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**International
Criminal
Court**



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Date: **8 October 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 Further Defence Motion 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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Trial Chamber IX of the International Criminal Court, in the case of *The Prosecutor v. Dominic Ongwen*, having regard to Article 64(2) of the Rome Statute (the ‘Statute’) and Rule 134 of the Rules of Procedure and Evidence (the ‘Rules’), issues the following ‘Decision on Further Defence Motion Alleging Defects in the Confirmation Decision’.

I. Procedural history and submissions

1. On 23 March 2016, the Pre-Trial Chamber confirmed the charges against Mr Ongwen (the ‘Confirmation Decision’).¹
2. In preparation of the trial hearings, the Chamber set a deadline of 28 October 2016 to file any motions which required resolution prior to the commencement of the trial.²
3. Trial hearings commenced on 6 December 2016.³
4. The first witness called by the Office of the Prosecutor (the ‘Prosecution’) testified in January 2017.⁴ The Prosecution completed its presentation of evidence in April 2018.⁵
5. On 18 September 2018, the Defence for Mr Ongwen gave its opening statement.⁶ The Defence called its first witness on 1 October 2018,⁷ and has been conducting its evidence presentation ever since.
6. On 1 February 2019, the Defence filed four motions alleging various defects in the Confirmation Decision (the ‘Defects Series’).⁸ In the Defects Series, the Defence

¹ Decision on the confirmation of charges against Dominic Ongwen, ICC-02/04-01/15-422-Red (with two annexes; confidential version notified the same day).

² Decision Setting the Commencement Date of the Trial, 30 May 2016, ICC-02/04-01/15-449.

³ Transcript of hearing, ICC-02/04-01/15-T-26-ENG.

⁴ Transcript of hearing, 16 January 2017, ICC-02/04-01/15-T-28-ENG.

⁵ Notice of the Prosecution’s completion of evidence presentation, 13 April 2018, ICC-02/04-01/15-1225.

⁶ Transcript of hearing, ICC-02/04-01/15-T-179-Red-ENG.

⁷ Transcript of hearing, ICC-02/04-01/15-T-180-Red-ENG.

⁸ 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 (the ‘Defects Series Part I’); 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 Charges Crimes (Part IV of the Defects Series), ICC-02/04-01/15-1433.

requested the Chamber to dismiss the charges and modes of liability which were facially deficient and violated the fundamental fair trial right of notice to Mr Ongwen.⁹

7. On 7 March 2019, the Chamber dismissed the relief sought in the Defects Series (the ‘First Decision on Motions Alleging Defects’).¹⁰ The Chamber found the arguments presented to be untimely.¹¹ Considering that Rule 134(2) of the Rules ‘precludes parties from raising such challenges for the first time during trial when they had a reasonable opportunity to do so earlier’,¹² the Chamber concluded that motions alleging defects in the confirmation decision may not generally be brought after the commencement of trial.¹³ The Chamber reasoned that the purpose of Rule 134(2) of the Rules is ‘to ensure procedural economy and enable trial chambers to focus on the evidence at trial’ and that it ‘serves as a safeguard against strategic efforts to undermine the conduct of the proceedings’.¹⁴ Also, the Chamber considered challenges to the sufficiency of the confirmation decision to fall within both letter and intended purpose of Rule 134(2) of the Rules.¹⁵ Further, the Chamber found that granting leave under Rule 134(2) of the Rules was not justified in the circumstances.¹⁶ The Chamber also dismissed two jurisdictional arguments as untimely, indicating that the Defence failed to justify any exceptional circumstances for raising such arguments at this time.¹⁷
8. On 14 March 2019, the Defence requested leave to appeal the First Decision on Motions Alleging Defects with regard to two issues.¹⁸ The Chamber granted leave to appeal the first issue presented by the Defence.¹⁹
9. On 17 July 2019, the Appeals Chamber, unanimously, confirmed the First Decision on Motions Alleging Defects.²⁰ Specifically, concerning the application of Rule 134(2) of

⁹ Defects Series Part I, ICC-02/04-01/15-1430, para. 59.

¹⁰ Decision on Defence Motions Alleging Defects in the Confirmation Decision, ICC-02/04-01/15-1476.

¹¹ First Decision on Motions Alleging Defects, ICC-02/04-01/15-1476, para. 12.

¹² First Decision on Motions Alleging Defects, ICC-02/04-01/15-1476, para. 14.

¹³ First Decision on Motions Alleging Defects, ICC-02/04-01/15-1476, para. 36.

¹⁴ First Decision on Motions Alleging Defects, ICC-02/04-01/15-1476, para. 23.

¹⁵ First Decision on Motions Alleging Defects, ICC-02/04-01/15-1476, para. 23.

¹⁶ First Decision on Motions Alleging Defects, ICC-02/04-01/15-1476, paras 24-30, 36.

¹⁷ First Decision on Motions Alleging Defects, ICC-02/04-01/15-1476, paras 34-35, 37.

¹⁸ 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.

¹⁹ Decision on Defence Request for Leave to Appeal a Decision on Motions Alleging Defects in the Confirmation Decision, 1 April 2019, ICC-02/04-01/15-1493.

the Rules, the Appeals Chamber reasoned that Rule 134(2) of the Rules relates to issues arising between the confirmation hearing and the start of the trial and that such objections cannot subsequently be raised or made again during the trial proceedings proper without leave of the trial chamber.²¹ The Appeals Chamber found the purpose of Rule 134 (and also Rule 122) of the Rules to be ‘to safeguard the nature of the judicial process as an orderly succession of procedural acts provided by law that ensure the proper administration of justice, including the expeditious conduct of the proceedings’.²² The Appeals Chamber further recognised that Rule 134(2) and (3) of the Rules allows belated challenges to be made with leave of the trial chamber, and further challenges to be made in the course of the trial.²³ Importantly, the Appeals Chamber found that in the instant case the observance of prescribed time limits in search of expeditiousness did not lead to unfairness towards the accused,²⁴ and that the Chamber’s interpretation of Rule 134 of the Rules was compatible with the requirements of a fair and expeditious trial and Mr Ongwen’s rights as an accused person.²⁵

10. Furthermore, with regard to the question of whether the Chamber abused its discretion in dismissing the Defects Series *in limine* for untimeliness in the circumstances at hand, the Appeals Chamber found that the Chamber ‘acted in a manner consistent with its duty under article 64(2) of the Statute to ensure the fair and expeditious conduct of the proceedings’.²⁶ The Appeals Chamber opined that the Defence did not advance any reasoned justification for raising challenges to the Confirmation Decision more than three years after its issuance and after the Prosecution presented its case, and that the Defence’s arguments ‘primarily focused on the importance of [the] right to be informed in detail of the nature, cause and content of the charge under article 67(1)(a) of the Statute’.²⁷ Also, the Appeals Chamber concluded that the Chamber ‘correctly found’ that jurisdictional challenges under Article 19(4) of the Statute would have to take place prior

²⁰ Judgment on the appeal of Mr Dominic Ongwen against Trial Chamber IX’s ‘Decision on Defence Motions Alleging Defects in the Confirmation Decision’, ICC-02/04-01/15-1562 OA4 (the ‘Appeals Chamber Judgment’).

²¹ Appeals Chamber Judgment, ICC-02/04-01/15-1562 OA4, para. 127.

²² Appeals Chamber Judgment, ICC-02/04-01/15-1562 OA4, paras 131 and 163 ii).

²³ Appeals Chamber Judgment, ICC-02/04-01/15-1562 OA4, para. 132.

²⁴ Appeals Chamber Judgment, ICC-02/04-01/15-1562 OA4, paras 139 and 163 v).

²⁵ Appeals Chamber Judgment, ICC-02/04-01/15-1562 OA4, para. 140.

²⁶ Appeals Chamber Judgment, ICC-02/04-01/15-1562 OA4, paras 145 and 163 ix).

²⁷ Appeals Chamber Judgment, ICC-02/04-01/15-1562 OA4, para. 146.

to or at the commencement of trial and that the Defence failed to justify any exceptional circumstances for raising such arguments at this time.²⁸

11. On 20 September 2019, the Defence filed a further motion alleging defects in the Confirmation Decision, this time with regard to counts related to sexual and gender based crimes (the ‘Motion’).²⁹ The Defence states it is ‘seeking leave’ of the Chamber under Rule 134(2) of the Rules ‘to amend its Defects Series’.³⁰ It submits that the Motion is ‘timely because the lack of specificity in the allegations continues to impact on Mr Ongwen’s fair trial rights and the conduct of the Defence presentation of evidence’.³¹
12. Specifically in relation to counts 50-60,³² the Defence alleges defects in notice with regard to the geographic parameters of the alleged crimes, which – according to the Defence – also impact notice of the temporal aspect of the crimes.³³ It requests that ‘the SGBC confirmed and legally characterized in counts 50 through 60 be dismissed’.³⁴ The Defence further ‘reserves the right to amend this Motion’.³⁵
13. On 24 September 2019, the Prosecution filed its response (the ‘Prosecution Response’).³⁶ It requests that the Motion be dismissed *in limine* since it ‘raises issues which could and should have been raised prior to the start of trial’ and does not offer any explanation for the delay.³⁷
14. On 27 September 2019, the Common Legal Representative of Victims (the ‘CLRv’) responded to the Motion, submitting that the Chamber should dismiss it ‘for the same reason of untimeliness that it rejected the [Defects Series]’.³⁸ The CLRv considered the

²⁸ Appeals Chamber Judgment, ICC-02/04-01/15-1562 OA4, para. 155.

²⁹ Motions on Defects in the Confirmation Decision Regarding SGBC, ICC-02/04-01/15-1603-Conf.

³⁰ Motion, ICC-02/04-01/15-1603-Conf, para. 2.

³¹ Motion, ICC-02/04-01/15-1603-Conf, para. 2.

³² Motion, ICC-02/04-01/15-1603-Conf, para. 2.

³³ Motion, ICC-02/04-01/15-1603-Conf, para. 3.

³⁴ Motion, ICC-02/04-01/15-1603-Conf, para. 58.

³⁵ Motion, ICC-02/04-01/15-1603-Conf, para. 59.

³⁶ Prosecution’s Response to the Defence “Motions on Defects in the Confirmation Decision Regarding SGBC”, ICC-02/04-01/15-1609-Conf.

³⁷ Prosecution Response, ICC-02/04-01/15-1609-Conf, para. 1.

³⁸ CLRv Response to “Motions on Defects in the Confirmation Decision Regarding SGBC”, ICC-02/04-01/15-1613-Conf (the ‘CLRv Response’), para. 12.

Motion to be ‘frivolous and vexatious’ as the Defence did not attempt to satisfy any of the criteria under Article 19(4) of the Statute or Rule 134(2) of the Rules.³⁹

15. On 30 September 2019, the Legal Representative of Victims (the ‘LRV’) also responded, arguing the Motion should be dismissed *in limine* as it is made ‘grossly out of time’.⁴⁰ The LRV submits that the Defence fails to provide ‘any semblance of an explanation’ as to why the challenges were not brought forward earlier.⁴¹ It argues that the issues fall in the scope of and reflect those already adjudicated by both the Chamber and the Appeals Chamber in the context of the Defects Series.⁴²

II. Analysis

16. With regard to the confidential classification of the filings, the Chamber notes the submissions in the Prosecution Response,⁴³ the CLRV Response⁴⁴ and the LRV Response,⁴⁵ and accordingly directs the Registry to reclassify these filings as ‘public’. Further, the Chamber directs the Defence to file a public redacted version of the Motion within five days of notification of this decision.
17. Turning to the substance of the Motion, the Chamber notes that the Defence purportedly seeks leave under Rule 134(2) of the Rules to amend the Defects Series.⁴⁶ The Chamber notes that it already ruled on the Defects Series and that this decision was confirmed on appeal. Accordingly, the purpose of ‘amending’ the Defects Series is unclear. Further, nowhere in the Motion is it specified for which reason leave of the Chamber under Rule 134(2) of the Rules should be granted. The Defence does not provide any explanation as to why the Motion was submitted at this time and could not have been submitted at the commencement of the trial or otherwise as part of the Defects Series. It merely indicates that it had previously ‘reserved its right to amend the Defects Series’.⁴⁷ The Defence also does not provide any reason for which the challenges raised and relief requested in the

³⁹ CLRV Response, ICC-02/04-01/15-1613-Conf, para. 13.

⁴⁰ Victims’ Response to “Defence Motions on Defects in the Confirmation Decision Regarding SGBG”, ICC-02/04-01/15-1618-Conf, (the ‘LRV Response’), paras 1 and 16.

⁴¹ LRV Response, ICC-02/04-01/15-1618-Conf, para. 11.

⁴² LRV Response, ICC-02/04-01/15-1618-Conf, para. 14.

⁴³ Prosecution Response, ICC-02/04-01/15-1609-Conf, para. 2.

⁴⁴ CLRV Response, ICC-02/04-01/15-1613-Conf, para. 8.

⁴⁵ LRV Response, ICC-02/04-01/15-1618-Conf, para. 6.

⁴⁶ Motion, ICC-02/04-01/15-1603-Conf, para. 2.

⁴⁷ Motion, ICC-02/04-01/15-1603-Conf, para. 1.

Motion are to be distinguished from those discussed – and dismissed – in the context of the Defects Series.

18. Bearing in mind the findings in the Appeals Chamber Judgment as recalled above, the Chamber is of the view that the current Motion falls within the same category of challenges previously addressed in the framework of the Defects Series. The Chamber considers that the arguments raised in the Motion could and should have been presented at an earlier stage in the proceedings in accordance with Rule 134(2) of the Rules, since they relate to the conduct of the proceedings between the confirmation hearing and the beginning of the trial.⁴⁸
19. The Chamber is further of the view that the Defence fails to provide a reasoned justification for the Chamber to nevertheless grant leave to raise the challenges.⁴⁹ In order to justify leave to raise objections or make observations under Rule 134(2) of the Rules after the commencement of the trial, it is not sufficient for the Defence to point out that it had ‘reserved its right to amend the Defects Series’. The Defence must provide a reasonable justification for how in the particular circumstances at hand, and bearing in mind the need for the Chamber to ensure the fair and expeditious conduct of the proceedings, the challenges raised in the Motion should be considered.⁵⁰
20. For these reasons, the Chamber considers that the arguments presented in the Motion are untimely and that no exceptional circumstances justify their consideration at this point in time. Therefore, the arguments are dismissed *in limine*.

⁴⁸ See also Appeals Chamber Judgment, ICC-02/04-01/15-1562 OA4, paras 127 and 130.

⁴⁹ See also Appeals Chamber Judgment, ICC-02/04-01/15-1562 OA4, paras 132 and 146. See further para. 135: ‘In this regard, the Appeals Chamber recalls that “a party to a proceeding who claims to have an enforceable right must exercise due diligence in asserting such a right” in order for the relevant chamber “to take account of the interests of the other parties to and participants in the proceedings and of the statutory injunction for fairness and expeditiousness”’ (footnote omitted).

⁵⁰ See also Appeals Chamber Judgment, ICC-02/04-01/15-1562 OA4, paras 145-147, 153.


FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

DISMISSES the relief sought in the Motion;

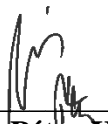
ORDERS the Defence to file a public redacted version of filing ICC-02/04-01/15-1603-Conf within five days of notification of this decision; and

ORDERS the Registry to reclassify as ‘public’ filings ICC-02/04-01/15-1609-Conf, ICC-02/04-01/15-1613-Conf, and ICC-02/04-01/15-1618-Conf.

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



Judge Bertram Schmitt, Presiding Judge



Judge Péter Kovács



Judge Raul C. Pangalangan

Dated 8 October 2019

At The Hague, The Netherlands