

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

No.: **ICC-02/04-01/15 OA 4**

Date: **23 April 2019**

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

Prosecution's Response to "Defence's appeal against the 'Decision on Defence Motion Alleging Defects in the Confirmation Decision'"

Source: Office of the Prosecutor

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I. INTRODUCTION

1. Ongwen's appeal¹ against the Trial Chamber's decision² dismissing *in limine* his challenges to alleged defects in the Confirmation Decision³ for untimeliness should be rejected. Ongwen failed to raise the alleged defects before or at the commencement of the trial, despite being specifically asked by the Presiding Judge under rule 134(2) of the Rules of Procedure and Evidence ("Rules") whether he had any objections.⁴ Instead, he raised the alleged defects only on 1 February 2019,⁵ almost three years after the Pre-Trial Chamber confirmed the charges,⁶ more than two years after the commencement of the trial,⁷ at a stage where the Prosecution had closed its case and where the Defence was well into the presentation of its own case. Having afforded him the opportunity to raise any objections at the commencement of his trial, the Trial Chamber – based on rule 134(2) – correctly refused to entertain Ongwen's belated arguments on their merits by considering, among others, the need to ensure procedural economy and expeditiousness by avoiding significant delays in the proceedings.⁸

2. The Trial Chamber certified for appeal a single issue, namely, "whether the dismissal of the Initial Requests *in limine*, on grounds of untimeliness, is consistent with the rights of the accused."⁹ The Trial Chamber clarified that the issue certified for appeal only concerns the question "whether a party is entitled to force a chamber to pronounce itself on the formulation of the (confirmed) charges and questions of jurisdiction at any point during the trial proceedings and thus being allowed,

¹ ICC-02/04-01/15-1496 ("[Ongwen Appeal](#)").

² ICC-02/04-01/15-1476 ("[Impugned Decision](#)").

³ ICC-02/04-01/15-422-Red, 23 March 2016 ("[Confirmation Decision](#)").

⁴ [Impugned Decision](#), para. 26 (referring to Trial Transcripts [ICC-02/04-01/15-T-26-ENG](#), pp. 21-22).

⁵ The objections were filed in a document comprising four parts: [ICC-02/04-01/15-1430](#); [ICC-02/04-01/15-1431](#); [ICC-02/04-01/15-1432](#) and [ICC-02/04-01/15-1433](#) (collectively "Ongwen's notice objections").

⁶ [Confirmation Decision](#).

⁷ Ongwen's trial commenced on 6 December 2016.

⁸ [Impugned Decision](#), paras. 20-25, 36-37.

⁹ ICC-02/04-01/15-1493 ("[Decision on Leave to Appeal](#)"), p. 7 (referring to the First Issue, as understood in paragraph 11).

irrespective of any time limit, to raise fundamental objections which slow down the proceedings significantly".¹⁰

3. Ongwen's four grounds of appeal challenging the Trial Chamber's delimitation of the certified issue, and its interpretation and application of rule 134 of the Rules on the facts of his case, are without merit.

4. Ongwen's *first ground of appeal*¹¹ impugning the scope of the issue the Trial Chamber certified for appeal, challenges not the Impugned Decision, but the separate Decision on Leave to Appeal. It should be rejected on this basis alone. In addition, it is the Trial Chambers' and Pre-Trial Chambers' prerogative to state or certify the existence and scope of an appealable issue in an impugned decision.

5. Contrary to Ongwen's *second ground of appeal*,¹² the Trial Chamber correctly interpreted rule 134. Ongwen does not accurately present the Impugned Decision. The purported defects of the Confirmation Decision were foreseeable prior to the commencement of the trial proceedings. Ongwen's arguments should be dismissed *in limine*. Moreover, there is nothing in rule 134 obligating a Trial Chamber to always entertain an accused's motions on the merits, whether such motions are brought at the commencement of the proceedings (rule 134(2)) or subsequently (rule 134(3)). Chambers are granted a margin of discretion to balance all competing values, and to decide whether to entertain motions on the merits or to dismiss them *in limine* including for untimeliness.

6. Contrary to Ongwen's *third ground of appeal*,¹³ the Trial Chamber properly exercised this discretion when considering the impact of the untimeliness of Ongwen's objections on procedural economy and expeditiousness in the conduct of the proceedings.

¹⁰ [Decision on Leave to Appeal](#), para. 14.

¹¹ [Ongwen Appeal](#), paras. 10-15.

¹² [Ongwen Appeal](#), paras. 16-24.

¹³ [Ongwen Appeal](#), paras. 25-35.

7. Contrary to what Ongwen claims in his *fourth ground of appeal*,¹⁴ the Chamber correctly applied the relevant provisions and balanced all relevant factors, including procedural economy and expeditiousness by avoiding significant delays in the proceedings.¹⁵ These are not mere “procedural” rules but fundamental values that a Chamber must balance with other values.

II. SUBMISSIONS

8. As a preliminary matter, the Appeals Chamber should summarily dismiss Ongwen’s attempt in his Appeal to “incorporate the Defence submissions presented in its Defects Series as well as its ‘Defence Request for Leave to Appeal’ Decision on Defence Motions Alleging Defects in the Confirmation Decision.”¹⁶ Any participant in an appeal is obliged to substantiate his or her arguments within his or her filing in relation to that particular appeal and “cannot make submissions on appeal by incorporation of arguments advanced in other filings.”¹⁷ This appeal should thus be confined to matters specifically substantiated in the Ongwen Appeal.

(a) The Trial Chamber did not err in the characterisation of the issue for appeal (*contra* Ongwen’s first ground of appeal)

9. The Appeals Chamber should dismiss Ongwen’s argument that the Chamber erred by re-characterising the issue for which he sought leave to appeal.¹⁸

10. Ongwen’s first ground of appeal is directed against the Trial Chamber’s separate Decision on Leave to Appeal and not against the Impugned Decision. Ongwen has not been granted leave to appeal that separate decision. Accordingly,

¹⁴ [Ongwen Appeal](#), paras. 36-42.

¹⁵ [Impugned Decision](#), paras. 20-25, 36-37.

¹⁶ [Ongwen Appeal](#), para. 6.

¹⁷ [ICC-01/05-01/13-2275-Red](#), para. 532; [ICC-01/04-01/06-774 OA6](#), para. 29.

¹⁸ [Ongwen Appeal](#), paras. 10-15.

his arguments under the first ground of appeal should be rejected on this basis alone.

11. In addition, it is the Trial Chamber's prerogative "to state or more accurately still to certify the existence of an appealable issue"¹⁹ in an impugned decision. This is because article 82(1)(d) "does not confer a right to appeal interlocutory [...] decisions of either the Pre-Trial or the Trial Chamber."²⁰ Rather, "a right to appeal arises only if the Pre-Trial or Trial Chamber is of the opinion that such decision must receive the immediate attention of the Appeals Chamber."²¹ Consequently, "it is for the Pre-Trial or Trial Chamber to determine not only whether a decision may be appealed, but also to what extent."²²

12. The Appeals Chamber should therefore disregard Ongwen's arguments²³ that are entirely beyond the issue in relation to which he was granted leave to appeal. This would be consistent with the Appeals Chamber's practice.²⁴

13. Ongwen's reliance on *Lubanga* Appeal Decision 2953²⁵ is misplaced.²⁶ When seized with appeals under both article 82(4) and article 82(1)(d) in respect of the same impugned decision, the Appeals Chamber had to assess whether the Trial Chamber had properly characterised the impugned decision in order to determine "under which provision the Impugned Decision may be appealed."²⁷ The *Lubanga* Appeal Decision 2953 was therefore concerned with the nature of impugned decision rather than with how the Trial Chamber had exercised its powers in delimiting the appealable issues arising from the said impugned decision.²⁸

¹⁹ [ICC-01/04-168 OA3](#), para. 20; [ICC-02/11-01/11-572 OA5](#), para. 62.

²⁰ [ICC-02/11-01/11-572 OA5](#), para. 62.

²¹ [ICC-02/11-01/11-572 OA5](#), para. 62.

²² [ICC-02/11-01/11-572 OA5](#), para. 63.

²³ See e.g., [Ongwen Appeal](#), para. 29 (a) and (b) (concerning alleged jurisdictional challenge).

²⁴ See e.g., [ICC-02/11-01/11-572 OA5](#), para. 62.

²⁵ [ICC-01/04-01/06-2953](#), para. 50.

²⁶ [Ongwen Appeal](#), para. 15, footnote 17.

²⁷ [ICC-01/04-01/06-2953](#), para. 50.

²⁸ *Contra* [Ongwen Appeal](#), para. 15

14. For the reasons set out above, Ongwen's first ground of appeal should be rejected.

(b) The Trial Chamber correctly interpreted rule 134 (*contra* Ongwen's second ground of appeal)

15. Ongwen's second ground of appeal misunderstands the Impugned Decision. In dismissing Ongwen's notice objections for untimeliness without addressing their merits, the Trial Chamber correctly held that rule 134(2) required Ongwen to raise any potential defects in the Confirmation Decision prior to trial.²⁹ He did not. While noting that rule 134(2) does not entirely foreclose late challenges - the Trial Chamber retains discretion to grant a party leave to file a late challenge³⁰ - the Chamber also correctly concluded that "by providing that objections concerning the conduct of proceedings 'may not be raised or made again on a subsequent occasion,' the rule precluded parties from raising such challenges for the first time during trial when they had a reasonable opportunity do so earlier."³¹ It also correctly concluded that rule 134(3) was not applicable to the Ongwen situation, because it only governed motions on issues which '*arise during the course of the trial*'.³²

16. Ongwen's objections to the Confirmation Decision are not matters which were unforeseeable at the commencement of trial nor did they arise during the course of the proceedings.³³ To the contrary, Ongwen knew the content of the charges upon notification of the Confirmation Decision issued by Pre-Trial Chamber II.³⁴

²⁹ [Impugned Decision](#), paras. 19, 23. See more generally paras. 13-23.

³⁰ [Impugned Decision](#), para. 24.

³¹ [Ongwen Appeal](#), para. 14.

³² [Impugned Decision](#), para. 22.

³³ *Contra* [Ongwen Appeal](#), para. 20 (indicating that 'not all trial objections can be foreseen at the commencement of trial') and 22 ('[i]t would be illogical to assume that all potential issues would be foreseeable prior to the commencement of the trial proceedings').

³⁴ [Impugned Decision](#), para. 19 (stating that 'an ICC accused knows the full content of the charges upon notification of the pre-trial chamber's confirmation decision. All potential charges 'defects' arising from the confirmation decision can therefore be raised prior to trial').

17. Ongwen's second ground of appeal disregards all of the above. It should be dismissed on this basis alone.

18. Moreover, Ongwen's claim suggesting that rule 134 permitted an open-ended right for a party to raise objections throughout the proceedings and for the Chamber to address them (arguably on their merits),³⁵ is not supported.

19. To the contrary, there is nothing in rule 134 obligating the Trial Chamber to entertain any party's objections on the merits raised after the commencement of the trial, whether such objections are raised under rule 134(2) or rule 134(3). A Chamber is granted a margin of discretion, including dismissing such objections for untimeliness and to promote expeditiousness of the proceedings, after balancing all competing values.

20. This flows from the terms of rule 134, when construed in good faith in accordance with the ordinary meaning to be given to those terms in their context and in light of rule's objects and purpose, as required by the Vienna Convention.³⁶

21. By using the term "shall," the first sentence of rule 134(2) obligates a Chamber at the commencement of the trial to ask the parties if they have any objections concerning the conduct of the proceedings which have arisen since the confirmation hearing. On the other hand, the second sentence of rule 134(2) grants a Chamber broad discretion as to the appropriate action,³⁷ when it subjects any objection or observation raised by a party on subsequent occasion to the leave of the Chamber.³⁸ It specifically restricts any party failing to raise objections or observations at the

³⁵ [Ongwen Appeal](#), paras. 18-24.

³⁶ [ICC-01/04-01/06-1432](#), OA9 OA10, para. 55.

³⁷ [ICC-01/09-01/11-1334](#), para. 15 ("[R]ule 134 (...) confers broad powers on the Chamber to rule on 'any issues concerning the conduct of proceedings' [...]").

³⁸ Rule 134(2) ("[S]uch objections or observations may not be raised or made again on a subsequent occasion in the trial proceedings, *without the leave of the Trial Chamber* in this proceeding"). Emphasis added.

commencement of the trial from raising them again on a subsequent occasion in the trial proceedings “without *leave of the Trial Chamber* in this proceeding.”³⁹

22. By vesting a Chamber with “leave” powers, the second sentence of rule 134(2) presupposes that a party’s objections or observations under the rule will not always be granted or entertained on the merits as of right. Indeed, in relation to article 82(1)(d), which grants Pre-Trial and Trial Chambers “leave” powers regarding interlocutory appeals, the Appeals Chamber has emphasised that this means that the article “does not confer a right to interlocutory or intermediate decisions [...]”⁴⁰

23. Nor does rule 134(3) enshrine an open-ended right for the parties to raise objections throughout the proceedings, let alone an obligation on the Chamber to entertain any such objections on their merits.⁴¹ To the contrary, this provision concerns issues that “arise during the course of trial.” Complaints such as those Ongwen raised regarding alleged defects in the Confirmation Decision clearly arise before trial, and not during the course of trial. They thus fall within the scope of rule 134(2), but lie outside the scope of rule 134(3).

24. Even assuming, *arguendo*, that the Trial Chamber could have relied on rule 134(3),⁴² Ongwen’s appeal should nevertheless be rejected. *First*, even if the rule covers objections that could not have been “foreseen at the commencement of the trial,”⁴³ Ongwen does not show he could not have foreseen his extensive notice objections.⁴⁴

25. *Second*, like for motions filed after the commencement of the trial under rule 134(2), rule 134(3) vests in a Trial Chamber a margin of discretion. By stating that a

³⁹ Rule 134(2), second sentence. Emphasis added.

⁴⁰ [ICC-01/04-168 OA3](#), para. 20; [ICC-02/11-01/11-572 OA5](#), para. 62.

⁴¹ *Contra* [Ongwen Appeal](#), paras.18-24.

⁴² [Ongwen Appeal](#), paras. 21-24.

⁴³ [Ongwen Appeal](#), para. 20.

⁴⁴ Ongwen notice objections: [ICC-02/04-01/15-1430](#); [ICC-02/04-01/15-1431](#); [ICC-02/04-01/15-1432](#) and [ICC-02/04-01/15-1433](#).

Trial Chamber *may rule*⁴⁵ (instead of *shall rule*) on issues that arise during the course of the trial, rule 134(3) confers upon the Trial Chamber broad discretion to rule on such issues as it deems appropriate.⁴⁶ It does not oblige a Chamber to entertain each and every such issue on the merits. To the contrary, it may dismiss any such motions *in limine*, including for purposes of promoting procedural economy and expeditiousness by avoiding significant delays in the proceedings as the Chamber determined in Ongwen's case.

26. In this case, even if the Trial Chamber had considered Ongwen's challenges to the Confirmation Decision under rule 134(3), it would have been faced with the same set of facts relevant to its exercise of discretion under rule 134(2) and it would correctly have rejected Ongwen's objections on the same grounds.

27. The Trial Chamber's rejection *in limine* of Ongwen's notice objections for untimeliness in the interests of ensuring procedural economy and expeditiousness by avoiding significant delays in the proceedings,⁴⁷ is also supported by rule 134's drafting history. This history shows that the rule's principal object and purpose was to address trial delays as those experienced at the *ad hoc* Tribunals due to endless procedural challenges.⁴⁸ Indeed this object is reflected in the rule itself: at the trial's commencement, the Trial Chamber is required to ask the parties if they have any objections concerning the conduct of the proceedings that have arisen since the confirmation hearing. This is to enable the Chamber to resolve such objections to allow an uninterrupted trial. Moreover, such objections may not be subsequently raised, and in any event they are subjected to the Chamber's scrutiny. Ultimately,

⁴⁵ [ICC-01/04-169 OA](#), para. 48 (“The use of the word ‘may’ [*in article 19(1)*] indicates that a Chamber is vested with discretion as to whether the Chamber makes a determination of the admissibility of a case” – Emphasis added). See also [ICC-01/09-01/11-307 OA](#), para. 110 (“Under [*rule 58(2)*], the Pre-Trial Chamber *may* hold a hearing, but it is not obliged to do so. The Pre-Trial Chamber's decision not to convene an oral hearing was thus an exercise of its discretion” – material in brackets added for clarity).

⁴⁶ [ICC-01/09-01/11-1334](#), para. 15 (“[R]ule 134 (...) confers broad powers on the Chamber to rule (...) on ‘issues that arise during the course of the trial [...]’”).

⁴⁷ [Impugned Decision](#), paras. 20-25, 36-37.

⁴⁸ [Impugned Decision](#), para. 21, also citing Peter Lewis, ‘Trial Procedure,’ in *The International Criminal Court – Elements of Crimes and Rules of Procedure and Evidence* (Roy S. Lee et al (eds.), Transnational Publishers, 2001), p. 544.

since belated objections are an exception to the general rule that objections must be raised in a timely manner, they must be subjected to a stricter scrutiny.

28. For the reasons set out above, Ongwen's second ground of appeal should be rejected.

(c) The Trial Chamber properly exercised its rule 134(2) discretion in refusing to rule on the merits of Ongwen's notice objections (*contra* Ongwen's third ground of appeal)

29. Ongwen's alternative claim that even if the Chamber correctly relied on rule 134(2), it erred in its exercise of article 64(2) discretion by refusing to rule on the merits of his notice objections,⁴⁹ is without merit.

30. The Trial Chamber properly dismissed Ongwen's challenge to the Confirmation Decision for untimeliness. It correctly held that the purpose of rule 134(2) is "to ensure procedural economy and enable trial chambers to focus on the evidence at trial."⁵⁰ Moreover, it correctly held that rule 134(2) placed time-limits on objections on the notice of the charges in order to avoid significant delays in the conduct of the proceedings.⁵¹

31. Ongwen argues that at the heart of this ground of appeal is the Trial Chamber's dismissal of Ongwen's argument that fairness to the accused—rather than 'procedural' rules—is the determinative criterion whether his motion should have been entertained on the merits.⁵² This ground must fail. As the Trial Chamber rightly noted, that a Chamber must always act in fairness to the accused does not mean that an accused person can subvert the Court's carefully crafted regime by simply invoking 'fairness'.⁵³

⁴⁹ [Ongwen Appeal](#), paras. 25-35.

⁵⁰ [Impugned Decision](#), para. 23.

⁵¹ [Impugned Decision](#), para. 20.

⁵² [Ongwen Appeal](#), para. 25, referring to [Impugned Decision](#), para. 25.

⁵³ [Impugned Decision](#), para. 25.

32. A Chamber does not therefore necessarily err merely because it dismisses raising matters of fairness for being untimely. For example, in the *Katanga* case,⁵⁴ the Appeals Chamber confirmed the Trial Chamber's decision to reject a Defence motion alleging pre-surrender unlawful arrest and detention *in limine* because it had not acted in a timely manner.

33. Contrary to Ongwen's claim, the Trial Chamber correctly relied on the *Katanga* decision,⁵⁵ which held that the expeditiousness of the proceedings (one of the factors considered in the Impugned Decision⁵⁶) is "an independent and important value in the Statute to ensure the proper administration of justice and is therefore more than just a component of the fair trial rights of the accused."⁵⁷

34. Moreover, Ongwen does not show that the Chamber erred in the exercise of its discretion. Instead, Ongwen wrongly construes the Trial Chamber's factual assessment. He incorrectly claims he had raised objections concerning the Confirmation Decision both at the pre-trial and trial levels.⁵⁸ Yet, as the Chamber noted, all the materials he refers to are general statements that cannot constitute concrete allegations of the defects in the pleading of the charges or the notice received.⁵⁹ Ongwen cannot substitute such general statements with the belated detailed notice objections.⁶⁰

35. To the contrary, the Chamber properly exercised its discretion in dismissing *in limine* Ongwen's overly belated notice objections, considering the following factors:

⁵⁴ [ICC-01/04-01/07-2259 OA10](#) cited in the [Impugned Decision](#), fn. 47.

⁵⁵ [Ongwen Appeal](#), paras. 26-27; [Impugned Decision](#), para. 25.

⁵⁶ [Impugned Decision](#), paras. 20-25, 36-37.

⁵⁷ [ICC-01/04-01/07-2259 OA10](#), para. 47.

⁵⁸ [Ongwen Appeal](#), paras. 29-30.

⁵⁹ [Impugned Decision](#), paras. 26-27.

⁶⁰ Ongwen notice objections: [ICC-02/04-01/15-1430](#); [ICC-02/04-01/15-1431](#); [ICC-02/04-01/15-1432](#) and [ICC-02/04-01/15-1433](#).

- Ongwen did not raise any concrete objection to the charges before or at the commencement of the trial despite being specifically asked by the Presiding Judge under rule 134(2) whether he had any objections;⁶¹
- Ongwen only raised the alleged notice defects on 1 February 2019⁶² almost three years after the issuance of the Confirmation Decision,⁶³ more than two years after the commencement of trial,⁶⁴ at a stage where the Prosecution had closed its case and at a time when the Defence was well into the presentation of its own case;
- Ongwen failed to offer an explanation why he waited for so long to advance the objections to the Confirmation Decision;⁶⁵
- Ongwen's arguments as to why his objections should be allowed at this late hour were also unpersuasive:⁶⁶ they focused on the erroneous claim that fairness to the accused was the sole determinative criterion on whether its belated objections should be allowed, and that mere 'procedural' rules, must always be subordinated to fairness.
- Ongwen had suffered no prejudice in the conduct of his case from his alleged notice defects,⁶⁷ as (a) he had all relevant material including the Prosecution evidence, he had conducted an effective defence and had the opportunity to object to any potentially prejudicial effect of every item of evidence throughout the Prosecution's evidence presentation;⁶⁸ (b) the Trial Chamber

⁶¹ [Impugned Decision](#), para. 26.

⁶² Ongwen's notice objections: [ICC-02/04-01/15-1430](#); [ICC-02/04-01/15-1431](#); [ICC-02/04-01/15-1432](#) and [ICC-02/04-01/15-1433](#).

⁶³ [ICC-02/04-01/15-422-Red](#), 23 March 2016.

⁶⁴ Ongwen's trial commenced on 6 December 2016.

⁶⁵ [Impugned Decision](#), para. 24.

⁶⁶ [Impugned Decision](#), paras. 24-25.

⁶⁷ [Impugned Decision](#), paras. 28-29.

⁶⁸ [Impugned Decision](#), para. 28.

will consider Ongwen's arguments during its deliberations for the article 74 judgment,⁶⁹ and (c) the Trial Chamber will not use any evidence against Ongwen "in any manner which would exceed the scope of the charges or could not have been reasonably anticipated."⁷⁰

36. Ongwen fails to show that the Trial Chamber erred in the exercise of discretion by relying on the above factors.

37. In addition, Ongwen incorrectly argues that before the *ad hoc* Tribunals, "fair trial issues including defects on the indictment"⁷¹ can be raised and considered by the Trial Chamber at any time,⁷² without limits or consequences. This argument is inapposite because the *ad hoc* Tribunals do not have provisions identical to the Court's rule 134 and their legal regimes are more flexible on the timeliness for the defence to raise objections to pleadings.⁷³ In any event the *ad hoc* Tribunals' case-law does not rule out such objections' *in limine* dismissal by Trial Chambers for belatedness.⁷⁴ In addition, in determining which party bears the burden of demonstrating whether the alleged defects were prejudicial and the appropriate remedy, the *ad hoc* Tribunals' case-law has considered as relevant not only the timeliness of such objections but also whether the defence provides an explanation for its late objections. Where the accused fails to raise such objections at all, or does so belatedly and without justification, both during trial and on appeal, he or she

⁶⁹ [Impugned Decision](#), para. 28.

⁷⁰ [Impugned Decision](#), para. 29.

⁷¹ [Ongwen Appeal](#), para. 31.

⁷² [Ongwen Appeal](#), para. 31.

⁷³ See the ICTY's rule 72(A), the ICTR's rule 72(A) and the SCSL's rule 72(A). They include deadlines when preliminary motions may be submitted, but they do not explicitly prohibit such issues being raised again after the commencement of the trial. See also [Impugned Decision](#), para. 21, fn. 40

⁷⁴ *Prosecutor v. Niyitegeka*, Judgment, [ICTR-96-14-A](#), 9 July 2004, para. 199 (also citing *Prosecutor v. Kayishema & Ruzindana*, Judgment (Reasons), [ICTR-95-1-A](#), para. 91 and the ICTY's *Prosecutor v. Kupreskić et al.*, Appeal Judgement, [IT-95-16-A](#)) (In general, "a party should not be permitted to refrain from making an objection to a matter which was apparent during the course of the trial, and to raise it only in the event of an adverse finding against that party. Failure to object in the Trial Chamber will usually result in the Appeals Chamber disregarding the argument on the ground of waiver. In the case of objections based on lack of notice, the Defence must challenge the admissibility of evidence of material facts not pleaded in the indictment by interposing a specific objection at the time the evidence is introduced. The Defence may also choose to file a timely motion to strike the evidence or to seek an adjournment to conduct further investigations in order to respond to the unpleaded allegation").

bears the burden of demonstrating that his or her ability to defend herself or himself was materially impaired.

38. Indeed, “defence objections to the indictment based on lack of notice should be timely in that they should be raised either at the pre-trial stage (in a motion challenging the indictment) or at the time the evidence of a new material fact is introduced.”⁷⁵ Moreover, in the *Bagosora* case, the ICTR Appeals Chamber held as follows:⁷⁶

[w]hen [an] objection based on lack of notice is raised at trial (albeit later than at the time the evidence was adduced), the Trial Chamber should determine whether the objection was so untimely as to consider that the burden of proof has shifted from the Prosecution to the Defence in demonstrating whether the accused’s ability to defend himself has been materially impaired. In doing so, the Chamber should take into account factors such as whether the Defence has provided a reasonable explanation for its failure to raise its objection at the time the evidence was introduced, and whether the Defence has shown that the objection was raised as soon as possible thereafter.

39. Ongwen thus fails to show that the Trial Chamber erred in the exercise of its discretion. His third ground of appeal should therefore be dismissed.

(d) The Trial Chamber correctly applied rule 134 (*contra* Ongwen’s fourth ground of appeal)

40. The Trial Chamber correctly applied rule 134 and the purposes it serves when it dismissed *in limine* Ongwen’s belated notice objections.⁷⁷

41. Similar to his *third ground if appeal*, Ongwen argues in his fourth ground that the Chamber erred in not ruling on his objections because these challenges “have the potential to considerably influence the charged crimes.”⁷⁸ Ongwen’s claim that the

⁷⁵ *Prosecutor v. Karadžić*, Decision on Accused’s motion for relief from defects in the indictment, [IT-95-5/18-T](#) para. 18.

⁷⁶ *Prosecutor v. Bagosora et al*, Decision on Aloys Ntabakuze’s interlocutory appeal on questions of law raised by the 29 June 2006 Trial Chamber I Decision on motion for exclusion of evidence, [ICTR-98-41-AR73](#), para. 45.

⁷⁷ *Contra Ongwen Appeal*, paras. 36-42.

⁷⁸ *Ongwen Appeal*, para. 39.

Chamber's decision "is antithetical to the core principles of the Statute"⁷⁹ is unsupported, and his suggestion that article 21(3) requires the Chamber to rule on his objections is incorrect.⁸⁰ Ongwen disregards that the Trial Chamber correctly applied the applicable law. A Chamber must apply in the first place, the Statute, Elements of Crimes and its Rules of Procedure and Evidence.⁸¹ This is what the Chamber did when it applied rule 134. Moreover, the Chamber's Decision was consistent with internationally recognised human rights.⁸² Although Ongwen had not raised any alleged defects since the issuance of the Confirmation Decision almost three years earlier, the Chamber also afforded him a further opportunity to do so under rule 134. At the commencement of his trial, the Presiding Judge specifically asked him whether he had any objections.⁸³ Ongwen did not do so. Instead, he belatedly raised the objections more than two years after the commencement of the trial.⁸⁴

42. Moreover, and as noted above, the Trial Chamber correctly considered rule 134's objects and purposes, including the need to ensure procedural economy and expeditiousness by avoiding significant delays in the proceedings.⁸⁵ These are important values within the Statute.

43. In addition, a trial that is unduly delayed will not comply with the accused's right under article 67(1)(c) to be tried without undue delay. Therefore, "requiring the accused person to act in an expeditious manner is not in itself inconsistent with full respect for his rights [...]. [T]he accused's rights are given full respect so long as the accused person has been given the adequate opportunity to assert them."⁸⁶

⁷⁹ *Contra* [Ongwen Appeal](#), para. 39.

⁸⁰ *Contra* [Ongwen Appeal](#), para. 41.

⁸¹ Article 21(1)(a) of the Rome Statute.

⁸² See e.g. [Impugned Decision](#), fn. 54.

⁸³ [Impugned Decision](#), para. 26 (referring to Trial Transcripts [ICC-02/04-01/15-T-26-ENG](#), pp. 21-22).

⁸⁴ Ongwen's trial commenced on 6 December 2016.

⁸⁵ [Impugned Decision](#), paras. 20-25, 36-37.

⁸⁶ [ICC-01/04-01/07-2259 OA10](#), para. 64.

44. Ongwen does not show that he was denied opportunity to exercise his rights. He had access to the Confirmation Decision as soon as it was issued, but did not raise any notice objections until almost three years had elapsed during the presentation of his defence. He did not even raise any objections when specifically asked by the Presiding judge at the commencement of his trial, as shown in response to his third ground of appeal.

45. Nor does Ongwen demonstrate that the Chamber accorded procedural economy and expeditious conduct of the proceedings undue weight “at the expense of other rights of the accused.”⁸⁷ As argued in response to Ongwen’s third ground appeal, the Trial Chamber considered all relevant factors before it and properly exercised its discretion in dismissing *in limine* Ongwen’s unduly belated notice objections in the interest of procedural economy and expeditiousness by avoiding significant delays in the proceedings.

46. For the reasons set out above, Ongwen’s fourth ground of appeal should be rejected.

III. CONCLUSION

47. Based on the foregoing, the Appeals Chamber should dismiss Ongwen’s Appeal.



Fatou Bensouda, Prosecutor

Dated this 23rd day of April 2019
At The Hague, The Netherlands

⁸⁷ [Ongwen Appeal](#), para. 42.