

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

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

Date: 18 March 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'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'"**

Source: The Office of the Prosecutor

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

The Office of the Prosecutor

Ms Fatou Bensouda
Mr James Stewart
Mr Benjamin Gumpert

Counsel for Dominic Ongwen

Mr Krispus Ayena Odongo
Mr Charles Taku
Ms Beth Lyons

Legal Representatives of Victims

Mr Joseph Akwenyu Manoba
Mr Francisco Cox
Ms Paolina Massidda

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
Defence**

States Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Peter Lewis

Counsel Support Section

Victims and Witnesses Section

Mr Nigel Verrill

Detention Section

**Victims Participation and Reparations
Section**

Other

Introduction

1. The Defence Request for Leave to Appeal (“Defence Request”)¹ the ‘Decision on Defence Motions Alleging Defects in the Confirmation Decision’ (“Impugned Decision”)² should be denied because the issues proposed for certification either rest upon mischaracterisations of the Impugned Decision, or are no more than disagreements with the Trial Chamber’s exercise of its discretion and thus not appealable within the meaning of article 82(1)(d) of the Rome Statute (“Statute”). Furthermore, the Defence Request does not meet the two remaining cumulative requirements under article 82(1)(d) of the Statute.

Submissions

Issue 1

2. The proposed issue - “Whether the 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 full respect for the right of the accused” [is] consistent with Article 67(1)” - purports to address a ‘circumvention’ of the Accused’s right to proper notice of the crimes of which he accused.³ The proposed issue does not arise out of the Impugned Decision, but is rather based upon a series of mischaracterisations.

3. The Impugned Decision does not deny, still less seek to circumvent, the accused’s right to notice, but rather states clearly the reasons why challenges based on an alleged lack of notice in the Confirmation Decision must, unless leave to the contrary is granted under rule 134(2) of the Rules of Procedure and Evidence (‘Rules’), be made *before* the trial commences.

¹ ICC-02/04-01/15-1480.

² ICC-02/04-01/15-1476.

³ Defence Request, para. 4.

4. In particular the Impugned Decision observes⁴ that the Defence interpretation of fairness and respect for the right of the accused for under article 67(1) would permit the Defence to wait until the Prosecution and the Pre-Trial Chamber are time-barred from remedying any possible defects in the Confirmation Decision⁵ before springing their complaints upon the Trial Chamber.

5. Further mischaracterisation of the Impugned Decision is to be found in paragraph 6 of the Defence Request, which asserts that “The Decision fails to address the provision of Rule 134(3).” On the contrary the provisions of this rule were specifically addressed in paragraph 22 of the Impugned Decision, where the Trial Chamber found that ‘Defects in the Confirmation Decision’ (the Defence’s own choice as a title for its four linked Motions) are not issues that arise during the course of the trial.

6. In developing issue 1 the Defence asserts⁶ that the Trial Chamber “reject[s] ‘lock stock and barrel’, the content of the Defence assertions of defects in the CoC Decision”. This, again, is a mischaracterisation of the Impugned Decision in which the Trial Chamber specifically acknowledged that rule 134(2) of the Rules potentially permits the Defence to make such assertions at this late stage of the proceedings, if there are grounds for the Chamber to grant leave to do so. Paragraphs 24 to 30 of the Impugned Decision set out the reasons why granting such leave is not justified. Self-evidently there can have been no formal decision on the merits of arguments which the Defence have been refused leave to make.⁷

7. For these reasons it is submitted that leave to appeal should not be granted in respect of issue 1. The defence is doing no more than seeking to litigate before the

⁴ Impugned Decision para. 20.

⁵ By virtue of an application to the Pre-Trial Chamber under article 61(9) of the Statute.

⁶ Defence Request para. 10. See also paras. 14 and 21.

⁷ Contra Defence Request, para. 13.

Appeals Chamber a matter which the Trial Chamber has found is time barred by virtue of the application of rule 134(2).

Issue 2

8. The proposed issue - “Whether the Decision’s finding, at paragraph 37, that jurisdictional arguments on forced marriage are untimely, is accurate” - amounts to no more than a disagreement with the Trial Chamber’s findings⁸ that the Defence’s arguments concerning forced marriage are (a) governed by article 19(4) of the Statute, (b) cannot be made after the commencement of the trial save in exceptional circumstances, and (c) that no such circumstances exist.

9. The fact that such arguments concerning forced marriage were advanced,⁹ considered, and dismissed¹⁰ in the course of the confirmation proceedings does not elevate this disagreement to the status of an appealable issue.¹¹

The remaining article 82(1)(d) criteria are not met

10. Even if issue 1 did arise from a proper reading of the Impugned Decision, and if issue 2 were more than a mere disagreement with the Trial Chamber’s finding, neither meet the remaining two cumulative requirements for an interlocutory appeal under article 82(1)(d) of the Statute.

11. First, the issues proposed for certification would not “significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial.”¹²

12. The Impugned Decision expressly considers the Trial Chamber’s obligation under article 64(2) of the Statute to ensure the fair and expeditious conduct of the proceedings. It confirms that “no evidence will be used against the accused in a manner which would exceed the scope of the charges or could not have been

⁸ Impugned decision para. 34.

⁹ Defence Request para. 28.

¹⁰ ICC-02/04/01/15-422-Conf, paras. 87 to 95.

¹¹ Contra Defence Request, paras. 28-29.

¹² Rome Statute, article 82(1)(d).

reasonably anticipated”,¹³ and it finds that there is “nothing in the conduct of the proceedings to date to suggest that the Defence is somehow unfairly burdened by the formulation of the charges.”¹⁴

13. Both issues purport to be about fairness, but are in fact complaints that the Chamber has refused to allow the Defence to ‘game the system’ and to bring challenges concerning the formulation of the charges and the jurisdiction of the court long after the time prescribed by the rules.

14. Second, immediate resolution by the Appeals Chamber of these issues would not “materially advance the proceedings.”¹⁵ It will delay them.

Conclusion

15. For the reasons set out above, the Defence Request for Leave to Appeal Decision 1476 should be rejected.



Fatou Bensouda, Prosecutor

Dated this 18th day of March 2019
At The Hague, the Netherlands

¹³ Impugned Decision, para. 29.

¹⁴ Impugned Decision, para. 28.

¹⁵ Rome Statute, article 82(1)(d).