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THE APPEALS CHAMBER

Before: **Judge Luz del Carmen Ibáñez Carranza, Presiding Judge**
Judge Chile Eboe-Osuji
Judge Howard Morrison
Judge Piotr Hofmański
Judge Solomy Balungi Bossa

SITUATION IN UGANDA

IN THE CASE OF
THE PROSECUTOR v. DOMINIC ONGWEN

Public

Victims' submissions in response to the Order for Further Submissions

Source: **Legal Representatives of Victims**

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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I. INTRODUCTION

1. The Legal Representatives of Victims ("the LRVs") file these submissions in response to the Order for Further Submissions from the Appeals Chamber ("the Chamber").

II. PROCEDURAL HISTORY

2. On 1 February 2019 the Defence submitted related four filings which alleged defects in the Confirmation Decision (the "Defects Series").[1]

3. On 7 March 2019 Trial Chamber IX dismissed *in limine* the Defects Series as out of time (the "Impugned Decision").[2]

4. On 14 March 2019 the Defence requested leave to appeal the Impugned Decision.[3]

5. On 1 April 2019 Trial Chamber IX partly granted leave to appeal the Impugned Decision.[4]

6. On 11 April 2019 the Defence filed the "Defence's appeal against the 'Decision on Defence Motions Alleging Defects in the Confirmation Decision'" (the Defence Appeal").[5]

7. On 23 April 2019 the Prosecution and OPCV filed responses to the Defence Appeal.[6]

[1] Defence Motion on Defects in the Confirmation of Charges Decision: Defects in the Charged Crimes (Part I of the Defects Series), ICC-02/04-01/15-1430, 1 February 2019; 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, 1 February 2019; Ongwen, 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, 1 February 2019; Ongwen, 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, 1 February 2019.
[2] Decision on Defence Motions Alleging Defects in the Confirmation Decision, ICC-02/04-1/15-1476, 7 March 2019.
[3] Defence Request for Leave to Appeal 'Decision on Defence Motions Alleging Defects in the Confirmation Decision, ICC-02/04-01/15-1476, 14 March 2019.
[4] Decision on Defence Request for Leave to Appeal a Decision on Motions Alleging Defects in the Confirmation Decision, ICC-02/04-01/15-1492, 1 April 2019.
[5] Defence's appeal against the 'Decision on Defence Motions Alleging Defects in the Confirmation Decision', ICC-02/04-01/15-1496, 11 April 2019.
[6] Prosecution's Response to "Defence's appeal against the 'Decision on Defence Motion Alleging Defects in the Confirmation Decision'", ICC-02/04-01/15-1502, 23 April 2019; CLRV's Response to "Defence's Appeal against 'Decision on Defence Motions Alleging Defects in the Confirmation Decision'", ICC-02/04-01/15-1503, 23 April 2019.

8. On 24 May 2019 the Chamber issued its Order for Further Submissions.[7]

III. SUBMISSIONS

9. The Chamber's order requests any further submissions on four specific questions. The LRVs will respond to each in turn.

Which are the specific issues that, in the view of Mr Dominic Ongwen, arose during the course of the trial warranting the application of rule 134(3) of the Rules?

10. In order to circumvent the requirement for leave from the Trial Chamber pursuant to rule 134(2) of the Rules of Procedure and Evidence (hereinafter RPE), the Defence has sought to argue that its Defect Series could be considered pursuant to rule 134(3) RPE. However, this sub-rule only relates to the consideration of motions "on issues that arise during the course of the trial."

11. To date the Defence has not – either in the Defects Series itself, or in the Defence Appeal – expressly identified how any of the issues it raises can be said to have "arise[n] during the course of the trial".

12. An issue must surely be taken to "arise" at the time when it has become known to the party concerned by it. In this case, the issues raised in the Defects Series concern alleged flaws in the Confirmation Decision. They were known to the Defence by early 2016. They clearly *arose* before the start of trial.

13. The best effort that the Defence has so far made to implicitly identify a development during trial as the basis for its Defect Series is summarised in paragraphs 29 and 30 of the Defence Appeal. There the Defence lists a number of occasions, from Pre-Trial up until 18 September 2019 during the Defence opening statements, on which it claims to have "raised its objections and observations" concerning the alleged defects. The Defence goes on to say that

> *"Finally, on 1 February 2019, after the extensive record of objections raised within the period of almost three years, of which all of them were either dismissed or remained unaddressed by both the Pre-Trial*

[7] Order for Further Submissions, ICC-02/04-01/15-1524, 24 May 2019.

Chamber II (save for Judge Marc Perrin de Brichambaut) and the Trial Chamber, the Defence proceeded to file its Defects Series."

14. The insinuation is that the issue which "arose" during trial was the fact that the chamber either dismissed or did not address the Defence's "objections and observations". However none of the instances listed by the Defence in paragraph 29 of the Defence Appeal was such as to reasonably warrant any deliberation by the Trial Chamber. In those instances at most the Defence mentioned that it had concerns about notice. In no instance did the Defence provide details of the nature of the defect, or any analysis or authorities concerning the impact of the alleged defects. Indeed, in the last example provided, Defence counsel acknowledged, in raising the issue of notice, that this was something which would need to be elaborated in writing.[8]

15. It is disingenuous for the Defence to now attempt to claim (albeit impliedly) that its passing references to defects in the Confirmation Decision, somehow created a duty on the Trial Chamber to spontaneously seize itself of this question; and that the Chamber's repeated failure to do so throughout trial could therefore be treated as a matter which has "arise[n] during the course of the trial".

16. Indeed, to the contrary, rather than giving the Defence a basis for repeatedly delaying filing the Defects Series, the instances listed in paragraph 29 of the Defence Appeal only go to prove the point that the matter in question *arose* long ago. By its own submissions in paragraph 29 of the Defence Appeal, the Defence has been aware of this issue since well before the commencement of trial. There is therefore no basis on which these issues can be said to have arisen during the course of the trial.

2. Why did Mr Dominic Ongwen raise concrete alleged defects in the confirmation of charges decision three years after it was issued?

17. For the reasons given above, it is apparent that the Defence had identified concerns regarding the level of notice provided in the Confirmation Decision

[8] Defence Appeal, para.29(j).

from early 2016. Despite this the Defence did not file its Defects motion until 1 February 2019. This delay has never been explained by the Defence.

18. The Defence Brief asserts that "the issue of notice in relation to the charged crimes and modes of liability is so fundamental to fair trial in this case that [the Defence] would be derelict in its duty not to raise and litigate the issues at every possible opportunity…"[9] And yet no explanation has ever been provided as to why the Defence *did* fail to litigate this issue prior to the start of trial.

19. The Defence also opines that: "not all trial objections can be foreseen at the commencement of trial, nor their contexts and implications be known".[10] However it is clear that this objection not only could have been foreseen at the commencement of trial, but even by the Defence's own admission, *was* foreseen. The implication is, perhaps, that the "contexts and implications" of the objection remained unknown. How this could possibly be the case has yet to be explained. On its face it is contradicted by the assertions in paragraph 29 of the Defence Appeal which claim that the Defence was already concerned about lack of notice since before the start of trial. It is also unclear what "context or implication" could have changed such that an alleged lack of notice which was *not* initially perceived as not warranting legal challenge became worthy of such challenge.

3. What type of issues, objections or observations can be raised prior to or during trial under rule 134 of the Rules? In this regard, are 'observations concerning the conduct of the proceedings' limited to procedural aspects or can substantive aspects be raised as well?

20. The LRVs submit that the matters which can be under rule 134 are *procedural* questions only. They further submit that the matters sought to be raised by the Defence in the Defects series are clearly procedural in nature. They are therefore properly governed by rule 134.

[9] Defence Appeal, para. 30.
[10] Defence Appeal, para. 20

21. First, issues, objections or observations which can be raised prior to the commencement of the trial, under rule 134(1) RPE, are limited to those that concern procedural issues. The same applies to raising to a Trial Chamber objections or observations at the commencement of the trial under sub-rule (2) of rule 134 RPE. This stems directly from explicit wording of sub-rules 1 and 2 of the rule in question. Rule 134(1) RPE refers to "issue concerning the conduct of the proceedings", whereas Rule 134(2) RPE to "objections or observations concerning the conduct of the proceedings which have arisen since the confirmation hearings".

22. Rule 134(3) RPE may appear to be different, since it uses broader language in stating that "[a]fter commencement of the trial, the Trial Chamber […] may rule on *issues* that arise during the course of the trial". However, this sub-rule must be interpreted in the context of sub-rules 1 and 2 of rule 134 RPE, and taking into account its object and purpose.[11] Rule 134(3) is clearly intended to ensure that a party is not prevented from raising an issue during trial by rule 134(2) where the issue only arose during the course of trial. It is therefore intended to address issues of the same nature which would have been covered under rule 134(1) and (2) – that is, procedural questions – but which were not able to be identified before the commencement of trial.

23. In addition, it needs to be re-emphasised that rule 134 RPE "is a direct response to the concerns felt by many delegations that proceedings at the ICTR and ICTY were being delayed by endless *procedural* challenges. […] Some delegates argued that it would be impossible to settle all procedural issues at the start of a lengthy trial. For this reason sub-rule 3 was added which allows the Court to make later rulings, although these are confined to issues that 'arise during the course of the trial'".[12] Therefore, the entirety of rule 134 RPE should be understood as

[11] Article 31 and Article 32 of the Vienna Convention on the Law of Treaties, singed on 23 May 1969, entered into force on 27 January 1980, United Nations, Treaty Series, Vol. 1155, 1-18232.
[12] Peter Lewis, Trial Procedure, in *The International Criminal Court – Elements of Crimes and Rules of Procedure and Evidence*, Edited by Roy S. Lee et al., Transnational Publishers, 2001, p. 543.

concerning issues pertaining to issues of a procedural rather than substantive nature

24. The LRVs submit that the matters raised in the Defects Series are undoubtably issues of a procedural nature, and therefore fall within the ambit of rule 134.

25. What lies at heart of the Defects Series is the assertion (also presented in the Defence Appeal) that the Accused "suffers prejudice due to errors in the 'Decision on the confirmation of charges against Dominic Ongwen' [footnote omitted], which in turn, violate his right to a fair trial."[13]

26. The right to be informed promptly and in detail of the nature and cause of the charges provided for, among others, in article 14(3)(a) International Covenant on Civil and Political Rights (hereinafter ICCPR) and in article 6(3)(a) of the European Convention on Human Rights (hereinafter "ECHR") is one of the basic guarantees of an accused's right to a fair trial in *criminal proceedings*. Article 67(1)(a) of the Statute, when compared with article 14(3)(a) ICCPR and article 6(3)(a) ECHR requires additionally that the information about the charges provided to the Accused includes also "content" of the charges.

27. To understand the nature of the so called right to notice and the difference between its phrasing in the above human rights treaties and in the Statue, it is worth referring to the explanations of the content of these provision provided by the Human Rights Committee and the ECtHR respectively.

28. The Human Rights Committee and the ECtHR have explained that the right to notice requires that one is informed of the alleged acts on which the charge is based and of the legal characterisation given to those acts.[14] However, the Strasbourg standard does not require that the information concerning the charges

[13] Defence Appeal, para. 6.

[14] General Comment No. 32 on Article 14: Right to equality before courts and tribunals and to a fair trial provides, CCPR/C/GC/32m 23 August 2007, p. 9. The General Comment explains: "[t]he specific requirements of subparagraph 3(a) may be met by stating the charge either orally - if later confirmed in writing - or in writing, provided that the information indicates both the law and the alleged general facts on which the charge is based"; Judgement of the ECtHR in the case of *Mattoccia v. Italy*, Application no. 23969/94, para. 59; Judgement of the ECtHR in the case of *Penev v. Bulgaria*, Application no. 20494/04, paras 33 and 42.

provided to the accused need not necessarily mention the evidence on which the charge is based.[15]

29. With regard to the additional "content" element provided for in article 67(1)(a), as opposed to the phrasing of this right in the ICCPR and ECHR, "[t]here may be no meaningful distinction between 'cause' and 'content', except perhaps a message of exhaustivity" [footnote omitted]. The LRVs point here to the disclosure requirements under the Statute and to the fact that the article 67(1)(a) of the Statute "must be taken in combination with the very thorough disclosure requirements that are imposed upon the Prosecutor" [footnote omitted].[16] These disclosure obligations, which are undeniably of procedural character, contribute to the fulfillment of the requirement to provide information to the Accused on the "content" of the charges put against him.

30. The rights of the accused enshrined in article 67 of the Statute (just as those in article 14(1) and (3) ICCPR and article 6(1) and (3) of the ECHR) are by their nature of procedural character. These provisions establish a set of guarantees which ensure a fair conduct of proceedings against the accused. The right of the accused to be informed about the nature, cause and content of the charges, if safeguarded, guarantees that the accused knows the case put against him and ensures that the right of the accused to have adequate time and facilities for the preparation of the defence, provided for in article 67(1)(b), is real and effective, not theoretical and illusory.

31. Given the above, the LRVs reiterate that the objections raised in the Defects Series are of procedural character. It is therefore clear that the Defects Series is governed by rule 134. The Defence may not circumvent rule 134 by seeking to claim that the issues raised are substantive.

[15] Decision of Commission in the case of *X. v. Belgium*, Application no. 7628/76.
[16] William A. Schabas/Yvonne McDermott, Article 67 Rights of the Accused, in Otto Troffterer and Kai Ambos (Eds.), *The Rome Statute of the International Criminal Court – A commentary*, Third Edition, C.H. Beck, 2015, p. 1660.

4. The Appeals Chamber notes that Mr Dominic Ongwen raises arguments concerning the possible violation of his fundamental rights as a result of the Impugned Decision, referring, inter alia, to his right under article 67(1)(a) of the Statute. Are there any additional submissions that the parties and participants intend to raise in this regard?

32. The Trial Chamber gave rule 134 its plain meaning: namely that rule 134(1) and (2) RPE apply to issues which arose prior to the commencement of trial; while rule 134(3) RPE applies to issues which arise during the course of the trial. Issues arising prior to the commencement of trial must be litigated prior to the start of trial, or afterwards only with leave of the Chamber where good cause can be shown. This meaning is not only the plain meaning; it also accords with the evident intent of the drafters, and achieves the necessary objective of ensuring that the procedural rules for trial are, to the greatest extent possible, settled before the start of trial. This enables the rules to be applied consistently throughout the entire trial and equally to all parties.

33. The Defence claim that this interpretation of rule 134 violates his rights under article 67(1) of the Statute (whether read alone or interpreted in the light of international human rights principles). The argument appears to be that imposing a time-limit on the Defence's ability to challenge the Confirmation Decision for lack of notice is contrary to the rights of the accused under article 67(1) of the Statute. In the alternative the Defence argues that the way that the Chamber exercised its discretion pursuant to rule 134(2) RPE violated defence rights under article 67(1) of the Statute. In effect, the Defence complaint is that defence rights were violated through the Trial Chamber adhering to a time-limit (the commencement of trial) for raising objections concerning the conduct of proceedings, and refusing to use its discretion to allow an objection to be made after that time-limit.

34. The Defence Appeal refers to rights granted to the defence under articles 67(1) paragraphs (a) and (c) of the Statute. In fact, this is on a more precise analysis not an argument about the right enshrined in article 67(1)(a) or (c), but rather an argument about the right to access the Court for the determination in respect of

those defence rights. This is not a right expressly articulated in article 67(1), but the LRVs do not contest that it is one of the rights implicitly granted to all participants, if not expressly under the statute than through article 21(1)(b) and article 21(3) given the uniformity of its recognition in human rights instruments.

35. However this argument must fail. There is no aspect of an accused's right to access a court for the determination of his or her rights which has been violated either by rule 134 RPE (and the construction given to it by the Trial Chamber) or by the way in which the Trial Chamber exercised its discretion.

36. Among the Defence submission decrying the unfair violation of the accused's rights, not a single reference is given for jurisprudence indicating that it is a violation of defence rights for the RPE to establish time limits; or for a Chamber to duly enforce them.

37. Indeed, international jurisprudence supports precisely the contrary position. The ECtHR has repeatedly held that the existence and enforcement of time-limits does not in itself violate fair trial rights, either in civil or criminal proceedings. In the context of time-limits set for filing appeals the ECtHR has held that:

> *"the rules governing the formal steps to be taken and the time-limits to be complied with in lodging an appeal are aimed at ensuring a proper administration of justice and compliance, in particular, with the principle of legal certainty. Litigants should expect those rules to be applied."*[17]

38. For example, in *Johansen v Germany* the ECtHR applied these principles in the context of a criminal case where the applicant had failed to lodge an objection to a penal order within a two week statutory time-frame. The ECtHR considered the rules establishing the time-limit. Far from finding that they violated the rights of the accused, the ECtHR held that "[the defendant] must lodge an objection to [a]

[17] ECtHR judgement in the case of *Miragall Escolano and others v Spain* App. Nos 38366/97, 38688/97, 40777/98, 40843/98, 41015/98, 41400/98, 41446/98, 41484/98, 41487/98 and 41509/98, Judgment of 21 January 2000, para. 33.

penal order within two weeks following its service… safeguard the right of access to court of the defendants concerned."[18]

39. Therefore the Trial Chamber's interpretation of rule 134 RPE, which effectively reads it as imposing a deadline at the commencement of trial for bringing motions concerning issues which arose before that time, can in no way be said to violate the defendant's rights. The mere existence of a time limit in procedural rules is entirely consistent with article 67 and human rights principles incorporated through article 21(1)(b) and (3) of the Statute.

40. This is not to say, of course, that the strict *enforcement or application* of a time limit in a particular case may never violate an accused's access to a court. The principles applied in this respect are well-established:

> *"...the "right to a court", of which the right of access is one aspect, is not absolute; it is subject to limitations permitted by implication, in particular where the conditions of admissibility of an appeal are concerned. Nonetheless, the limitations applied must not restrict or reduce the individual's access in such a way or to such an extent as to impair the very essence of the right. Furthermore, limitations will only be compatible with Article 6 § 1 if they pursue a legitimate aim and there is a reasonable relationship of proportionality between the means employed and the aim pursued."*[19]

41. In the caselaw it is clear that strict enforcement of a procedural time-limit is only considered a violation of defence rights to access a court where a *reasonable justification* has been provided for the failure to comply with the time-limit. It is only where the applicant has shown that circumstances in effect made it impossible to comply with the time limit that the ECtHR has held that enforcement of a time-limit violates the right to access a court. For example: in

[18] ECtHR judgement in the case of *Johansen v Germany*, App. No. 17914/10, Judgment of 12 September 2016, para.46.
[19] *Ibid*. para. 44; see also eg ECtHR judgement in the case of *Mareti v Croatia*, App. No. 55759/07, Judgment of 25 June 2009, para. 37.

Maresti v Croatia[20] the copy of an appealable decision was served on applicant's mother who had schizophrenia and was deemed unable to inform the applicant of the decision; in *Labergère v France*[21] the applicant had failed to meet the applicable deadline because his mental state during commitment to a psychiatric institution prevented him appealing.

42. In other cases, where a person has not shown that there was a compelling reason demonstrating that they were unable to meet a deadline, the ECtHR has found that strict enforcement of the deadline does not violate the right to access a court. Thus in *Johansen v Germany*, where the applicant had failed to appeal during the available two week period, no violation of her right held to have occurred.[22]

43. In the absence of *any* explanation from the Defence as to why they did not comply with the time-limit imposed by Article 134 of the RPE, the Trial Chamber's enforcement of that time-limit cannot constitute a violation of the accused's rights. Neither can the Trial Chamber's, refusal to exercise its discretion to allow an out of time motion constitute such a violation.

44. Furthermore, even if the Defence could (or can) provide an explanation for why it failed to file its Defects Series in a timely manner before the start of trial in compliance with rule 134(2) RPE, this would not automatically mean that the late motion should be allowed. Rather, as the above jurisprudence makes clear, the question is one of *proportionality*: namely whether the limitation on defence rights which is created by enforcing the time-limit in all the circumstances is proportionate to the aim which the time-limit pursues.

45. It is relevant therefore to emphasize that the aim which is pursued by the time limit in rule 134(2) RPE is itself absolutely fundamental to a fair trial. This rule aims to ensure that the rules of the trial do not change mid-way through. It aims to ensure that all participants in the proceedings know the rules in advance, and that all are subject to the same rules. The requirement to address concerns about

[20] ECtHR judgement in the case of *Maresti v Croatia*, App. No. 55759/07, Judgment of 25 June 2009.
[21] ECtHR judgement in the case of *Labergère v France*, App. No. 16846/02, Judgment of 26 September 2006.
[22] ECtHR judgement in the case of *Johansen v Germany*, App. No. 17914/10, Judgment of 12 September 2016.

the charges before the start of trial goes even beyond this: they ensure that the Prosecution has an opportunity to rectify formal defects in the charges before trial starts. If challenges against the charges could be made later the Trial Chamber would need to decide between restarting the trial or simply dismissing charges which could well have been rectified if objections had been raised in a timely manner.

46. In seeking to present the Chamber with this choice, and in seeking to change the rule mid-contest, the Defence appears to forget the more than 4000 victims who are also participating in this trial. Those victims have an interest in seeing the truth come out through the proceedings, and also in seeing that the Prosecution has ever fair chance to meet its burden of proof. To allow the Defence to bring a challenge almost three years late, which could (if successful) lead to the striking out of charges would be grossly unfair to the victims. It would likewise be grossly unfair to the victims if delays by the Defence meant that the trial had to restart. As the Pre-Trial Chamber I held recently, victims have a right to access to justice which demands particular expedition in proceedings which – as in the case of ICC trials – are linked to victims' right to reparations.[23]

47. Even if the Defence is now – at this late point – able to produce a justification for its delay in presenting the Defects Series, the LRVs submit that the rights of victims would have to be borne in mind by any Chamber in assessing whether refusing to grant leave under rule 134(2) RPE is proportionate. Moreover, in the unlikely event that this occurs, victims and the Prosecution must be given an opportunity to be heard on that question.

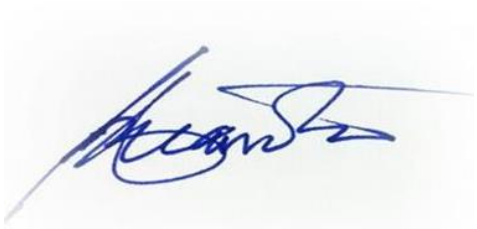
Final matter

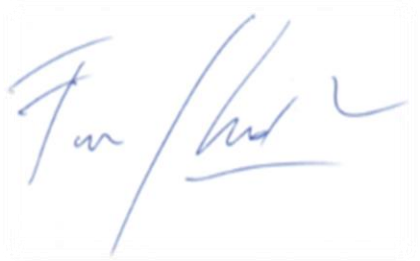
48. The LRVs note that the Chamber's Order for Further Submissions grants each party and participant 15 pages within which to make their submissions. The LRVs

[23] *Request under regulation 46(3) of the Regulations of the Court*, Decision on the "Prosecution Request for a Ruling on Jurisdiction under Article 19(3) of the Statute", ICC-RoC46(3)-01/18-37, 6 September 2018, para.88.

have duly ensured that these submissions are within that limit. The LRVs respectfully request that the Chamber ensure that the Defence likewise comply with page limits, not only in form but also in substance. The LRVs note that the Defence Appeal appears to have violated regulation 36(4) of the Regulations of the Court by using reduced margins. They note that, much like time-limits, page limits and the formatting regulations which support them are established in order to ensure efficient proceedings and guarantee a fair contest between all participants at trial.

Respectfully submitted,





Joseph Manoba Francisco Cox

Dated this 31st day of May 2019

At Kampala, Uganda and The Hague, Netherlands