

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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Date: 15 February 2021

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 the "Defence Request for Leave to Appeal 'Decision scheduling a hearing on sentence and setting the related procedural calendar'"

Source: The Office of the Prosecutor

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

The Office of the Prosecutor

Mr James Stewart

Counsel for Dominic Ongwen

Mr Krispus Ayena Odongo

Mr Charles Taku

Ms Beth Lyons

Legal Representatives of Victims

Mr Joseph Akwenyu Manoba

Mr Francisco Cox

Ms Paolina Massidda

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

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

Amicus Curiae

States Representatives

REGISTRY

Registrar

Mr Peter Lewis

Counsel Support Section

Victims and Witnesses Section

Detention Section

**Victims Participation and Reparations
Section**

Other

Introduction

1. Trial Chamber IX should dismiss the Defence Request¹ for leave to appeal the “Decision scheduling a hearing on sentence and setting the related procedural calendar.”² The proposed issue – concerning alleged rights violations based on failure to provide Mr Ongwen with a full translation of the Trial Judgment for the sentencing hearing – does not arise from the Decision. It thus does not constitute an appealable issue. In any event, the proposed issue does not satisfy the remaining requirements of article 82(1)(d).

Submissions

A. There is no appealable issue

2. The purported issue is whether “the Impugned Decision violate(s) Mr Ongwen’s rights in respect to sentencing under Article 76(2) and fair trial rights under Articles 67(1)(a), (b), (e) and (f) of the Rome Statute and Rule 144(2)(b) of the Rules of Procedure and Evidence (‘Rules’), namely an Acholi translation of the Trial Judgment (‘Judgment’) and the ability to have adequate time and facilities to prepare his defence of his sentence, before the sentencing proceedings can commence, especially considering that Mr Ongwen is a special needs person.”³

3. In a nutshell, the Defence seeks leave to appeal the Decision for allegedly denying Mr Ongwen a full translation of the article 74 Judgment into the Acholi language for the sentencing litigation in this case.⁴

4. But the Impugned Decision (which was solely concerned with setting out the calendar for the sentencing proceedings) does not deal with, and thus did not make

¹ [ICC-02/04-01/15-1766-Red](#) (“Defence Request”).

² [ICC-02/04-01/15-1763](#) (“Decision”).

³ [Defence Request](#), para. 1(a).

⁴ [Defence Request](#), paras. 19-26.

any determination concerning, the translation of the Judgment. Accordingly, the Defence's proposed issue does not arise from the Decision and is thus not an appealable issue under article 81(2)(d) of the Statute.

5. The Defence erroneously submits that "the Impugned Decision *implicitly recognises* that the sentencing proceeding shall commence, continue and be finalised before Mr Ongwen is ever afforded his right to have the Judgment in a language he understands and speaks."⁵ Nothing in the Decision makes this kind of recognition. In any case, an application for leave to appeal based on purported "implied recognition",⁶ rather than a decision's specific determinations, is not grounded in the jurisprudence of the Court.

6. As stated by the Appeals Chamber, to grant a leave to appeal, not only must there be a decision – meaning "determinations or rulings made by a Pre-Trial or Trial Chamber"⁷ – but there must also be an appealable issue – namely, an identifiable subject or topic forming the subject matter of an appealable decision.⁸ Indeed, "[i]n order for a request for leave to appeal to be granted, it should identify specific 'issues' *which were dealt with in the Impugned Decision (...)*."⁹ Both "a decision" and an "appealable issue" are missing in the Defence Request. The Decision determined scheduling matters, not translation issues. Since it was not intended to address translation questions, it did not make any determination on them.

7. Relatedly, even assuming the Impugned Decision has any bearing to translation issues – and the Prosecution submits that it does not – the Defence Request's claims that it violated Mr Ongwen's right to a *full* translation of the article 74 Judgment into Acholi for the sentencing hearing¹⁰ is legally wrong, because rule

⁵ [Defence Request](#), para. 22. Emphasis added.

⁶ [Defence Request](#), para. 22.

⁷ [ICC-01/04-01/06-1433](#) OA11, 11 July 2008, para. 3, Dissenting Opinion of Judge Song.

⁸ [ICC-01/04-168 OA3](#), 13 July 2006, para. 9.

⁹ [ICC-01/12-01/18-734](#), para. 13. Emphasis added.

¹⁰ [Defence Request](#), paras. 10-15, 17-26.

144(2) does not establish an automatic right to full translation. To the contrary, it is a case-by-case determination, by assessing whether such translation is “necessary to meet the requirements of fairness” under article 67(1)(f). Indeed, rule 144(2) translation entitlements may be met by providing Mr Ongwen with a translation of only parts of the Judgment deemed by the Trial Chamber to be relevant to sentencing, rather than the entire article 74 Judgment.¹¹ The Chamber may also take any additional or alternative measures such as to ensure that the rule 144(2) entitlements are met.¹²

8. Moreover, the Defence’s complaint regarding the lack of translation is also premature and speculative, as it is grounded only in a theoretical breach of translation entitlement (be it a full or partial translation of the article 74 Judgment, or any relevant additional measures a Chamber may take). Any alleged breach can only be made once the Trial Chamber specifically takes a decision on the translation issue.

9. The mere fact that the Registry Language Service Section (LSS) informed the Defence on 5 February 2021 that the translation of the Judgement had not yet begun¹³ is not a sufficient basis to assume or substantiate that the Trial Chamber is not taking any steps, including identifying for translation by the Registry LSS all relevant parts of the article 74 Judgment. The Defence merely speculates that it will not be availed of any such translation, or any appropriate translation assistance.¹⁴

10. In sum, the proposed issue does not qualify as an appealable issue within the meaning of article 82(1)(d) of the Statute. Given that the article 82(1)(d) criteria are

¹¹ [ICC-01/05-01/13-2001](#), paras. 11, 13; the *Bemba et al.* Trial Chamber identified parts of the judgments to be translated into French for the purposes of sentencing. The *Ntaganda* Trial Chamber likewise identified parts of the judgment to be translated into Kinyarwanda for the purposes of sentencing: [ICC-01/04-02/06-2405](#), para. 3 and fn. 2.

¹² For example, apart from providing a written translation of the Trial Judgment (or portions thereof), the Trial Chamber might instruct the Registry to make additional interpreters available to assist Defence counsel in advising Mr Ongwen regarding the content of the Trial Judgment, or to interpret portions of the Trial Judgment to the Accused orally.

¹³ [Defence Request](#), para. 17.

¹⁴ [Defence Request](#), para. 22.

cumulative, and that failure to fulfil one of the criteria is fatal to an application for leave to appeal,¹⁵ the Defence's Request should fail on this basis alone.

11. In any case, the Defence Request does not meet the remaining cumulative requirements under article 82(1)(d) of the Rome Statute.

B. The proposed issue does not meet the remaining article 82(1)(d) criteria

12. Even *arguendo*, the proposed issue should not be certified for appeal because the Defence does not show that it would significantly affect the fair and expeditious conduct of the proceedings, or the outcome of the trial, and that its immediate resolution by the Appeals Chamber may materially advance the proceedings.

13. To the contrary, as noted above, since the Impugned Decision was concerned with scheduling matters, it did not make any determination on translation matters which could therefore establish alleged prejudicial impact justifying appellate intervention. The Trial Chamber will have the opportunity to address any translation issues before the sentencing hearing. The Defence merely assumes that the Trial Chamber is not taking any action on the matter, and that the Defence will have no translation (whether in full, or only the salient parts) in Acholi for the purpose of sentencing.

14. In effect, the proposed issue is hypothetical and premature, as it refers to a theoretical breach of the right to receive a translation – a breach that can be alleged to have occurred only once it can be shown that the Trial Chamber has definitively failed to take any action on the translation issue or has actually decided that no translation will be provided.

¹⁵ [ICC-01/05-01/08-3273](#), para. 8; [ICC-02/11-01/15-117](#), para. 26; [ICC-02/11-01/15-132](#), para. 5.

15. Since the proposed issue is premature and speculative, any potential prejudice to the fair and expeditious conduct or outcome of the proceedings can only be assessed in light of the specific Trial Chamber decision or actions on the translation question that will be taken before the sentencing hearing. The Trial Chamber should be allowed the opportunity to take measures it deems appropriate in light of the circumstances of this case. Until then, no matter concerning translation is ripe for appellate review. Ultimately, appellate intervention at this will delay (rather than materially advance) the proceedings.

Conclusion and relief sought

16. For the reasons stated above, the Prosecution requests that the Defence Request be rejected.



James Stewart, Deputy Prosecutor

Dated this 15th day of February 2021

At The Hague, the Netherlands.