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Pénale
Internationale**



**International
Criminal
Court**

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

Date: **14 November 2019**

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 to Change the Date of the Closing Statements

Source: Defence for Dominic Ongwen

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

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I. INTRODUCTION

1. The Defence for Dominic Ongwen ('Defence') hereby requests Trial Chamber IX ('Chamber') to reconsider its recent scheduling modification which set the date for closing statements.¹ The Defence requests the Chamber to change the date of the closing statements to 24 March 2019 to provide a reasonable time period between the filing of the closing briefs to permit the Defence (and all Parties) to read and analyse the briefs, and permit the Defence to liaise with the Registry to translate selected portions of the briefs into Acholi for the client.²
2. Given the number of pages for the briefs (200 for the OTP and 120 for the LRV and CLR),³ the Defence has to analyse the closing briefs and select portions to be translated. A two-week hiatus is simply insufficient time. This does not allow Mr Ongwen to exercise his fair trial rights pursuant to Articles 67(1)(b), 67(1)(e) and 67(1)(f) of the Rome Statute. The Defence shall be required to visit the International Criminal Court Detention Centre ('ICC-DC') to explain and have interpreted much of the parts of the three closing briefs.
3. The Defence reiterates its assertion 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.⁴

II. BACKGROUND

4. On 20 May 2005, the Office of the Prosecutor ('Prosecution') submitted its Article 58 Application for arrest of Mr Dominic Ongwen.⁵ Mr Ongwen never received an Acholi version of this document.
5. On 19 May 2015, the Prosecution raised the issue of interpretations and the need to have interpreters who speak Acholi.⁶ Single Judge Tarfusser assured the Prosecution that he would raise the issue with the Registrar.⁷

¹ ICC-02/04-01/15-1645.

² ICC-02/04-01/15-1226, para. 8.

³ *Ibid*, para. 4.

⁴ *See also* ICC-02/04-01/15-1238-Red para. 3.

⁵ ICC-02/04-01/15-3-Conf-Red3 (with annexes).

⁶ ICC-02/04-01/15-T-6-ENG, p. 24, ln 21 to p. 25, ln. 24.

⁷ *Ibid*, p. 26, lns 12-16.

6. On 30 July 2015, the Defence objected to the former Registrar's failure to staff properly the Language Service Section with Acholi translators and field interpreters.⁸
7. On 18 January 2016, the Defence objected to the lack of Acholi versions of witness statements disclosed by the Prosecution at the eleventh hour before the hearing on the confirmation of charges.⁹
8. On 12 February 2016, the Defence requested an interpreter for a meeting with its Client on 23 March 2016.¹⁰ On 16 February 2016, CSS relayed a message from the Language Service Section ('LSS') that it could not provide interpretation services for the Defence on the 23rd or 24th of March until 16h15 (*i.e.* 30 minutes before closing time of the ICC-DC) because of work-related functions.¹¹ After protracted discussions, an Acholi interpreter was made available for 23 March 2016. The Defence highlights that that request was made 40 days in advance.
9. On 23 March 2016, Pre-Trial Chamber II issued the "Decision on the confirmation of charges against Dominic Ongwen" ('Confirmation Decision').¹²
10. On 29 March 2016, the Defence requested leave to appeal the Confirmation Decision on five grounds. The first ground related to the failure of receiving Acholi translations of statements of Prosecution witnesses.¹³
11. On 18 May 2016, the Defence requested the expeditious disclosure of Acholi translations statements of testifying witnesses.¹⁴
12. On 23 May 2016, issues related to translations and interpretations encompassed a sizeable amount of the status conference held about the trial.¹⁵
13. On 6 July 2016, the Defence responded to the Prosecution's request to introduce the Article 56 examinations into evidence.¹⁶ Amongst the many complaints against the introduction of

⁸ ICC-02/04-01/15-281-Red.

⁹ ICC-02/04-01/15-404-Conf, paras 58-67.

¹⁰ Email from Defence to CSS, "*RE: Request for Interpretations*," sent at 15h27 CET on 12 February 2016.

¹¹ Email from CSS to Defence, "*RE: Request for Interpretations*," received at 09h13 CET on 16 February 2016.

¹² ICC-02/04-01/15-422-Conf.

¹³ ICC-02/04-01/15-423, paras 12-19.

¹⁴ ICC-02/04-01/15-439-Conf, paras 14-16.

¹⁵ ICC-02/04-01/15-T-25-ENG, pp 14-19. The equates to approximately 13% of all the pages.

¹⁶ ICC-02/04-01/15-492.

the examinations was the fact that Mr Ongwen had not been served with translations of six of the seven persons questioned during the Article 56 hearings, which violated Rule 76(3) of the Rules of Procedure and Evidence ('RPE').¹⁷

14. On 6 July 2016, the Defence noted that Counsel Ayena Odongo is a Counsel on the case, not an interpreter, and is not a legal (or fair) substitute to ensure the Mr Ongwen's fair trial right related to translations is respected.¹⁸
15. On 26 July 2016, the Defence objected about adequate time and facilities to respond to a Rule 68(2)(b) request from the Prosecution,¹⁹ noting specifically that translations were yet to be provided by the Prosecution to Mr Ongwen.²⁰
16. On 5 October 2016, the Defence objected to inadequate time to respond to a Rule 68(2)(b) request from the Prosecution as the Acholi translations had recently been disclosed, three of which were disclosed 13 days after request from the Prosecution.²¹
17. On 7 November 2016, the Defence objected to the lack of adequate time and facilities to respond to a Rule 68(2)(b) request from the Prosecution, noting specifically that the Acholi translation of P-0001's statement was yet to be provided by the Prosecution to Mr Ongwen²² and that the disclosure of Rule 68(2)(c) Acholi transcripts were late in light of the timing of the application.²³
18. On 14 November 2016, the Defence made several comments about Mr Ongwen's right to have Acholi translations of addendums to witness statements and investigation notes about disagreements to witness statements.²⁴ The Defence also objected to not having Acholi translations of witness statements from Article 68(3) witnesses.²⁵
19. On 6 December 2016, the trial commenced.

¹⁷ *Ibid*, para. 26. See also ICC-02/04-01/15-492-AnxA (containing a list of the disclosure dates of the statements of all but one of the Article 56 examinations).

¹⁸ *Ibid*, footnote 30.

¹⁹ ICC-02/04-01/15-509-Conf-Corr, paras 42-50.

²⁰ *Ibid*. See also ICC-02/04-01/15-509-Conf-AnxB.

²¹ ICC-02/04-01/15-555-Conf, paras 10-13. See also ICC-02/04-01/15-555-AnxA.

²² ICC-02/04-01/15-587-Conf, para. 29.

²³ *Ibid*, paras 32 and 35.

²⁴ ICC-02/04-01/15-592-Conf, paras 29-30.

²⁵ *Ibid*, paras 34, 35, 36, 39, 42, 43, 44 and 45.

20. On 7 February 2017, the Defence responded to the Prosecution's second Bar Table Motion.²⁶ In it, the Defence objected about documents which it believed (and still does) should have been translated into Acholi for Mr Ongwen.²⁷
21. On 11 December 2017, the Defence objected to the lack of translations in the case,²⁸ including a complaint that the Defence still did not have a fully translated copy of the Confirmation Decision for Mr Ongwen.²⁹ Specifically, the Defence noted the following:
- The Defence requested a complete Acholi translation after the March 2016 decision was issued. It is now almost 21 months later, and only some sections have been translated. The translation stops at para 145, and does not include the remaining paragraphs of the Decision, the confirmed Statement of Facts and Charges for the counts, or the Separate Opinion of J. de Brichambaut. The Defence has been informed that a complete translation will not be available until February 2018—close to **two years after the Confirmation of Charges decision was issued**. This does not satisfy the requirement of being informed promptly.³⁰
22. On 13 December 2017, the Court Management Section ('CMS') uploaded the Acholi version of the Confirmation Decision. The Defence was not notified pursuant to Regulation 31(2) of the Regulations of the Court.
23. On 8 January 2018, the Defence filed "Defence Request for Findings on Fair Trial Violations and Remedy, Pursuant to Articles 67 and 64 of the Rome Statute."³¹
24. On 10 January 2018, in response to an email from the Chamber,³² the Defence filed "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 on 8 January 2018."³³

²⁶ ICC-02/04-01/15-701.

²⁷ *Ibid.*, paras 11 and 43 (*noting* footnote 55).

²⁸ ICC-02/04-01/15-1098, paras 6, 8 and 29.

²⁹ *Ibid.*, para. 29 and footnote 21.

³⁰ *Ibid.* footnote 21. [Emphasis in original]

³¹ ICC-02/04-01/15-1127.

³² Email from Chamber to Defence, "Question by the Chamber in Relation to Request 1127," received at 16h57 on 8 January 2018.

³³ ICC-02/04-01/15-1129.

25. On 11 January 2018, Counsel Support Section informed the Defence *via* email that the Acholi translation of the Confirmation Decision was completed.³⁴ Still, by 15 January 2018, the Defence still did not have access to the Acholi Translation of the Confirmation of Charges Decision.³⁵
26. On 20 February 2018, the Acholi version of the Separate Opinion of the Confirmation Decision of Judge de Brichambuat was notified by with CMS.³⁶
27. On 13 April 2018, the Chamber issued “Directions on Closing Briefs and Closing Statements” (‘Order’).³⁷ The Chamber directed that the closing statements would begin two weeks after the closing briefs.³⁸ The Chamber also stated that the closing briefs of the Prosecution, Common Legal Representative for Victims and Legal Representatives for Victims are not required to be translated in Acholi.³⁹ An attempted remedy to this denial of Mr Ongwen’s rights was that it noted that the Defence could liaise with the Registry about having discrete sections translated for Mr Ongwen.⁴⁰
28. On 23 April 2018, the Defence requested reconsideration and leave to appeal the Order.⁴¹ Amongst other issues, the Defence requested reconsideration and leave to appeal the issue that the Chamber is not requiring these essential documents to be filed concurrently in Acholi as required by the Rome Statute and Rules of Procedure and Evidence.⁴²
29. On 18 October 2019, the Defence requested two documents to be translated from Acholi into English.⁴³ These two documents are three⁴⁴ and four pages.⁴⁵
30. On 29 October 2019, the Defence received the translation of UGA-OTP-0025-0260.⁴⁶

³⁴ Email from CSS to Defence, “*Translation/Traduction: ICC-02/04-01/15-422-Conf-tACH – Acholi Translation of Decision on the confirmation of charges against Dominic OngwenOngwen* [sic]”, received 10h47 CET on 11 January 2018.

³⁵ Email from Defence to CSS, “*RE: Translation/Traduction: ICC-02/04-01/15-422-Conf-tACH – Acholi Translation of Decision on the confirmation of charges against Dominic OngwenOngwen* [sic]”, sent 11h51 CET on 15 January 2018.

³⁶ Email from CMS to Defence, “*Translation/Traduction: ICC-02/04-01/15-422-Anx-tACH - Acholi translation of the Separate opinion of Judge Marc Perrin de Brichambaut*,” received at 10h15 CET on 20 February 2018.

³⁷ ICC-02/04-01/15-1226.

³⁸ *Ibid*, para. 9.

³⁹ *Ibid*, paras 5-7.

⁴⁰ *Ibid*, para. 8.

⁴¹ ICC-02/04-01/15-1238-Red.

⁴² *Ibid*, paras 21-26, 31-40 and 51-71.

⁴³ Email from Defence to CSS, “*Ongwen Defence – TRANSLATION Request*,” sent at 14h55 CET on 18 October 2019.

⁴⁴ UGA-OTP-0025-0260.

⁴⁵ UGA-OTP-0025-0263.

31. On 1 November 2019, the Defence received the translation of UGA-OTP-0025-0263.⁴⁷
32. As of the date of this filing, the following seven documents in the court's electronic document management system – Records Manager ('RM') – have been translated into Acholi: ICC-02/04-01/15-6-tACH-Corr, ICC-02/04-01/15-7-tACH-Corr, ICC-02/04-01/15-8-tACH, ICC-02/04-01/15-375-Conf-AnxB, ICC-02/04-01/15-422-Conf-tACH, ICC-02/04-01/15-422-Anx-tACH and ICC-02/04-01/15-1230-Conf-AnxB.⁴⁸

III. LAW

A. The applicability of reconsideration

33. The extraordinary remedy of reconsideration is applicable where a "clear error of reasoning has been demonstrated or if it is necessary [...] to prevent an injustice."⁴⁹ In *Bemba et al.*, the Trial Chamber asserted that "[n]ew facts and arguments arising since the decision was rendered may be relevant to this assessment."⁵⁰ On the contrary, reconsideration may be denied if the new argument was "within the Chamber's contemplation at the time of issuing the Decision."⁵¹
34. In other cases, the Prosecution has also sought reconsideration on the grounds that the Trial Chamber "wrongly construed"⁵² or "misunderstood"⁵³ a submission which led to "manifestly unsound and unsatisfactory consequences".⁵⁴
35. Notably, the very first ICC decision that established the possibility of reconsideration occurred in a situation where the Defence had "made a straightforward mistake about something that at the relevant time was 'known' by everyone concerned."⁵⁵ Fittingly, reconsideration is an established remedial mechanism that can be employed to prevent an

⁴⁶ Email from CSS to Defence, "RE: Ongwen Defence - TRANSLATION Request," received at 17h32 on 29 October 2019.

⁴⁷ Email from CSS to Defence, "RE: Ongwen Defence - TRANSLATION Request," received at 16h56 on 1 November 2019

⁴⁸ This list was created by created a search with the criteria "Container = The Dominic Ongwen" and "Language = ACH – Acoli". Documents ICC-02/04-01/15-317-Conf-Exp-Anx1, ICC-02/04-01/15-342-Conf-AnxIII, ICC-02/04-01/15-342-Conf-AnxIV and ICC-02/04-01/15-342-Conf-AnxV were excluded as the original language was Acholi, and document ICC-02/04-01/15-375-AnxB-Red was excluded as the confidential version is listed above.

⁴⁹ ICC-01/04-02/06-611, para. 12 and ICC-01/04-02/06-605, para. 7.

⁵⁰ ICC-01/05-01/13-1282 para. 8; ICC-01/09-01/11-1813 para. 19; and ICC-01/09-02/11-863, para.11.

⁵¹ ICC-01/09-01/11-1813, para. 21 and ICC-01/05-01/13-1282 para. 9.

⁵² ICC-01/04-02/06-460, para. 2.

⁵³ ICC-01/04-02/06-519, paras. 8- 9.

⁵⁴ ICC-01/04-02/06-460, para. 2.

⁵⁵ ICC-01/04-01/06-2705, para. 10.

injustice, whether arising from the error of a party for having failed to present an argument or fact; from an issue that only becomes evident after a decision is delivered; or from any misunderstanding or uncertainty that may have stemmed from the party's submissions. All three of these aspects may apply simultaneously.

B. Law on Translations/Interpretations

36. Article 64(2) of the Rome Statute requires the Chamber to “ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused and due respect for the protection of victims and witnesses.”
37. Article 67(1)(b) of the Rome Statute guarantees the accused “[t]o have adequate time and facilities for the preparation of the defence and to communicate freely with counsel of the accused's choosing in confidence.”
38. Article 67(1)(e) of the Rome Statute guarantees that “[t]he accused shall also be entitled to raise defences and to present other evidence admissible under this Statute.”
39. Article 67(1)(f) of the Rome Statute guarantees that the accused shall “have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness, if any of the proceedings of or documents presented to the Court are not in a language which the accused fully understands and speaks.”
40. Rule 42 of the RPE requires “[t]he Court [...] [to] arrange for the translation and interpretation services necessary to ensure the implementation of its obligations under the Statute and Rules.”
41. Regulation 40(2)(b) of the Regulations of the Court (‘RoC’) require the Registrar to provide interpretation services for an accused who does not fully understand or speak any of the working languages of the Court.
42. Regulation 40(6) of the RoC requires the Registrar to translate all of the decisions or orders in the case into a language which the accused fully understands or speaks. It also requires Counsel to inform Mr Ongwen of other documents filed in the case.

IV. SUBMISSIONS

A. Opening concerns related to translations of decision or orders

43. The Defence notes with concern and disbelief the fact that only seven documents in RM have been translated into Acholi, five of which are decisions or orders.⁵⁶ Three of these Acholi decisions are documents which were filed on 22 November 2005⁵⁷ and 19 April 2006.⁵⁸ One document was filed by the Prosecution,⁵⁹ and another document filed by the LRV.⁶⁰ The final two decisions are the Confirmation Decision⁶¹ and the Separate opinion of Judge Marc Perrin de Brichambaut.⁶²
44. The Defence expects this violation of Mr Ongwen's rights to be remedied by the Registry.

B. Incorporation of previous arguments

45. The Defence incorporates by reference relevant arguments from paragraphs 31-40 and 58-71 of Defence filing ICC-02/04-01/15-1238-Red.

C. New facts have arisen since the Defence's request on 23 April 2018

46. New facts have arisen since the Defence's request for reconsideration or leave to appeal on 23 April 2018.⁶³ The Defence notes with scepticism that paragraph 8 of the Order will have any effect on Mr Ongwen's fair trial rights owing to recent documents which the Defence requested to be translated.
47. The Defence recently requested two handwritten documents, totalling seven pages, to be translated from Acholi to English.⁶⁴ It took 11 days (seven business days) and 14 days (10 business days) to complete the two translations.⁶⁵ As learned during the trial, translating from English into Acholi and Acholi into English can sometimes be a challenging task.⁶⁶ As LSS has not produced an Acholi decision or order since 20 February 2018,⁶⁷ it is safe to assume

⁵⁶ See paragraph 32 above.

⁵⁷ ICC-02/04-01/15-8-tACH

⁵⁸ ICC-02/04-01/15-6-tACH-Corr and ICC-02/04-01/15-7-tACH-Corr.

⁵⁹ ICC-02/04-01/15-375-Conf-AnxB.

⁶⁰ ICC-02/04-01/15-1230-Conf-AnxB.

⁶¹ ICC-02/04-01/15-422-Conf-tACH.

⁶² ICC-02/04-01/15-422-Anx-tACH.

⁶³ ICC-02/04-01/15-1238-Red.

⁶⁴ See para. 29 above.

⁶⁵ See paras 30-31 above.

⁶⁶ *E.g.* ICC-02/04-01/15-T-54-Red2-ENG, p. 39, lines 14-23 (*noting* that the word "victim" in Acholi uses six words).

⁶⁷ See para. 32 above.

that translating other documents caused these documents to be delivered in seven and 10 business days.

48. Paragraph 8 of the Order has no effect on Mr Ongwen's ability to participate in the closing statement of his Defence. There are **eight** business days between the submission of the closing briefs and the start of the closing statements. If it took LSS 10 days to translate seven pages from Acholi into English, any request from the Defence to have "certain discrete parts" of the Prosecution's, CLRV's or LRV's closing briefs translated into Acholi would not be completed before the first day of closing statements.
49. As such, the Defence shall be required to visit Mr Ongwen at the ICC-DC to explain and interpret much of three closing briefs.⁶⁸ The Defence shall be doing this instead of preparing its final brief. As the Chamber decided that the closing briefs are not required to be translated in Acholi for the benefit of Mr Ongwen,⁶⁹ which the Defence still disputes, Counsel shall be required to ensure that his obligation pursuant to Regulation 40(6) of the RoC is fulfilled. These obligations can only be done in person from 09h00 – 16h45 on business days at the ICC-DC.
50. Fulfilling this requirement and giving LSS enough time to translate specific discrete parts shall take time. The Defence shall need to:
 - a. Read through a possible 440 pages;
 - b. Select certain discrete parts to be translated by LSS for the benefit of Mr Ongwen;
 - c. Visit the ICC-DC to interpreter most of the 440 pages and consult Mr Ongwen; and
 - d. Finish its closing statement.
51. The current amount of time allotted does not comport with Mr Ongwen's fundamental rights outlined in Articles 67(1)(b), 67(1)(e) and 67(1)(f) of the Rome Statute, the duty of the Court outlined in Rule 42 of the RPE and the duty of Counsel under Regulation 40(6) of the RoC. It also does not give enough time for the Registrar to fulfil his duty to Mr Ongwen pursuant to Regulation 40(2)(b) of the RoC.

⁶⁸ The word "interpret" in this sentence means to have an Acholi interpreter from LSS attend the meetings at the ICC-DC and interpreter the three closing briefs.

⁶⁹ Order, para. 6.

52. Granting an additional 10 business days for the start of the closing statements, which is until 24 March 2020, gives everyone involved the absolute minimum amount of time needed to fulfil these obligations. It balances the rights of Mr Ongwen, the obligations of everyone, and does not unduly extend the length of the proceedings.

V. RELIEF

53. For the reasons described above, the Defence respectfully requests Trial Chamber IX to:
- a. Change the start of the closing statements to 24 March 2020.

Respectfully submitted,



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Hon. Krispus Ayena Odongo
On behalf of Dominic Ongwen

Dated this 14th day of November, 2019

At Ngai, Uganda