

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

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

Date: **1 April 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

**Decision on Defence Request for Leave to Appeal a Decision on Motions Alleging
Defects in the Confirmation Decision**

To be notified, in accordance with Regulation 31 of the *Regulations of the Court*, to:

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Counsel Support Section

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Detention Section

**Victims Participation and Reparations
Section**

Others

Trial Chamber IX of the International Criminal Court, in the case of *The Prosecutor v. Dominic Ongwen*, having regard to Article 82(1)(d) of the Rome Statute (‘Statute’) issues the following ‘Decision on Defence Request for Leave to Appeal a Decision on Motions Alleging Defects in Confirmation Decision’.

I. Procedural history

1. On 1 February 2019, the Defence filed four motions, alleging that the Confirmation Decision suffers multiple defects (the ‘Initial Requests’).¹
2. On 7 March 2019, the Chamber denied the Initial Requests (the ‘Impugned Decision’).² It dismissed the requests *in limine* on the basis that any allegation related to the formulation of the charges was untimely and without sufficient explanation for its timing.³ It equally dismissed *in limine* arguments challenging the jurisdiction on indirect co-perpetration and forced marriage for untimeliness and found that there were no exceptional circumstances warranting their consideration at this point during the trial.⁴
3. On 14 March 2019, the Defence requested leave to appeal the Impugned Decision (the ‘Request’).⁵ It seeks leave to appeal on two issues:

‘[w]hether the [Impugned] Decision, based on procedural grounds under Rules 122(4) and 134(2), implements the Trial Chamber’s responsibility under Article 64(2) to “ensure that a trial is fair [...] and is conducted with the full respect for the right of the accused” consistent with Article 67(1)’ (the ‘First Issue’) and

‘[w]hether the [Impugned] Decision’s finding, at paragraph 37, that jurisdictional arguments on forced marriage are untimely, is accurate’ (the ‘Second Issue’).⁶

¹ Defence Motion on Defects in the Confirmation of Charges Decision: Defects in Notice and Violations of Fair Trial (Part I of the Defects Series), ICC-02/04-01/15-1430; Defence Motion on Defects in the Confirmation of Charges Decision: Defects in the Modes of Liability (Part II of the Defects Series), ICC-02/04-01/15-1431; Defence Motion on Defects in the Confirmation of Charges Decision: Defects in Notice in Pleading of Command Responsibility under Article 28(a) and Defects in Pleading of Common Purpose Liability under Article 25(3)(d)(i) or (ii) (Part III of the Defects Series), ICC-02/04-01/15-1432; Defence Motion on Defects in the Confirmation of Charges Decision: Defects in the Charged Crimes (Part IV of the Defects Series), ICC-02/04-01/15-1433.

² Decision on Defence Motions Alleging Defects in the Confirmation Decision, ICC-02/04-01/15-1476.

³ Impugned Decision, ICC-02/04-01/15-1476, paras 14, 24-30 and 36.

⁴ Impugned Decision, ICC-02/04-01/15-1476, paras 34-35 and 37.

⁵ Defence Request for Leave to Appeal ‘Decision on Defence Motions Alleging Defects in the Confirmation Decision (ICC-02/04-01/15-1476), notified 7 March 2019, ICC-02/04-01/15-1480.

4. On 18 March 2019, the Prosecution filed a response to the Request, seeking that it be rejected (the ‘Prosecution Response’).⁷
5. On the same day, the Common Legal Representative for Victims provided its response, also submitting that the Request should be rejected (the ‘CLR V Response’).⁸

II. Submissions and analysis

6. The Chamber recalls the interpretation of Article 82(1)(d) of the Statute as set out in detail previously.⁹
7. In respect of the First Issue the Defence argues that it arises from the Impugned Decision since the Initial Requests were dismissed on procedural grounds alone.¹⁰ It further contends that the Impugned Decision failed to address Rule 134(3) of the Rules of Procedure and Evidence (the ‘Rules’)¹¹ and proceeds to interpret the Impugned Decision with regard to the Chamber’s pronouncement on whether notice has been provided in accordance with Article 67(1)(a) of the Statute.¹²
8. With regard to the Second Issue, the Defence submits that it already raised the issue during the pre-trial phase of the proceedings and repeats that the issue is a fundamental fair trial issue which ‘can be raised at any time during the proceedings.’¹³
9. The Prosecution argues, that both issues do not arise out of the Impugned Decision,¹⁴ that the Defence mischaracterizes several aspects of the Impugned Decision¹⁵ and that the remaining criteria of Article 82(1)(d) of the Statute are equally not met.¹⁶

⁶ Request, ICC-02/04-01/15-1480, para. 3.

⁷ Prosecution’s Response to “Defence Request for Leave to Appeal ‘Decision on Defence Motions Alleging Defects in the Confirmation Decision (ICC-02/04-01/15-1476), notified 7 March 2019’”, ICC-02/04-01/15-1486.

⁸ CLR V’s Response to “Defence Request for Leave to Appeal ‘Decision on Defence Motions Alleging Defects in the Confirmation Decision (ICC-02/04-01/15-1476), notified 7 March 2019’”, ICC-02/04-01/15-1484.

⁹ Decision on Defence Request for Leave to Appeal Decision ICC-02/04-01/15-521, 2 September 2016, ICC-02/04-01/15-529, paras 4-8; Decision on Defence Request for Leave to Appeal the Decision on Prosecution Request to Introduce Evidence of Defence Witnesses via Rule 68(2)(b), ICC-02/04-01/15-1331, para. 8.

¹⁰ Request, ICC-02/04-01/15-1480, paras 4-5.

¹¹ Request, ICC-02/04-01/15-1480, para. 6.

¹² Request, ICC-02/04-01/15-1480, paras 8-14.

¹³ Request, ICC-02/04-01/15-1480, paras 28-29.

¹⁴ Prosecution Response, ICC-02/04-01/15-1486, paras 2-4 and 8-9.

¹⁵ Prosecution Response, ICC-02/04-01/15-1486, paras 5-6.

¹⁶ Prosecution Response, ICC-02/04-01/15-1486, paras 10-14.

10. The Common Legal Representative for Victims equally submits that both issues are not appealable issues¹⁷ and, additionally, that the further criteria of Article 82(1)(d) are not fulfilled.¹⁸

A. First Issue

11. The Chamber considers that the First Issue, namely whether the dismissal of the Initial Requests *in limine*, on grounds of untimeliness, is consistent with the rights of the accused, to be a discrete legal question arising from the Impugned Decision. Although the Defence only makes explicit reference to Rules 122(4) and 134(2) of the Rules, the Chamber's equivalent reasoning under Article 19(4) of the Statute equally falls under this issue.¹⁹ The First Issue's resolution is also essential for the determination of the matters raised in the Initial Requests – objections against the formulation of the Confirmation Decision and challenges to the jurisdiction of the Court. Therefore the Chamber finds that the First Issue constitutes an appealable issue pursuant to Article 82(1)(d) of the Statute.
12. However, in light of the submissions made in the Request, the Chamber feels compelled to explain the contours of the First Issue. The Chamber notes that the Request mischaracterises the Impugned Decision when alleging that it failed to address Rule 134(3) of the Rules. The Impugned Decision stated that 'reliance on Rule 134(3) of the Rules [...] is also misguided' and provided reasons why the Chamber considered Rule 134(3) to be inapplicable.²⁰ Any argument raised by the Defence in support of its contention constitutes a mere re-litigation²¹ of the Impugned Decision and is not related to the First Issue.
13. Equally, the Defence tries to re-engage on the issue of whether notice has been provided in accordance with Article 67(1)(a) of the Statute.²² The Defence does not link the arguments raised in this regard to the First Issue but merely concludes that it

¹⁷ CLRV Response, ICC-02/04-01/15-1484, paras 11-14, 20-21.

¹⁸ CLRV Response, ICC-02/04-01/15-1484, paras 22-24.

¹⁹ *See for example*, Request, ICC-02/04-01/15-1480, paras 9 and 11 which sums up the Defence's understanding of the First Issue that a rejection solely on procedural grounds is against fair trial principles and paragraph 29 which contents that jurisdictional challenges can be raised at any time during the proceedings.

²⁰ Impugned Decision, ICC-02/04-01/15-1476, para. 22.

²¹ Request, ICC-02/04-01/15-1480, para. 7.

²² Request, ICC-02/04-01/15-1480, paras 12-15 and 20.

‘disagrees’.²³ Since the Impugned Decision rejected the Initial Requests *in limine*, the Defence, again, tries to re-litigate the Impugned Decision. The First Issue is not about whether notice has been properly provided, but whether a rejection of the Initial Requests on procedural grounds alone is possible.²⁴ The First Issue does not therefore require an assessment of whether notice in accordance with Article 67(1)(a) of the Statute has been provided properly.

14. Having outlined the First Issue, the Chamber finds that it significantly affects the outcome of the trial. The challenges to the formulation of the Confirmation Decision and the jurisdiction of the Court have the potential to considerably influence the charged crimes.²⁵ The Chamber stresses that this does not mean that, in a case of a reversal, the Initial Requests would have to be granted (since the Impugned Decision did not pronounce itself on the substance of the Initial Requests). Instead, the First Issue only treats the issue of whether a party is entitled to force a chamber to pronounce itself on the formulation of the (confirmed) charges and questions of jurisdiction at any point during the trial proceedings and thus being allowed, irrespective of any time limit, to raise fundamental objections which slow down the proceedings significantly.
15. The Chamber further is of the view that an immediate resolution by the Appeals Chambers may materially advance the proceedings. As stated in paragraph 14 above, the First Issue can potentially have a substantial impact on the trial. A decision by the Appeals Chamber on the First Issue before the final judgment is therefore, in the opinion of the Chamber, warranted in this instance.

B. Second Issue

16. In respect of the Second Issue, the Defence argues that it arises from the Impugned Decision since it already raised a jurisdictional challenge with regard to forced marriage during the Pre-Trial phase.²⁶ However, this does not contradict the Impugned Decision. Paragraph 34 of the Impugned Decision stated that ‘[f]or similar reasons to those set out

²³ Request, ICC-02/04-01/15-1480, para. 15.

²⁴ *The Defence itself seems to be aware of this, see:* Request, ICC-02/04-01/15-1480, para. 24.

²⁵ However, the Chamber rejects the argument by the Defence, that it will raise the same questions again on appeal, should it not be resolved now (paragraph 15 of the Request). The Chamber does not consider that the announcement that the party seeking leave may initiate future litigation is a sufficient reason to accept that this criterion of Article 82(1)(d) of the Statute is fulfilled.

²⁶ Request, ICC-02/04-01/15-1480, para. 28.

in the prior sub-section, the Defence is manifestly too late...'. The referenced sub-section finds that the Defence failed to raise the objections during the trial phase.²⁷ Any potential challenges before the Pre-Trial Chamber on this matter were irrelevant to the timing of the ones dismissed in the Impugned Decision.²⁸

17. The other argument raised with regard to the Second Issue, that jurisdictional challenges can be raised at any point in the proceedings,²⁹ is essentially an attack on the *in limine* dismissal of the Initial Requests and therefore pertains to the First Issue, which has been granted. It cannot be employed to justify that the Second Issue arises from the Impugned Decision.


18. Accordingly, the Chamber finds that the Second Issue, on the arguments presented by the Defence, does not arise from the Impugned Decision and rejects the Request with regard to the Second Issue.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

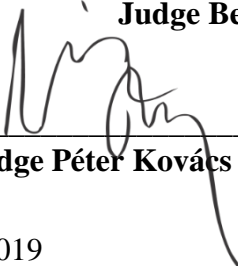
GRANTS the Leave to Appeal for the First Issue, as understood in paragraph 11 above; and

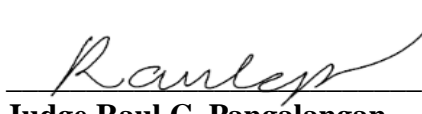
REJECTS the remainder of the Request.

Done in both English and French, the English version being authoritative.



Judge Bertram Schmitt, Presiding Judge



Judge Péter Kovács

Judge Raul C. Pangalangan

Dated 1 April 2019

At The Hague, The Netherlands

²⁷ Impugned Decision, ICC-02/04-01/15-1476, para. 34.

²⁸ In this regard, the Defence's argumentation suggests that it believes that it has already raised an unsuccessful challenge to the jurisdiction of the Court in relation to forced marriage. This is potentially problematic in light of Article 19(4) of the Statute which states that '[t]he jurisdiction of the Court [...] may be challenged only once by any person or State referred to in paragraph 2.'

²⁹ Request, ICC-02/04-01/15-1480, para. 29.