

1 International Criminal Court
2 Appeals Chamber - Courtroom 1
3 Situation: Uganda
4 In the case of The Prosecutor v. Dominic Ongwen - ICC-02/04-01/15
5 Presiding Judge Christine Van den Wyngaert
6 Appeals Chamber Judgment
7 Wednesday, 17 June 2015
8 (The hearing starts in open session at 11.31 a.m.)
9 THE COURT USHER: All rise.
10 The International Criminal Court is now in session.
11 Please be seated.
12 PRESIDING JUDGE VAN DEN WYNGAERT: Good morning everybody. Good
13 morning, Mr Ongwen.
14 Would the Court officer please call the case.
15 THE COURT OFFICER: Yes, your Honour. Good morning.
16 The situation in Uganda, in the case of The Prosecutor versus Dominic Ongwen, case
17 reference ICC-02/04-01/15.
18 And for the record we are in open session.
19 PRESIDING JUDGE VAN DEN WYNGAERT: My name is Judge Christine
20 Van den Wyngaert, and I am the Presiding Judge on this appeal arising from the case
21 of the Prosecutor versus Dominic Ongwen. The other Judges of the Appeals
22 Chamber on this appeal are Judge Sanji Monageng, Judge Howard Morrison,
23 Judge Olga Herrera-Carbuccia and Judge Piotr Hofmański.
24 May I ask the parties to introduce themselves, starting with the Defence counsel for
25 Mr Dominic Ongwen.

1 MR ODONGO: Your Honour, my names are Krispus Ayena Odongo, Defence
2 counsel for Dominic Ongwen. I'm assisted by Thomas Obhof, assistant legal counsel,
3 and Roy Titus Ayena, who is case manager.

4 PRESIDING JUDGE VAN DEN WYNGAERT: Thank you very much.
5 Prosecution?

6 MS BRADY: Good morning, your Honour. Helen Brady. I'm appearing on behalf
7 of the Prosecution, and I'm here today with appeals counsel Reinhold Gallmetzer.
8 Thank you.

9 PRESIDING JUDGE VAN DEN WYNGAERT: Thank you.
10 Today the Appeals Chamber is delivering its judgment on the Prosecutor's appeal
11 against the decision of the Pre-Trial Chamber II entitled, quote, "Decision Setting the
12 Regime for Evidence Disclosure and Other Related Matters," unquote, rendered on
13 27 February 2015.

14 In today's summary, I will refer to this decision as the Impugned Decision.
15 I shall now summarise the Appeals Chamber's judgment and the reasons for it
16 starting with a brief procedural history. This summary is not part of the written
17 judgment, which is the only authoritative account of the Appeals Chamber's ruling
18 and reasons. The written judgment, which is unanimous, will be made available to
19 the parties at the conclusion of this hearing. In today's summary I will refer to the
20 subject matter in the appeal being the in-depth analysis chart by the acronym IDAC.
21 In-depth analysis chart will be referred to by the acronym IDAC.

22 On 8 July 2005, Pre-Trial Chamber II issued a warrant of arrest against
23 Dominic Ongwen. On 21 January 2015, Mr Ongwen was transferred to the Court's
24 detention centre. On 26 January 2015, he made his initial appearance before the
25 Single Judge responsible for carrying out the functions of the Pre-Trial Chamber with

1 respect to this case. I will further refer to this Judge as the "Single Judge."

2 On 27 February 2015, the Single Judge issued the Impugned Decision. In this
3 decision, she ordered the Prosecution and Mr Ongwen to file, inter alia, an IDAC, an
4 IDAC with each disclosure batch and a further consolidated IDAC prior to the
5 commencement of the confirmation of charges hearing.

6 The Prosecutor's request for leave to appeal the Impugned Decision was granted on
7 14 April 2015 by Judge Cuno Tarfusser, who has since become the Single Judge
8 responsible for carrying out the functions of the Pre-Trial Chamber with respect to the
9 instant case.

10 On 28 April 2015, the Prosecution filed the Document in Support of the Appeal and,
11 on 8 May 2015, Mr Ongwen submitted the Response to the Document in Support of
12 the Appeal.

13 Under the first ground of appeal, the Prosecutor alleges that the Single Judge has
14 erred in law by exceeding her powers under Article 61(3) of the Statute and
15 Rule 121(2) of the Rules of Procedure and Evidence when she ordered the preparation
16 and submission of IDACs before the confirmation of charges hearing. The
17 Prosecutor argues that by imposing a significant extra statutory duty before the
18 confirmation of charges hearing, the Impugned Decision violates her independence
19 under Article 42(1) of the Statute to present and prepare her case.

20 Mr Ongwen submits that the Single Judge was empowered by virtue of Article 61(3)
21 of the Statute and Rule 121(2) of the Rules of Procedure and Evidence to order the
22 production and submission of IDACs. He considers that the duty of the Pre-Trial
23 Chamber to ensure that the disclosure takes place under satisfactory conditions limits
24 the Prosecutor's independence under Articles 42(1) and 61 of the Statute.

25 At the outset, the Appeals Chamber notes that a large part of the Prosecutor's

1 arguments are premised on the understanding that the Single Judge intended to rely
2 on the IDACs for her decision on the confirmation of charges under Article 61(7) of
3 the Statute. The Appeals Chamber has carefully reviewed the Impugned Decision.
4 It does not find any indication of an intention on the part of the Single Judge to rely
5 on the information disclosed, but not subsequently presented at the confirmation of
6 charges hearing for the purposes of the determination under Article 61(7) of the
7 Statute. Neither does it find an indication of the Single Judge's intention to curtail
8 the Prosecution's power to present her case. The Appeals Chamber finds the
9 arguments advanced by the Prosecutor in this connection to be speculative and shall
10 not consider them further in the present judgment.

11 Turning to the remaining arguments under the first ground of appeal, the Appeals
12 Chamber finds that Article 61(3) of the Statute and Rule 121(2) of the Rules accord the
13 Pre-Trial Chamber broad discretion in the disclosure process. This is borne out by
14 the use of the words, quote, "may issue orders regarding the disclosure of
15 information," unquote, in Article 61(3) of the Statute and shall "take the necessary
16 decisions regarding disclosure," unquote, in Rule 121(2) of the Rules of Procedure and
17 Evidence.

18 The Appeals Chamber, therefore, considers that the Single Judge did not err in law in
19 determining that she had the discretion to issue orders to ensure that the disclosure
20 takes place under satisfactory conditions. Such orders may indeed address various
21 aspects of the disclosure process, including the production and submission of aids or
22 tools such as IDACs. As the Prosecution has not established a legal error in this
23 regard, the first ground of appeal is rejected.

24 Under the second ground of appeal, the Prosecution argues that assuming, *arguendo*,
25 that the Single Judge had the requisite discretionary power to order the preparation

1 and submission of IDACs, the effects of this decision are so unfair and unreasonable
2 as to constitute an abuse of discretion. Mr Ongwen and the Prosecutor both agree
3 that the Impugned Decision would unreasonably delay the proceedings and that
4 IDACs for the instant case would not be useful.

5 For the reasons that follow, the Appeals Chamber finds that in the case at hand the
6 Single Judge did not properly exercise her discretion when she ordered the
7 production and submission of IDACs without first receiving submissions of the
8 parties.

9 The Appeals Chamber notes that one of the reasons advanced by the Single Judge for
10 issuing an order to produce IDACs was to ensure the overall efficiency and fairness of
11 the proceedings. She placed particular emphasis on the need to provide the Defence
12 with, quote "all necessary tools to understand the reasons why the Prosecutor relies
13 on any particular piece of evidence," unquote.

14 The Pre-Trial Chamber's duty to ensure that the disclosure process takes place under
15 satisfactory conditions requires that the full circumstances of each individual case
16 must be considered in making orders and decisions regarding disclosure. To this
17 end, Rule 121(2)(b) of the Rules of Procedure and Evidence provides for the holding
18 of status conferences to ensure that the disclosure takes place under satisfactory
19 conditions. This rule highlights the importance of receiving the submissions of the
20 parties, to the extent possible, on the relevance -- on issues relevant to the disclosure
21 process.

22 In the circumstances of the present case, the Appeals Chamber considers that it was
23 incumbent on the Single Judge to receive submissions from the parties prior to
24 rendering the Impugned Decision, given that the imposition of an obligation to
25 prepare and submit IDACs may place a disproportionate burden on the parties and

1 may ultimately lead to delays in the proceedings. However, no submissions were
2 requested and the need for the Prosecutor to provide an additional tool to facilitate
3 the Defence's understanding of the disclosed information was not discussed nor
4 foreshadowed at the ex parte, Prosecutor only, status conference convened by the
5 Single Judge to discuss disclosure-related matters.

6 In the absence of submissions, it appears that the Single Judge's conclusion that this,
7 quote, "approach minimises any detrimental effects on the effective and timely
8 preparation of the confirmation hearing," unquote, was informed exclusively by a
9 practice developed in past cases rather than by the exigencies of the case before her.

10 The Appeals Chamber finds that by failing to seek observations from the parties
11 before ordering the production and submission of in-depth analysis charts in the
12 present case, the Single Judge failed to exercise her discretion in a fair and reasonable
13 manner.

14 For this reason, the Appeals Chamber considers it appropriate to reverse the
15 Impugned Decision to the extent that it orders the Prosecution to produce and submit
16 IDACs alongside the disclosure of information and a consolidated IDAC prior to the
17 confirmation of the charges hearing. The Appeals Chamber also considers it
18 appropriate to reverse the Impugned Decision to the extent that it imposes the same
19 requirements on Mr Ongwen.

20 In the circumstances of this case, the Appeals Chamber deems it unnecessary to
21 remand the matter to the Pre-Trial Chamber for a new determination. This is, of
22 course, without prejudice to the Pre-Trial Chamber exercising its discretion and to
23 re-examine the matter.

24 This concludes my summary of the judgment. I thank the interpreters and the court
25 reporters.

- 1 The session is now closed.
- 2 THE COURT USHER: All rise.
- 3 (The hearing ends in open session at 11.45 a.m.)