi translations of the closing briefs along with the English versions, the Common Legal Representative submits that the Defence seems to misinterpret the relevant parts of the Decision. Indeed, the Chamber did not rule that the Defence cannot or shall not have Acholi translations of the closing briefs but that "[s]*hould the Defence consider that certain discrete parts of the other participants' closing briefs require translation in order to prepare for the closing statements, it can liaise with the Registry accordingly*".[11] No clear legal error of reasoning is committed by the Chamber in this regard. Moreover, the Common Legal Representative recalls that in accordance with the established practice before the Court, the accused do not have an automatic right to receive the translation of all documents in a language they fully understand and speak. In this regard, Trial Chamber VI issued a similar ruling holding that, while the accused does not have an absolute right to have all

[10] See the Decision, *supra* note 3, para. 3.
[11] *Idem*, para. 8.

documents in the case translated into a language that he fully speaks and understands, the Prosecution's closing brief may contain information that the accused should receive translation of into the language that he speaks and thus instructed the Defence to identify the portions of the Prosecution's closing brief that may require translation.[12]

9. As for the allocation of four weeks between the filing of the closing briefs and the hearing of closing statements, the Common Legal Representative submits that the Chamber explicitly held in the Decision that "*the closing briefs will merely be a summary and reiteration of the parties and participants' views and positions*".[13] Thus, the parties and participants do not necessarily need a substantial amount of time to review each other's closing briefs prior to making their closing statements. The Defence shall have an unfettered opportunity to make its closing statements on an equal footing as the Prosecution and the Legal Representatives. In any case, providing two weeks, rather than four weeks sought by the Defence, does not show a clear error of reasoning nor does it demonstrate that the right of the Accused will be violated as a consequence.

10. As for the alleged right to reply to the closing briefs to be filed by the Legal Representatives, the Common Legal Representative submits that the closing briefs are not to be considered "*written observation*" in the sense of rule 91(2) of the Rules of Procedure and Evidence (the "Rules"). Indeed, according to the leading commentators, "[the right to respond] *does not apply to* <u>*submissions*</u>*, since some submissions may be dealt with* ex parte*, such as a submission for special measures under Rule 88, or may be submitted as protective measures for the purpose of forfeiture as referred to in article 57, paragraph3 (e)*".[14] In this regard, the Decision clearly spells out that "[t]*he*

[12] See the "Order providing directions related to the closing briefs and statements" (Trial Chamber VI), No. ICC-01/04-02/06-2170, 28 December 2017, paras. 10-11. See also the "Decision providing further directions on the closing briefs" (Trial Chamber VI), No. ICC-01/04-02/06-2272, 13 April 2018, para. 11.
[13] See the Decision, *supra* note 3, para. 3.
[14] See GILBERT BITTI and HAKAN FRIMAN, Participation of Victims in the Proceedings in (R. S. Lee) The International Criminal Court Elements of Crimes and Rules of Procedure and Evidence, Transnational Publishers, 2001, p. 467 (Emphasis added).

closing briefs by the parties and participants […] *are to be filed six weeks after the declaration of the closure of the submission of evidence. The purpose of* <u>*these submissions*</u> *is to provide a succinct summary of their views, positions and arguments on the confirmed charges and the evidence presented during trial.* […] *It is therefore not necessary to receive the* <u>*closing submission*</u> *of another party or participant beforehand*."[15] Moreover, it will be in fact illogical to grant the Defence a right to respond to the closing briefs of the Legal Representatives while the former will not be able to respond to the closing briefs of the Prosecution, which is the opposing party proffering charges against the Accused. The relevant ruling of the Chamber does not show a clear error of reasoning. Since the Defence does not have an absolute right to comment on the parties and participants' own arguments on the assessment of the evidence, not being able to make remarks on the Legal Representatives' submissions does not necessarily mean that the Accused will automatically suffer injustice as a result.

11. Therefore, the Common Legal Representative submits that none of these matters demonstrate *a clear error of reasoning* nor do they show that it is *necessary* to reconsider the Decision *in order to prevent an injustice.* Moreover, the Chamber has taken into account the need of the Defence to have adequate time to prepare for the end of the trial. Indeed, the Chamber explicitly stated in the Decision that "[t]*he directions are given at this early point in time to provide the parties and participants with the maximum amount of time to organise and plan their workload*".[16]

B. Request Seeking Leave to Appeal

12. Article 82(l)(d) of the Rome Statute sets out the criteria for granting a request for leave to appeal as follows: (a) the decision shall involve an issue that would significantly affect: (i) the fair and expeditious conduct of proceedings; or (ii) the outcome of the trial; and (b) for which, in the opinion of the relevant Chamber, an

[15] See the Decision, *supra* note 3, para. 3 (Emphasis added).
[16] *Idem*.

immediate resolution by the Appeals Chamber may materially advance the proceedings.

13. For the purposes of the first prong of this test, the Appeals Chamber defined an "*issue*" as "*an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion*".[17] Moreover, the Appeals Chamber ruled that "*the Pre-Trial or Trial Chamber is vested with power to state, or more accurately still, to certify the existence of an appealable issue*".[18]

14. Consequently, it must first be determined whether the purported "*issue*" in the Request is an "*appealable issue*" within the meaning of article 82(l)(d) of the Rome Statute as interpreted by the jurisprudence of the Court. Indeed, "*while an application for leave to appeal should not contain in detail the arguments which the party intends to raise before the Appeals Chamber, it must still identify clearly the appealable issue, including by way of indicating a specific factual and/or legal error. Only in this case can the Chamber assess whether the issue, provided it was wrongly decided, may have implications on the fairness and expeditiousness of the proceedings or outcome of the trial*".[19]

15. In the Request, the Defence seeks leave to appeal the following issues: (i) Mr Ongwen's fair trial rights pursuant to articles 64(2), 67(1)(b), 67(1)(f) of the Statute and rule 42 of the Rules will be violated if the Defence's closing brief is required to be submitted six weeks after the closing of the presentation of evidence; (ii) Mr Ongwen's fair trial rights pursuant to articles 64(2), 67(1)(b), 67(1)(f) of the Statute and rule 42 of the Rules will be violated if Mr Ongwen is not supplied with concurrent Acholi translations of the closing briefs; (iii) Mr Ongwen's fair trial rights

[17] See the "Judgement on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal" (Appeals Chamber), No. ICC-01/04-168 OA3, 13 July 2006, para. 9.
[18] *Idem*, para. 20.
[19] See the "Decision on the Gbagbo Defence request for leave to appeal the 'Decision on Defence requests relating to the Prosecution's Pre-Trial Brief'" (Trial Chamber I), No. ICC-02/11-01/11-307, 21 October 2015, para. 70.

pursuant to articles 64(2), 67(1)(b), 67(1)(f) of the Statute and rule 42 of the Rules will be violated if the Defence is required to give its closing statement two weeks after the submission of all the closing briefs; and (iv) Mr Ongwen's fundamental right pursuant to rule 91(2) of the Rules will be violated if the Defence is not allowed to reply to the Legal Representatives' closing briefs.[20]

16. The Common Legal Representative underlines that the Defence does not clearly identify whether these matters constitute legal, factual or procedural error(s).

17. As for Issue (i), according to the clear terms of the Decision,[21] the parties and participants are expected to provide only *a brief summary* of their arguments in order to assist the Chamber in its evaluation of the evidence. The Defence shall have an unfettered opportunity to provide the Chamber with its own assessment of the evidence. In the circumstances, the time frame set by the Chamber for submitting said closing briefs six weeks after the closing of the presentation of evidence is sufficient. Thus, there is no issue that would significantly affect the fair and expeditious conduct of proceedings or the outcome of the trial. In fact, the Decision gives the parties and participants an equal chance to provide their assessment of evidence while ensuring the expeditiousness of the proceedings. As a result, even if granted leave to appeal, an immediate resolution of the issue by the Appeals Chamber will not further or materially advance the proceedings.

18. As for Issue (ii), the Defence appears to misinterpret the Decision. Indeed, as already argued *supra*, the Chamber did not hold that the Defence cannot have Acholi translations of the closing briefs but in fact instructed the Defence to liaise with the Registry in order to obtain translations of relevant parts of the closing briefs to be filed by the Prosecution and the Legal Representatives. Consequently, the Defence may seek the Acholi translation of parts of the closing briefs, if it deems it necessary. Therefore, this matter fails to properly constitute an appealable issue that would

[20] See the Request, *supra* note 2, para. 50.
[21] See the Decision, *supra* note 3, para. 3.

significantly affect the fair and expeditious conduct of proceedings or the outcome of the trial. Since, in accordance with the Decision, the Defence may seek the assistance of the Registry, an immediate resolution by the Appeals Chamber cannot materially advance the proceedings.

19. As for Issue (iii), following the clear terms of the Decision,[22] the closing briefs should only be a *summary* of the parties and participants' arguments on the assessment of the evidence. Therefore, the parties and participant are not in need of significant amount of time to review each other's closing briefs before making their closing statements. Additionally, the Defence's request for four weeks instead of the two weeks set in the Decision shows a mere disagreement with the ruling of the Chamber. As recalled *supra*,[23] such disagreements do not qualify for an appealable issue. Consequently, there is no issue that would significantly affect the fair and expeditious conduct of proceedings or the outcome of the trial. Even if such additional two weeks may be granted as a result of the appeal, an immediate resolution by the Appeals Chamber will not materially advance the proceedings. Obviously, extra litigation of this matter on appeal will in fact produce the opposite effect by delaying the end of the trial proceedings.

20. As for Issue (iv), rule 91(2) of the Rules states that the parties have a right to respond to "*written observation*" by the Legal Representatives. As mentioned *supra*[24], this right does not apply to submissions by the Legal Representatives and it will be in fact illogical to grant the Defence a right to respond to the closing briefs of the Legal Representatives while it will not be able to respond to the closing briefs of the Prosecution. In any case, the parties and participants will have an opportunity to respond to any issues raised in the closings briefs during the closing statements. Consequently, there arises no appealable issue that would significantly affect the fair

[22] *Idem*.
[23] See the "Judgement on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal", *supra* note 17.
[24] See GILBERT BITTI and HAKAN FRIMAN, *supra* note 14.

and expeditious conduct of proceedings or the outcome of the trial. Even if leave to appeal is granted, an immediate resolution by the Appeals Chamber will not materially advance the proceedings.

21. Therefore, the Common Legal Representative submits that none of the issues identified by the Defence constitute appealable issues, nor do they meet the stringent requirements for granting interlocutory appeal under article 82(1)(d) of the Rome Statute.

IV. CONCLUSION

22. For the foregoing reasons, the Common Legal Representative respectfully requests the Chamber to dismiss the Request.

Paolina Massidda
Principal Counsel

Dated this 30th day of April 2018

At The Hague (The Netherlands)