

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

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

Date: **14 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**

**Defence Request for Leave to Appeal ‘Decision on Further Defence Motion Alleging  
Defects in the Confirmation Decision’**

**Source: Defence for Mr Dominic Ongwen**

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

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## I. INTRODUCTION

1. Pursuant to article 82(1)(d) of the Rome Statute ('Statute'), the Defence for Mr Dominic Ongwen ('Defence') seeks leave to appeal the Trial Chamber IX's ('Trial Chamber' or 'Chamber') 'Decision on Further Defence Motion Alleging Defects in the Confirmation Decision'.<sup>1</sup> The appellate issue is:

Whether the Decision's application of rule 134 of the Rules, in the instant case, was consistent with the requirements of a fair and expeditious trial and Mr Ongwen's rights as an accused person ('Issue').

2. The Defence incorporates by reference the jurisprudence of this Court with respect to seeking leave to appeal as set out in its prior requests.<sup>2</sup>

## II. SUBMISSIONS

### A. Issue

3. The Defence submits that the Chamber's decision not to consider the merits of the Defects Motion on SGBC based largely on expeditiousness prejudiced Mr Ongwen's right to a fair trial, in particular his right to be informed in detail of the nature, cause and content of the charges.
4. The Appeals Chamber in the *Ongwen* case found that 'the right of the accused person to be informed of the charges is firmly grounded in the Statute' and emphasised 'the strong link between the right to be informed in detail of the nature, cause and content of the charges and the right to *prepare* one's defence'.<sup>3</sup>
5. The same Appeals Chamber ruled that:

Mr Ongwen is correct in stating that it would be 'illogical to assume that all potential issues would be foreseeable prior to the commencement of the trial proceedings' and that '[c]ertain issues only become evident once the proceedings unfold and develop'.

<sup>1</sup> *Ongwen*, Decision on Further Defence Motion Alleging Defects in the Confirmation Decision, [ICC-02/04-01/15-1630](#), 8 October 2019 ('**Decision**'); see also *Ongwen*, Motions on Defects in the Confirmation Decision Regarding SGBC, ICC-02/04-01/15-1603, 20 September 2019 ('**Defects Motion on SGBC**').

<sup>2</sup> *Ongwen*, Defence Request for Leave to Appeal "Decision on Defence Request for Amendment of the Seating Schedule", 1 October 2018, [ICC-02/04-01/15-1334-Red](#), at paras 4 to 10.

<sup>3</sup> *Ongwen*, 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](#), 17 July 2019 ('**Ongwen Appeal Judgment**'), at para. 69; see also Defects Motion on SGBC, at para. 11.

Rule 134(2) and (3) thus expressly provides for this, allowing belated challenges to be made with leave of the trial chamber, and for further challenges to be made in the course of the trial. Accordingly, rule 134 requires the parties to the proceedings to raise issues at the time that they arise, whilst recognising that ‘events may occur during the trial which call into question earlier decisions’ and therefore allowing challenges to be made at a later occasion.<sup>4</sup>

6. Therefore, in circumstances where an accused ‘could not reasonably be expected to raise the matter at the prescribed stage will he or she be permitted to raise it a subsequent stage’. Even if a challenge could have been raised earlier, the rule 134(2)’s flexibility ‘does not outright deny a party the opportunity to raise’ such challenge. This is consistent with the purpose of article 64(2) of the Statute, ‘which is to ensure that the trial is managed properly and expeditiously, whilst giving full respect to the rights of the accused’.<sup>5</sup>
7. The Chamber rejected *in limine* the Defence motion concerning defects in notice in regard to the element of the geographic parameters of the alleged crimes, which also impact on notice of the temporal aspect of the crimes, on two main grounds.
8. First, the Chamber found 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’.<sup>6</sup>
9. It is the Defence position that it could not reasonably be expected to raise the current challenges at an earlier point in time. The development of this Court’s jurisprudence and the progress in the *Ongwen* case allowed for the issues concerning the geographic parameters as well as the temporal aspect of the alleged crimes to become evident at a later stage. In addition, due to inadequate resources and personnel, the Defence was unable to conduct a proper analysis and raise this matter with the Chamber until September 2019. Therefore, the Chamber was incorrect, unreasonable and unfair in its ruling. Consequently the Chamber erred when it found that the challenges concerning the confirmed SGBC, which are legally characterized in counts 50-60 of the Confirmation Decision, could have been raised at an earlier point in time.

<sup>4</sup> [Ongwen Appeal Judgment](#), at paras 132 and 163 iii); see also [Decision](#), at para. 10.

<sup>5</sup> [Ongwen Appeal Judgment](#), at paras 139 and 163 iii).

<sup>6</sup> [Decision](#), at para. 18.

10. Second, the Chamber held that ‘the Defence fails to provide a reasoned justification for the Chamber to nevertheless grant leave to raise the challenges’ and that ‘it is not sufficient for the Defence to point out that it had ‘reserved its right to amend the Defects Series’.<sup>7</sup> This holding, however, that the Defence did not provide a reasoned justification and only reserved its right to amend the Defects Series is misleading.
11. It is apparent from the Defects Motion on SGBC that the Defence’s justification for raising the challenges was based on the lack of notice in the SGBC allegations which continues to negatively impact on, and prejudice Mr Ongwen’s fair trial rights and the conduct of the Defence presentation of evidence. This justification was emphasized throughout the entire Motion.<sup>8</sup> As confirmed by the Appeals Chamber, the rule 134(2)’s flexibility allows challenges to be made at a later stage and article 64(2) of the Statute requires the Chamber to consider justification for such challenges. Thus, the Chamber’s failure to consider these arguments *vis-à-vis* its goal of expeditiousness in the trial proceedings materially affected the Decision.
12. In summary, whether the Chamber’s application of rule 134(2) of the Rules, in the instant case, was consistent with a fair and expeditious conduct of the proceedings and Mr Ongwen’s right to a fair trial is an appellate issue that arises from the Decision.

**B. Issue satisfies the legal criteria under article 82(1)(d) of the Statute**

13. The key premise of the Issue is the protection of Mr Ongwen’s fair trial right to notice. The Issue’s resolution is also essential for the determination of the matters raised in the Defects Motion on SGBC – challenges against the confirmed SGBC and legally characterized in counts 50 through 60 in the Confirmation Decision.
14. The Defence is of the view that the Issue significantly affects both the fair and expeditious conduct of the proceedings and the outcome of the trial.
15. If the Chamber issues a conviction under article 74 of the Statute and the conviction is founded on a defective charging document, then the basis of such conviction will be challenged by the Defence as unfair and litigated on appeal. Furthermore, the Decision forecloses the possibility of resolving the defects in pleading regarding the location of allegation for the crimes confirmed against Mr Ongwen for P-99, P-101 and P-214. Such foreclosure prejudices his fair trial right to notice of the charges and modes of liability against him, as per article 67(1)(a) of the Statute.

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<sup>7</sup> [Decision](#), at para. 19.

<sup>8</sup> Defects Motion on SGBC, at paras 2, 4, 5, 8, 9, 11, 17, 19, 22, 57 and 58.

Thus, a failure to resolve the Issue will have a significant impact on the fair and expeditious conduct of the proceedings.

16. As previously found by this Chamber ‘the challenges to the formulation of the Confirmation Decision and the jurisdiction of the Court have the potential to considerably influence the charged crimes’ and ‘potentially have a substantial impact on the trial’.<sup>9</sup> In the present Decision, the Chamber found that ‘the current Motion falls within the same category of challenges previously addressed’ in the Defects Series.<sup>10</sup> Accordingly, the outcome of the trial may be significantly affected in the instant case as well.
17. The Issue warrants an immediate resolution by the Appeals Chamber. As stated above, the resolution of Issue is necessary for the determination of matters concerning the confirmed SGBC which are legally characterized in counts 50-60. A decision by the Appeals Chamber would thus materially advance the proceedings.

### III. RELIEF

18. For the reasons stated above, the Defence respectfully requests that leave is granted by the Chamber to appeal the Issue.

Respectfully submitted,



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 Hon. Krispus Ayena Odongo  
 On behalf of Mr Dominic Ongwen

Dated this 14<sup>th</sup> day of October, 2019

The Hague, Netherlands

<sup>9</sup> *Ongwen*, Decision on Defence Request for Leave to Appeal a Decision on Motions Alleging Defects in the Confirmation Decision, [ICC-02/04-01/15-1493](#), 1 April 2019, at paras 14-15.

<sup>10</sup> [Decision](#), at para. 18.