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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

Prosecution's Submission in response to "Order for Further Submissions" (ICC-02/04-01/15-1524)

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The Office of the Prosecutor

Ms Fatou Bensouda
Mr James Stewart
Ms Helen Brady

Counsel for the Defence

Mr Krispus Ayena Odongo
Mr Charles Achaleke Taku

Legal Representatives of Victims

Mr Joseph Akwenyu Manoba
Mr Francisco Cox
Ms Paolina Massidda

Common Legal Representatives for Victims

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

The Office of Public Counsel for the Defence

States Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section Other**

I. INTRODUCTION

1. The Prosecution files the following submissions in response to the four questions identified by the Appeals Chamber in its Order for Further Submissions¹ concerning Mr Ongwen's appeal² against Trial Chamber IX's Decision on alleged defects in the Confirmation Decision.³

2. The Prosecution is of the view that questions 1 and 2 are primarily addressed to Mr Ongwen and he is therefore best placed to respond to those questions at this stage. The Prosecution will address them only very briefly. After receiving Mr Ongwen's submissions on the matter, the Prosecution will assess if there is a need for it to seek leave to reply.

3. In the Prosecution's view, question 3 regarding the scope of rule 134 of the Rules of Procedure and Evidence ("Rules") deserves a more detailed answer. It will address that question first.

4. For question 4, the Prosecution has no further submissions additional to those it has already made before this Chamber and the Trial Chamber on the matter. It will therefore largely cross-refer to its previous submissions.

II. SUBMISSIONS

A. Question 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 proceedings' limited to procedural aspects or can substantive aspects be raised as well?

5. Rule 134 concerns "[m]otions relating to the trial proceedings."⁴ Rule 134(1) and (2) are expressly limited to matters pertaining to the "conduct of the proceedings" and rule 134(3) concerns issues that arise "during the course of the

¹ ICC-02/04-01/15-1524 ("Order").

² ICC-02/04-01/15-1496 ("Ongwen Appeal").

³ ICC-02/04-01/15-1476 ("Impugned Decision").

⁴ Rule 134 heading.

trial.” In general, therefore, rule 134 pertains to issues relating to how the trial proceedings are to be conducted, rather than how a trial chamber should rule on the merits of a particular observation, objection or motion from a party—whether these are procedural or substantive in nature. Rule 134 gives the Trial Chamber discretion to dismiss a party’s observation, objection or motion *in limine* if they are not raised at a certain point in time during the proceedings. And the Chamber commits no error as long as it affords the parties the opportunity to be heard, as happened in this case.⁵ This rule is consistent with the Chamber’s duty under article 64(2) to ensure that the trial is fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses. The drafting history of rule 134 confirms the rule’s principal object and purpose was to address and prevent trial delays due to endless procedural challenges.⁶

6. Mr Ongwen’s challenges to the formulation of the charges could properly be dealt with by reference to rule 134 and the Trial Chamber was correct to dismiss those arguments *in limine*.⁷ The procedural issue before the Trial Chamber was not *how* it may eventually rule on any issues regarding the formulation of the charges, but *when* it must make such a ruling. According to rule 134 (1) and (2), if Mr Ongwen wanted the Trial Chamber to rule on the merits of his challenge to the formulation of the charges, he had a duty to raise this issue prior to or at the commencement of the trial. This is because such issues concern the conduct of the proceedings “which have arisen since the confirmation hearing[.]”⁸ In the absence of a timely request by Mr Ongwen on the matter, the Trial Chamber was correct to dismiss his belated challenges *in limine*.

⁵ See below, paras. 15, 22.

⁶ 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), pp. 543-544.

⁷ Impugned Decision, para. 36.

⁸ Rule 134(2).

7. Similarly, the Trial Chamber was correct to dismiss *in limine* Mr Ongwen's belated arguments challenging the Court's subject-matter jurisdiction over the mode of liability of indirect co-perpetration and the crime against humanity of forced marriage as an inhumane act.⁹ Article 19(4) provides that a challenge to the Court's jurisdiction "shall take place prior to the commencement of the trial" and that this rule may be derogated from only in "exceptional circumstances" and with the Court's leave. According to rule 133, a challenge to the Court's jurisdiction at the commencement of the trial, or subsequently with the leave of the Court, shall be dealt with in accordance with rule 58, which at sub-paragraph (2) provides that a Chamber in addressing a jurisdictional challenge must ensure that the proceedings followed "not cause undue delay".

8. The Trial Chamber did not err in dismissing Mr Ongwen's jurisdictional challenges as a procedural matter on the basis that they "are untimely and no exceptional circumstances justify their consideration at this point during the trial".¹⁰ The Chamber's decision not to address the merits of his jurisdictional challenge at this point in the proceedings must be distinguished from the substantive decision that the Trial Chamber may eventually make on the merits of the Court's jurisdiction over the mode of liability of indirect co-perpetration and the crime against humanity of forced marriage as an inhumane act. As the Trial Chamber expressly stated, it "will decide upon the proper legal interpretation of the charged crimes and the modes of liability in the applicable law of its judgement".¹¹

9. There are a myriad of matters that could potentially fall within the scope of rule 134 as relating to the "conduct of the proceedings" (rule 134(2)) or as arising "during the course of the trial" (rule 134(3)). The former could include, for example, witness related issues, disclosure of evidence, fitness of the accused, joint trial or severance

⁹ Impugned Decision, paras. 36-37.

¹⁰ Impugned Decision, para. 37.

¹¹ Impugned Decision, para. 37.

issues, the admission and/or submission of evidence, and alleged defects in the notification of charges, among others. Concerning the latter, issues could include, for example, the manner of victims' interventions, no case to answer submissions, whether a joint trial was still appropriate and other evidence related issues, among others. However, it would exceed the scope of this appeal, and it would not be necessary, for the Appeals Chamber to definitely rule on the general scope of rule 134. For the Appeals Chamber to address the issue before it, it is sufficient to determine that belated challenges to the formulation of the charges and the Court's subject matter jurisdiction can properly be dismissed *in limine* by a Trial Chamber under rule 134 and/or article 19, read in conjunction with rules 133 and 58(2).

10. In any event, even if Mr Ongwen's belated challenges to the formulation of the charges and the Court's subject-matter jurisdiction are not regarded as issues falling within the scope of rule 134 and/or article 19, read in conjunction with rules 133 and 58(2), the Trial Chamber was still correct to dismiss them *in limine*.

11. Under article 64(8)(b), the Presiding Judge has broad discretion to give directions on the conduct of the proceedings, subject to the Trial Chamber's duty under article 64(2) to ensure that the trial is fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses. Accordingly, the Chamber's discretion includes a prerogative to dismiss a party's objections for untimeliness in order to promote the expeditiousness of the proceedings, after balancing all competing values.

12. In *Katanga*,¹² the Appeals Chamber upheld the Trial Chamber's dismissal of an untimely motion raising fair trial objections and seeking a substantive remedy in the form of stay of proceedings. The Appeals Chamber underscored that "expeditiousness was an independent and important value in the Statute to ensure

¹² ICC-01/04-01/07-2259 OA10, also cited in the Impugned Decision, fn. 47.

the proper administration of justice, and was therefore more than just a component of the fair trial rights of the accused".¹³

13. The Appeals Chamber specifically rejected an argument similar to that now raised by Mr Ongwen¹⁴ namely that, the alleged importance of the subject of the objection, such as it being concerned with the accused's fair trial rights, renders timely objection irrelevant.¹⁵ In its view, "it cannot be correct, as Mr Katanga argued, that such a motion may be brought at any time of the proceedings, regardless of the facts and circumstances of the case, fairness to the other parties and participants, and the statutory requirements of expeditiousness".¹⁶

14. Accordingly, and contrary to Mr Ongwen's similar arguments,¹⁷ the Appeals Chamber held that the "full respect for the rights of the accused does not mean that a Trial Chamber may not control the manner in which an accused person acts in the proceedings".¹⁸ Rather, "a party to a proceeding who claims to have an enforceable right must exercise due diligence in asserting such a right. This is as it should be in order for the Trial Chamber to take account of the interests of the other parties to and participants in the proceedings and of the statutory injunction for fairness and expeditiousness".¹⁹ Parties "must submit motions with repercussions on the conduct of the trial in a "timely manner'."²⁰

15. The Appeals Chamber also confirmed that a violation of an accused's fair trial rights cannot be established by a Chamber's *in limine* dismissal of the accused's belated objections, as long as it can be shown, as occurred in the present case, that the accused was afforded the opportunity to raise them. Indeed, "requiring the

¹³ ICC-01/04-01/07-2259 OA10, para. 47.

¹⁴ Ongwen Appeal, e.g., paras. 25-26.

¹⁵ ICC-01/04-01/07-2259 OA10, para. 49.

¹⁶ ICC-01/04-01/07-2259 OA10, para. 49, also referring to para.33.

¹⁷ Ongwen Appeal, e.g., paras. 25-26.

¹⁸ ICC-01/04-01/07-2259 OA10, para. 53.

¹⁹ ICC-01/04-01/07-2259 OA10, para. 54

²⁰ ICC-01/04-01/07-2259 OA10, para. 54.

accused person to act in an expeditious manner is not in itself inconsistent with full respect for his rights".²¹ Here, at the commencement of his trial, the Presiding Judge specifically asked the parties whether they had any rule 134(2) objections to make.²² Mr Ongwen raised no concrete objections.²³ When Mr Ongwen belatedly submitted his detailed objections to the formulation of the charges and the Court's subject matter jurisdiction, the Chamber had the benefit of assessing both his submissions and the Prosecution's response before deciding to dismiss Mr Ongwen's objections *in limine*.

16. In conclusion, Mr Ongwen's Appeal should be dismissed whether his challenges to the formulation of the charges and the Court's subject matter jurisdiction are found to fall within the scope of rule 134 or not.

B. Questions 1 and 2: Which are the specific issues that, in the view of Mr Ongwen, arose during the course of the trial warranting the application of rule 134(3), and why did Mr Ongwen raise concrete alleged defects in the confirmation decision three years after it was issued?

17. Mr Ongwen is best placed to respond to these questions, as they are directly addressed to him. However, if in responding to those questions Mr Ongwen raises new facts and arguments, the Prosecution will assess whether to seek leave to leave to reply to his submissions.

18. At this stage, the Prosecution merely stresses the following two points: *First*, in his motion to the Trial Chamber,²⁴ Mr Ongwen has already explained why he objected to the confirmation decision at this late stage. Mr Ongwen should not be allowed at this late stage to modify these reasons.

²¹ ICC-01/04-01/07-2259 OA10, para. 64.

²² ICC-02/04-01/15-T-26-ENG, p. 21, lines 13-18 ("[N]oting 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 leave of the Chamber").

²³ ICC-02/04-01/15-T-26-ENG, p. 21, line 22 to p. 22, line 4.

²⁴ See e.g., ICC-02/04-01/15-1430, para. 52. See also Impugned Decision, para. 28.

19. At the commencement of the trial, the Presiding Judge specifically asked the parties whether they had any rule 134(2) objections to make since the confirmation hearings. Mr Ongwen raised no concrete objections.²⁵ When Mr Ongwen belatedly raised alleged defects in the confirmation decision, three years after it was issued, he offered no valid explanation for why his challenges were made so late. He stated that he required “details of the evidence upon which the Prosecution relied, and the [Pre-Trial Chamber] confirmed to mount a defence and to investigate thoroughly”.²⁶

20. *Second*, given that appellate review of a Trial Chamber’s decision is corrective, and not a *de novo* review,²⁷ the Appeals Chamber should not overturn the Impugned Decision based on facts that Mr Ongwen did not place before the Trial Chamber while being in position to do so.

C. Question 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?

21. Mr Ongwen’s submissions that his fair trial rights were violated, including those under article 67(1)(a),²⁸ lack merit. The Prosecution respectfully refers the Appeals Chamber to the lengthy submissions it has already made in this regard before this Chamber²⁹ and the Trial Chamber.³⁰ The following briefly summarises its position.

22. *First*, as already argued before this Chamber, by dismissing Mr Ongwen’s objections *in limine*, the Trial Chamber properly concluded that Mr Ongwen would

²⁵ Impugned Decision, paras. 26-27.

²⁶ ICC-02/04-01/15-1430, para. 52. See also Impugned Decision, para. 28.

²⁷ ICC-02/05-03/09-295 OA2, para. 20; ICC-01/09-02/11-202 OA, paras. 11-12.

²⁸ Ongwen Appeal, paras. 37-42; ICC-02/04-01/15-1430, paras. 18, 19, 36, 54-59.

²⁹ See in particular, ICC-02/04-01/15-1502, paras. 29-36; 44-45.

³⁰ ICC-02/04-01/15-1463.

not suffer prejudice.³¹ It did so after hearing Mr Ongwen’s detailed objections to the formulation of the charges and the Court’s subject matter jurisdiction, and the Prosecution’s response. The Trial Chamber further held that it would consider Mr Ongwen’s arguments again during its deliberations on the article 74 judgment,³² and would not use any evidence against him “in any manner which would exceed the scope of the charges or could not have been reasonably anticipated”.³³

23. *Second*, as also already argued before the Trial Chamber, Mr Ongwen’s objections to alleged defects in the Confirmation Decision are without basis.³⁴ They conflate the “charges” (which have been properly identified) with the “evidence” underlying those charges (which need not be pleaded),³⁵ and interpret the Confirmation Decision in a piecemeal fashion. Ultimately, they ignore that the Decision provided adequate notification of the material allegations underpinning the crimes and the modes of liability alleged against him.³⁶

24. The Prosecution respectfully requests the Appeals Chamber to dismiss Mr Ongwen’s appeal against the Trial Chamber’s decision to dismiss *in limine* his recent and belated challenges to the formulation of the charges and the Court’s subject-matter jurisdiction.



Fatou Bensouda, Prosecutor

Dated this 31th May 2019
At The Hague, the Netherlands

³¹ See in particular ICC-02/04-01/15-1502, paras. 29-36; 44-45.

³² Impugned Decision, para. 28.

³³ Impugned Decision, para. 29.

³⁴ ICC-02/04-01/15-1463.

³⁵ ICC-02/04-01/15-1463, paras. 10-17.

³⁶ ICC-02/04-01/15-1463, paras. 18-88.