

**Cour
Pénale
Internationale**

**International
Criminal
Court**



Original: **English**

No.: ICC-02/04-01/15
Date: 21 October 2021

THE APPEALS CHAMBER

Before: Judge Luz del Carmen Ibáñez Carranza, Presiding Judge
Judge Piotr Hofmański
Judge Solomy Balungi Bossa
Judge Reine Alapini-Gansou
Judge Gocha Lordkipanidze

SITUATION IN UGANDA

**IN THE CASE OF
*THE PROSECUTOR V. DOMINIC ONGWEN***

Public

Response to “Defence Request for Reconsideration of a Decision”

Source: 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. Mr Ongwen was convicted by Trial Chamber IX in a judgment handed down in English on 4 February 2021.¹ A summary including essential details of the Trial Chamber’s reasoning and conclusions was simultaneously interpreted into Acholi for Mr Ongwen. Since then, the Defence received two extensions of time to the deadline to file a notice of appeal against the article 74 judgment, including to ensure that Mr Ongwen could participate appropriately in this process.² The Defence eventually filed a voluminous appeal brief on Mr Ongwen’s behalf on 22 July 2021,³ with the benefit of his instruction.

2. Furthermore, at the direction of the Appeals Chamber, the Defence had by 12 March 2021 identified “priority” sections of the Judgment for translation into Acholi, amounting to some 938 pages—or approximately 87% of the Judgment.⁴ The last of these priority sections was provided to Mr Ongwen by no later than 3 September 2021—more than six weeks ago—and an Acholi translation of the Judgment in full again made available by 8 October 2021.⁵

3. The Defence now seeks the permission of the Appeals Chamber to file any application to vary its grounds of appeal against the article 74 judgment, in light of the translation, on 8 November 2021.⁶ Yet it only filed the Request yesterday, 20 October 2021—just two days before the original deadline set by the Appeals Chamber on 11 October 2021 for receipt of this application: 22 October 2021.⁷

¹ ICC-02/04-01/15-1762-Red (“Judgment”).

² ICC-02/04-01/15-1871 (“First Extension Decision”), para. 12. *See also* ICC-02/04-01/15-1811 (“Second Extension Decision”).

³ ICC-02/04-01/15-1866-Conf (“Appeal Brief”).

⁴ *See* ICC-02/04-01/15-1793-AnxA. The cumulative total of the sections identified, based on the number of pages for each section stated by the Defence, is calculated at 938.

⁵ ICC-02/04-01/15-1876 (“Translation Decision”), para. 6. *See also* para. 8.

⁶ ICC-02/04-01/15-1878 (“Request”).

⁷ *See* Translation Decision, para. 8.

Submissions

4. The Request should be dismissed. While styled as a request for reconsideration of the Appeals Chamber’s decision, it is in reality a simple request for extension of time under regulation 35(2). But it neither shows a clear error of reasoning or the necessity to prevent an injustice (as required for requests for reconsideration),⁸ nor even good cause (as required for extensions of time).⁹ There has been no material change of circumstances. Rather, the Request is misconceived in almost every particular.¹⁰

5. Contrary to the implication of the Defence, and notwithstanding diagnoses of mental illness, the Court has to date identified no mental *disability* in Mr Ongwen material to the current Request.¹¹ In any event, the Request is unjustified in its own terms, since the requested extension is not necessary to ensure that Mr Ongwen has sufficient opportunity to review the Acholi translation of the Judgment.¹² Nor is the Defence required to file anything more than an *application* to vary its numerous grounds of appeals—if this can be justified at all.¹³ For its own part, the Prosecution does not agree that it would be assisted by any extension of time.¹⁴

6. The Appeals Chamber may also consider that the timing of the Request verges on presenting it with a *fait accompli*. This should not be rewarded by granting the proposed extension. If any extension must be granted, it should be very modest in nature, tailored to the reality of the circumstances, and bearing in mind the interest of all the parties—including Mr Ongwen—in an expeditious hearing of this appeal.

⁸ See e.g. ICC-01/12-01/18-1810 (“*Al Hassan* Reconsideration Decision”), para. 4.

⁹ See Regulations of the Court, reg. 35(2).

¹⁰ *Contra* Request, paras. 17-18.

¹¹ *Contra* Request, paras. 1, 10-11, 13, 17.

¹² *Contra* Request, paras. 12-15.

¹³ *Cf.* Request, paras. 8, 15, 17-18.

¹⁴ *Contra* Request, para. 16.

The Court has not identified any functional disability in Mr Ongwen

7. At least for the purpose of the proceedings of this Court, disability is a largely functional concept, and is not synonymous with the existence or suspected existence of a health condition as such. Whether or not Mr Ongwen suffered from mental illness (at trial, or at the times material to the charged crimes) was, as the Appeals Chamber is aware, a live issue during the proceedings before the Trial Chamber—with potential implications for the merits of the appeals against conviction and sentence. It is thus appropriate to exercise caution in entertaining substantive argument on related questions for the purpose of procedural matters such as the Request.

8. But even if it is accepted that Mr Ongwen may have been diagnosed with some mental illness during the trial by some mental health practitioners,¹⁵ this does not mean that he has “mental disabilities” broadly conceived,¹⁶ nor that they are of a nature automatically to justify the relief sought. Indeed, nothing in the available information concerning Mr Ongwen’s mental health while detained at the seat of the Court “point[s] to anything exceptional.”¹⁷ Consistent with the approach of the Trial Chamber, accommodations may be made if necessary on a case-by-case basis, to the extent that specific justification is shown.

9. Yet to the Prosecution’s knowledge, it was not contended at trial that Mr Ongwen’s ability to read and digest key written material, with the assistance of counsel, requires additional measures. Nor has the Defence made such a showing on this occasion, as the following paragraphs explain.

¹⁵ See Request, para. 10 (fn. 15: citing the report of the Chambers expert, Prof. De Jong, and Defence experts Dr. Akena and Prof. Ovuga).

¹⁶ Cf. Request, paras. 1, 10, 13, 17.

¹⁷ ICC-02/04-01/15-1819-Red (“Sentencing Judgment”), para. 103.

The Request is unjustified in its own terms

10. The Defence asserts that “Mr Ongwen requires adequate time to read the Judgment in its entirety”,¹⁸ and implies that this cannot be completed until “the first week of November 2021.”¹⁹ Underlying this claim is the premise that the time which has been afforded so far is insufficient. This is incorrect.

11. Even if it is true that Mr Ongwen can only read 25 pages per day,²⁰ he has *already* had time to read the entire judgment at that rate of progress. The Defence omits some crucial context when it suggests that Mr Ongwen has only had “the fully translated Judgment” — which it characterises, with some hyperbole, as “the longest decision in history” — “for just over a week”.²¹

- The 938 pages of “priority” translations were made available to Mr Ongwen by no later than 3 September 2021,²² which was 47 days prior to the date of the Request. At a rate of 25 pages per day, he could have read 1,175 pages in the time which has since elapsed — more than the Judgment in its entirety. He could have done this even if the Registry had not provided *any* of the priority translations on a rolling basis, as it was ordered.²³ And with the provision of rolling translations, he had even more time.
- Even allowing for the 139 pages of the Judgment which the Defence did not identify as “priority”, and which consequently were only made available to Mr

¹⁸ Request, para. 10.

¹⁹ Request, paras. 12, 15, 17.

²⁰ Request, para. 13 (“Mr Ongwen can read, on average, 20-25 pages per day”).

²¹ *Cf.* Request, para. 17.

²² The Prosecution notes that the Defence only seems to acknowledge receipt of “approximately 600” pages of priority translations: Request, para. 9. Yet it also states that the LSS “translated sections as asked”: Request, para. 14 (fn. 19). Since the Defence has not previously raised any concern about the priority translations, the Prosecution understands the Defence to describe the scale of the requested priority translations only in the very broadest terms. The Defence also appears to acknowledge that it did receive the priority translations on a rolling basis: *see e.g.* Request, para. 6.

²³ *See* Translation Decision, para. 3. *See also* para. 9 (fn. 14: noting that the LSS had reported to the Appeals Chamber that the Defence received “notifications as soon as draft translations of additional parts” of the Judgment, designated for priority translation, were ready); First Extension Decision, para. 14 (ordering the Registrar to provide Acholi translations of the sections of the Judgment designated by the Defence as priority “on a rolling basis [...] in the order indicated by the team”).

Ongwen (according to the Defence) on 11 October 2021, the elapsed time was still sufficient for him to have read each new page at the rate of 25 pages per day.

12. The Defence now claims that the measures previously put in place by the Appeals Chamber—the rolling provision of priority translations—in fact “caused some confusion” and were of lesser “utility”, even if they did in some degree “aid[] the review of the Judgment”.²⁴ If this were the case, and it could not be resolved through the assistance of counsel, the Defence does not explain why it did not bring this concern to the Appeals Chamber before.

13. Nor in any event is the Defence correct to imply that Mr Ongwen must necessarily be familiar with every particular of the Judgment in order to ensure the effective exercise of his right to appeal.²⁵ To the contrary, as the Appeals Chamber has previously reminded the Defence, it is necessary to consider “the circumstances as a whole and the convicted person’s ability to understand the details of his conviction by other means.”²⁶ In particular, Mr Ongwen is not coming to this case anew—but rather he is assisted by counsel, has been provided with full Acholi translations of other core documents during his trial, and “has followed all hearings in real-time through Acholi interpretation—including the oral summary of the reasons for the [Judgment]”.²⁷ Indeed, the Trial Chamber was impressed by Ongwen’s demonstration of his “great and detailed understanding of the trial, including of legal and procedural matters.”²⁸

14. In the current circumstances, having regard to the considerable time for which Mr Ongwen has already had access to Acholi translations of “priority” sections of the Judgment, the current stage of appeal proceedings, and his familiarity with the case, the Defence has not shown the necessity, or even the utility, of a further

²⁴ Request, para. 14.

²⁵ Request, para. 10 (“Mr Ongwen requires adequate time to read the Judgment in its entirety”).

²⁶ First Extension Decision, para. 10.

²⁷ First Extension Decision, para. 11.

²⁸ Sentencing Judgment, para. 104.

extension of time. This is confirmed by the limited nature of the determination which is required by the deadline set by the Appeals Chamber.

The Defence is obliged only to file an application to vary the appeal, not the varied grounds themselves

15. In the Request, the Defence refers generally to the need to file any “variations” to the “grounds of appeal” or the “appeal brief”.²⁹ For the avoidance of doubt, the Prosecution notes that the Defence is not expected to have drafted any additional substantive submissions by the deadline imposed.

16. Rather, as the Appeals Chamber has previously explained, the Defence need only submit a filing which complies with regulation 61(1) and (2), in particular by “*identify[ing]* the specific grounds of appeal, or arguments made within those, which require variation or need to be supplemented in light of the translation” and “*set[ting]* out the reasons” for that view.³⁰

17. Given the voluminous grounds of appeal already identified by the Defence, and their wide-ranging nature, the Prosecution doubts that a genuine need to vary the grounds of appeal (in the sense of adding to them) will be shown. It also notes that the opportunity given to the Defence to request variation under regulation 61 is strictly delimited by Mr Ongwen’s appreciation of the Judgment, in light of the Acholi translation. It must not serve as a means to reply to, or attempt to circumvent, the arguments of the Prosecution in response, which will be notified to the Defence today (with respect to the appeal against conviction) and next week (with respect to the appeal against sentence).

18. But even if the Defence does consider that an application for variation is warranted, it requires only targeted input at this stage from Mr Ongwen in order to identify potential additional grounds of appeal, and the reasons why—in the view of

²⁹ See e.g. Request, paras. 8, 15, 17-18.

³⁰ Translation Decision, para. 8 (emphasis added).

the Defence—this is justified. This process is not as burdensome as the Request tends to imply.

The proposed extension is not necessary to assist the Prosecution

19. Finally, the Defence avers that the proposed extension “will not cause any prejudice” and “may be advantageous to the Prosecution and Victim Representatives as it would allow the Parties and Participants to focus on finalising responses to the Defence’s appeal brief against the sentence without interruption”.³¹ For its own part, the Prosecution requires no such allowance—especially given the very late timing of the Request (which, itself, has required time to address), and the fact that its response to the conviction appeal is due today and its response to the sentence appeal only four working days after that. The Prosecution is ready to respond to any application which the Defence may choose to make, and in general supports the interest of all the parties in the expeditious hearing of this appeal.

Conclusion

20. For all the reasons above, the Request should be dismissed.



Karim A. A. Khan QC, Prosecutor

Dated this 21st day of October 2021

At The Hague, The Netherlands

³¹ Request, para. 16.