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No.: **ICC-02/04-01/15**
Date: **5 February 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

Prosecution request for dismissal, *in limine*, of the “Defence Motion on Defects in the Confirmation of Charges Decision: Defects in Notice and Violations of Fair Trial” dated 1 February 2019

Source: The 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. On 1 February 2019, the Defence filed a document in four parts¹ (collectively, “Defence Submissions”) regarding “defects in the notice provided by the confirmation of charges decision”,² requesting that the Trial Chamber dismiss “the charges and modes of liability which are facially deficient and violate the fundamental fair trial right of notice to Mr Ongwen”³.
2. The Defence Submissions should be dismissed *in limine* because (a) they are manifestly out of time; (b) they have been filed in breach of the applicable page limit; and (c) they repeat arguments that have already been dismissed by the Chamber. Any one of these grounds, taken alone, would justify dismissal.
3. The Prosecution limits itself, in this motion, to procedural arguments in support of dismissal *in limine*.
4. If the Trial Chamber decides not to dismiss the Defence Submissions *in limine*, the Prosecution requests, *firstly*, an extension of the deadline to file a substantive response to 30 days from the date of the issuance of the relevant decision and *secondly*, an extension of the page limit to 65 pages.⁴

¹ ICC-02/04-01/15-1430, ICC-02/04-01/15-1431, ICC-02/04-01/15-1432, ICC-02/04-01/15-1433.

² ICC-02/04-01/15-1430, para. 1.

³ ICC-02/04-01/15-1430, para. 59.

⁴ Any eventual Prosecution response on the merits would incorporate and expand upon the submissions on adequate notice and specificity of the charges made by the Prosecution in its response to the Defence request for leave to file a no case to answer motion. See ICC-02/04-01/15-1305, paras. 14-18.

Submissions

The Defence Submissions are out of time

5. The Defence Submissions relate to purported “defects in the notice provided by the confirmation of charges decision”.⁵ Hence they are objections regarding the conduct of pre-trial proceedings which could and should have been raised before the start of trial as dictated by rule 134(2) of the Rules of Procedure and Evidence.⁶ This rule was included in the statutory framework of the Court precisely in order to prevent endless procedural challenges after the commencement of trial.⁷ To say the Defence Submissions are late is actually an understatement, since they are filed almost three years after the issuance of the decision on the confirmation of charges against Dominic Ongwen,⁸ and more than two years after the commencement of trial,⁹ at a stage where the Prosecution has completed the presentation of its evidence and where the Defence is well into the presentation of its own case.

6. After the issuance of the Decision Confirming Charges, Trial Chamber IX repeatedly invited the Parties to raise any issues that required resolution prior to the commencement of trial. Notably, on 4 May 2016, the Presiding Judge of the Trial Chamber announced that, in accordance with article 64(8) (b) of the Statute and rule

⁵ ICC-02/04-01/15-1430, para. 1.

⁶ Additionally, insofar as the Defence were unsatisfied with the charges as articulated in the document containing the charges submitted by the Prosecution, rules 123 & 124 provided the appropriate procedural pathway for objections made regarding the same. See also Chamber’s Practice Manual, p. 13 (“At the commencement of the confirmation hearing on the merits, any questions on the form, completeness or clarity of the charges must be settled. If the Defence does not raise any challenge to the format of the charges at the latest as procedural objections under rule 122(3) of the Rules, it is precluded to raise it at a later stage, being the confirmation hearing or the trial”).

⁷ Peter Lewis, Trial Procedure, in Roy S. Lee (ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, Transnational Publishers, Ardsley, 2001, p. 543.

⁸ ICC-02/04-01/15-422-Red (“Decision Confirming Charges”), issued on 23 March 2016.

⁹ 6 December 2016.

140(1) of the Rules, he intended to issue directions on the conduct of the proceedings. The Presiding Judge indicated that '[t]he Chamber may take into account the submissions of the parties on these matters, but reserves the right to give directions in such a manner so as to comply with the principles of expeditiousness and fairness'.¹⁰ Shortly afterwards, on 23 May 2016, the Trial Chamber issued its Decision Setting the Commencement Date of the Trial.¹¹ The Chamber stated that:

"[...] in order to ensure that no issues affecting the commencement of the trial are unresolved by the commencement date, the Chamber sets a deadline for all motions which require resolution prior to the commencement of trial. This deadline will be set just over a month prior to the commencement of the trial."¹²

7. The relevant deadline was set for 28 October 2016.¹³ The Defence did not raise the matters contained in the current Defence Submissions during this period. On 6 December 2016, at the commencement of the trial, the Presiding Judge announced

"[a]s stated previously, in Decision 449, the Chamber set a deadline of 28 October 2016 for the filing of any motions requiring resolution prior to the commencement of the trial. The Chamber subsequently ruled on all requests received on or before this date, and with this morning's oral decision has in fact ruled on all pending requests at this time. However, noting Rule 134(2) of the Rules, the Chamber will now ask the parties whether they have any remaining objections or observations concerning the conduct of the proceedings which have arisen since the confirmation hearings. Be mindful that *in accordance with Rule 134(2), no such objection or observation may be raised or made again during the trial proceedings without the leave of the Chamber.*"¹⁴

8. In response, the Defence stated:

¹⁰ ICC-02/04-01/15-432, para. 4.

¹¹ ICC-02/04-01/15-449.

¹² ICC-02/04-01/15-449, para. 11.

¹³ ICC-02/04-01/15-449, page 7.

¹⁴ ICC-02/04-01/15-T-26-ENG, page 20, lines 17-25, page 21, lines 1-3 (emphasis added).

“We’ve carefully listened to the decision today and want just to say that in the course of the proceedings we expect that specificity be given to aspects of some of the charges which may -- with regard to venue, northern Uganda, within a period of five years, is so huge. So we hope that in relation to the question of specificity as the proceedings proceed, in order to have appropriate notice of some of the charges, we will raise this as the occasion arises in the course of the trial.”¹⁵

9. In other words, the Defence made no concrete allegation of a defect in the pleading of the charges or the notice received, and certainly did not indicate that there was any issue that required the dismissal of charges. In the words of the Trial Chamber, “[t]he Defence [...] made a vague reference to expecting that ‘specificity be given to aspects of some of the charges’, [...] and gave no indication that the trial could not proceed.”¹⁶

10. The Defence Submissions rely on rule 134(3).¹⁷ However, this provision is irrelevant since it relates to issues that “arise during the *course of the trial*”. Complaints regarding “defects in the notice provided by the confirmation of charges decision”¹⁸ are by definition issues that arise *before* trial, and hence within the purview of rule 134(2). The Defence have not shown any exceptional circumstances that prevented it from making the Defence Submissions before the start of trial, and that would justify the provision of leave from the Trial Chamber pursuant to rule 134(2). Indeed, the Defence have not made any attempt to seek leave to file the Defence Submissions and/or explain the rationale for their tardiness. In analogous circumstances, where the Defence made a request subject to rule 134(2), 13 months after the commencement of trial, the Trial Chamber stated that “[n]oting that *no leave*

¹⁵ ICC-02/04-01/15-T-26-ENG, page 21, lines 7-14.

¹⁶ ICC-02/04-01/15-1147, para. 17.

¹⁷ ICC-02/04-01/15-1430, para. 1.

¹⁸ ICC-02/04-01/15-1430, para. 1.

from the Chamber is sought to raise this objection now, the Request is dismissible for its untimeliness alone".¹⁹

11. The Defence asserts that the Chamber should receive its submissions now because "procedural rules [about timeliness] should be subordinated to the fairness criterion."²⁰ In fact, rule 134(2) is based precisely in considerations of fairness, as well as efficiency. Objections to the form of charges must be raised before trial, because it is at that time that they can most effectively be remedied. If the Defence had genuine concerns regarding the charges, or the notice received, it would have raised the matter when the Presiding Judge made explicit enquiries in accordance with rule 134(2) before the start of the trial. It defies logic that the Defence has only now become aware of 64 pages worth of purported defects. Allowing such challenges at this late stage in the trial would, in effect, allow the Defence to misuse the statutory framework which was carefully crafted to address genuine concerns while to ensuring expeditious conduct of proceedings. That is not "fairness" by any measure.

12. Moreover, the Defence cites easily distinguishable case law. For example, the decision in *Zigiranyirazo*²¹, where the Trial Chamber allowed the Defence an extension of time to file preliminary motions, hinged, firstly, on the fact that the relevant Defence request "was based on an informal agreement with the Prosecutor following a meeting between the parties..."²² and secondly, on the fact that the Prosecutor had sought leave to amend the indictment without disclosing the

¹⁹ ICC-02/04-01/15-1147, para. 18 (emphasis added).

²⁰ ICC-02/04-01/15-1430, para. 36.

²¹ Prosecutor v. Zigiranyirazo, ICTR-2001-73-I, Decision on the Defence Request for Extension of Time to File Preliminary Motions under Rule 72(G) of the Rules of Procedure and Evidence, 17 December 2003.

²² *Id.*, page 2.

materials supporting the amendment in the working language of the accused in a timely fashion.²³ Clearly, neither of these factors applies to the instant case.

13. In light of the above, the Defence Submissions should be dismissed *in limine* for being out of time.

The Defence Submissions inappropriately circumvent regulation 37

14. The Defence Submissions address one specific issue (alleged defects in the Decision Confirming Charges), but were filed as four separate filings in order to circumvent regulation 37 of the Regulations of the Court (“RoC”).²⁴ The combined page count of the Defence Submissions amounts to 64 pages. The Defence did not seek leave to extend the applicable 20 page limit. Neither did it set out any exceptional circumstances that would justify such an extension. This is a clear breach of regulation 37 and should not be permitted.

15. The Defence explained that it adopted this format “[s]ince it is not possible to analyse the defects in the CoC Decision within the standard 20-page limit, and a request for additional pages would result in an unwieldy document up to five times the standard page-limit”.²⁵ This argument does not hold water: first, litigants before Chambers of this Court routinely seek leave to file single documents significantly exceeding the 20-page limit if they consider that there is good cause to do so. Second, the Defence had the option of requesting leave to file a document in four parts if it believed that this was the best format for its pleading. It decided not to do so. If the current Defence approach is allowed, *any* page limit could be bypassed without leave by merely splitting the submission into multiple segments. Indeed, regulation

²³ *Ibid.*

²⁴ ICC-02/04-01/15-1430, ICC-02/04-01/15-1431, ICC-02/04-01/15-1432, ICC-02/04-01/15-1433.

²⁵ ICC-02/04-01/15-1430, para. 2.

37(2) would become entirely redundant. In light of the above, the Defence Submissions should be dismissed *in limine* for exceeding the permissible page limit by almost 50 pages.

The Defence Submissions repeat arguments that have already been dismissed

16. Several of the issues raised in the Defence Submissions have already been decided by the Trial Chamber. The Defence itself points this out in the Defence Submissions, when, for example, it complains of disclosure requests that have been rejected by the Trial Chamber²⁶ and laments the Trial Chamber's denial of the Defence request for a no-case-to-answer motion at the end of the Prosecution's case.²⁷

17. Notably, in the filing requesting leave to file a no-case-to-answer motion, the Defence had set out arguments regarding "Lack of Notice",²⁸ and "Defective Charges".²⁹ When rejecting the Defence's request, the Trial Chamber noted that:

"The Defence has argued before that the accused lacks notice of the charges. [...] the Chamber has previously rejected such arguments both for being untimely and on their merits. In particular, both this Chamber and the Pre-Trial Chamber have emphasised the significant distinction between being informed of the *charges* and the confirmation decision's *reasoning*. The Defence arguments for evidentiary references and legal definitions fail to appreciate this distinction"³⁰

18. The Defence now, in effect, seek a reconsideration of the above finding, arguing that "notice includes both charges and reasoning; there is no wall between

²⁶ ICC-02/04-01/15-1430, para. 54.

²⁷ ICC-02/04-01/15-1430, para. 57.

²⁸ ICC-02/04-01/15-1300, paras. 23-26.

²⁹ ICC-02/04-01/15-1300, paras. 27-32.

³⁰ ICC-02/04-01/15-1309, para. 9. Footnotes omitted. The Chamber cited ICC-02/04-01/15-1147 and further citations therein.

charges and reasoning”.³¹ The Court’s procedural framework does not allow this. If the Defence was dissatisfied with the above decisions of the Trial Chamber the appropriate procedural vehicle was either a request for leave to appeal at the time of the issuance of the relevant decision or a motion for reconsideration. As observed by the Trial Chamber, “[c]onsiderations from past decisions do not arise anew simply because they are repeated – leave to appeal must be sought and resolved at the original pronouncement”.³²

19. Entertaining these submissions now, re-litigating matters that have already been decided, is against the principle of finality of decisions and affects legal certainty. If such attempts at cyclic, repetitive litigation are allowed, nothing stops the Defence from raising the same grounds in a week, or a month or any other time prior to the close of the trial. Hence, on this ground too, the Defence Submissions should be dismissed *in limine*.

Alternative relief of extended deadline and page limit

20. In the alternative, if the Chamber decides not to dismiss the Defence Submissions *in limine*, and decides to address the merits of the Defence Submissions, the Prosecution requests an extension of the deadline to file a substantive response to 30 days from the date of the issuance of the relevant decision, pursuant to regulation 35 of the RoC and an extension of the page limit for its response to 65 pages, pursuant to regulation 37 of the RoC.

21. The time and page extensions are justified by the extent of the Defence Submissions, which amount to 64 pages, and to the wide-ranging, complex nature of

³¹ ICC-02/04-01/15-1430, paras. 13-19.

³² ICC-02/04-01/15-1426, para. 8.

the submissions, covering issues of both procedural and substantive law. These constitute “good cause” in the context of regulation 35(2) and “exceptional circumstances” in the context of regulation 37(2).

Conclusion

22. For the reasons set out above, the Prosecution requests the Chamber to dismiss the Defence Submissions *in limine*.

23. *Alternatively*, if the Trial Chamber does not dismiss the Defence Submissions *in limine*, the Prosecution requests,

- i) An extension of the deadline for the Prosecution’s response to the Defence Submissions to 30 days from the date of issuance of the relevant decision; and
- ii) An extension of the page limit for the Prosecution’s response to 65 pages.



Fatou Bensouda, Prosecutor

Dated this 5th February 2019
At The Hague, the Netherlands