

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 03 June 2019

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

**CLRV's Further Submissions Pursuant to
the Appeals Chamber's Order**

Source: **Office of Public Counsel for Victims**

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

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I. PROCEDURAL HISTORY

1. On 1 February 2019, the Defence filed four motions alleging, *inter alia*, lack of notice to the Accused and certain deficiencies in the decision confirming the charges against Mr Ongwen (“the Initial Requests”).¹ On 5 February 2019, the Prosecution requested Trial Chamber IX (the “Trial Chamber”) to dismiss *in limine* the Initial Requests.² On 6 February 2019, the Trial Chamber declined to dismiss said Requests, instructing the Prosecution and the Legal Representatives of Victims to file their consolidated responses to the Defence’s submissions by 25 February 2019.³ On 25 February 2019, the CLRV,⁴ the Prosecution⁵ and the Legal Representatives of Victims⁶ filed their responses to the Initial Requests.

2. On 7 March 2019, the Trial Chamber issued the “Decision on Defence Motions Alleging Defects in the Confirmation Decision” (the “Impugned Decision”).⁷ On 14 March 2019, the Defence filed a Request seeking leave to appeal the Impugned

¹ See the “Defence Motion on Defects in the Confirmation of Charges Decision: Defects in Notice and Violations of Fair Trial (Part I of the Defects Series)”, No. ICC-02/04-01/15-1430, 1 February 2019; the “Defence Motion on Defects in the Confirmation of Charges Decision: Defects in the Modes of Liability (Part II of the Defects Series)”, No. ICC-02/04-01/15-1431, 1 February 2019; the “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)”, No. ICC-02/04-01/15-1432, 1 February 2019; and the “Defence Motion on Defects in the Confirmation of Charges Decision: Defects in the Charged Crimes (Part IV of the Defects Series)”, No. ICC-02/04-01/15-1433, 1 February 2019 (cumulatively referred to as the “Initial Requests”).

² See the “Prosecution request for dismissal, *in limine*, of the ‘Defence Motion on Defects in the Confirmation of Charges Decision: Defects in Notice and Violations of Fair Trial’ dated 1 February 2019”, No. ICC-02/04-01/15-1436, 6 February 2019.

³ See the “Decision on Responses to the ‘Defects Series’ Following Prosecution Request for Dismissal” (Trial Chamber IX, Single Judge), No. ICC-02/04-01/15-1438, 6 February 2019.

⁴ See the “CLR V Response to the Defence’s Four Requests on Defects in the Confirmation of Charges Decision”, No. ICC-02/04-01/15-1461, 25 February 2019.

⁵ See the “Prosecution Response the ‘Defence Motion on Defects in the Confirmation of Charges Decision: Defects in Notice and Violations of Fair Trial’ dated 1 February 2019”, No. ICC-02/04-01/15-1463, 25 February 2019.

⁶ See the “Corrigendum to the Victims’ Response to ‘Defence Motion on Defects in the Confirmation of Charges Decision’ (Parts I-IV)”, No. ICC-02/04-01/15-1464-Corr, 25 February 2019 (notified on 26 February 2019).

⁷ See the “Decision on Defence Motions Alleging Defects in the Confirmation Decision” (Trial Chamber IX), No. ICC-02/04-01/15-1476, 7 March 2019 (the “Impugned Decision”).

Decision on two issues (the “Leave to Appeal Request”).⁸ On 18 March 2019, the Prosecution⁹ and the CLRV¹⁰ responded to the Leave to Appeal Request. On 1 April 2019, the Trial Chamber granted the Leave to Appeal Request in respect of one issue.¹¹ On 11 April 2019, the Defence filed its Appeal Brief.¹² On 23 April 2019, the Prosecution¹³ and the CLRV¹⁴ filed their responses to the Appeal Brief.

3. On 24 May 2019, the Appeals Chamber rendered the Order for Further Submissions (the “Order”), inviting the parties and participants to file additional observations on four issues by 31 May 2019.¹⁵ On 31 May 2019, pursuant to regulation 35(2) of the Regulations of the Court, the CLRV requested the Appeals Chamber to extend the deadline to file her further submissions until 3 June 2019.¹⁶ On the same day, the Appeals Chamber granted the CLRV’s request and equally extended the time limit for the parties and participants to file their further

⁸ See the “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’”, No. ICC-02/04-01/15-1480, 14 March 2019 (the “Leave to Appeal Request”).

⁹ See the “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’”, No. ICC-02/04-01/15-1486, 18 March 2019.

¹⁰ See the “CLRV’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’”, No. ICC-02/04-01/15-1484, 18 March 2019.

¹¹ See the “Decision on Defence Request for Leave to Appeal a Decision on Motions Alleging Defects in the Confirmation Decision” (Trial Chamber IX), No. ICC-02/04-01/15-1493, 1 April 2019.

¹² See the “Defence’s appeal against the ‘Decision on Defence Motions Alleging Defects in the Confirmation Decision’”, No. ICC-02/04-01/15-1496 OA4, 11 April 2019.

¹³ See the “Prosecution’s Response to “Defence’s appeal against the ‘Decision on Defence Motion Alleging Defects in the Confirmation Decision’”, No. ICC-02/04-01/15-1502 OA4, 23 April 2019.

¹⁴ See the “CLRV’s Response to ‘Defence’s Appeal Against the Decision on Defence Motions Alleging Defects in the Confirmation Decision’”, No. ICC-02/04-01/15-1503 OA4, 23 April 2019.

¹⁵ See “Order for Further Submissions” (The Appeals Chamber), No. ICC-02/04-01/15-1524 OA4, 24 May 2019, p. 3.

¹⁶ See the “CLRV’s Request for an Extension of Time Limit”, No. ICC-02/04-01/15-1529-Conf OA4, 31 May 2019.

submissions to 3 June 2019.¹⁷ Nonetheless, the Prosecution¹⁸ and the Legal Representative of Victims¹⁹ filed their further submissions in the course of the day.

II. ADDITIONAL SUBMISSIONS

4. The CLRV notes that the Defence is better placed to answer questions 1, 2 and 4 in the Order because said questions specifically relate to the arguments raised by the Defence. Therefore, the CLRV will only address in these submissions the issue raised in question 3 of the Order.

5. The CLRV submits that the provisions of rule 134 of the Rules of Procedure and Evidence (the “Rules”) are clear. Sub-rule 134(1) states that “[p]rior to the commencement of the trial, the Trial Chamber on its own motion, or at the request of the Prosecutor or the defence, may rule on any issue concerning the conduct of the proceedings”.²⁰ Sub-rule 134(2) indicates that “[a]t the commencement of the trial, the Trial Chamber shall ask the Prosecutor and the defence whether they have any objections or observations concerning the conduct of the proceedings which have arisen since the confirmation hearings”.²¹

6. Consequently, in accordance with the ordinary meaning of these provisions, *any issue* or *any objections* or observations concerning the conduct of the proceedings may be raised pursuant to said Rule prior to and at the commencement of the trial. While some commentators argued that the formation of rule 134 was a direct response to the concerns regarding the fact that the proceedings at the *ad hoc*

¹⁷ See the “Decision on the Victims’ request for time extension (Appeals Chamber)”, No. ICC-02/04-01/15-1530 OA4, 31 May 2019.

¹⁸ See the “Prosecution’s Submission in response to ‘Order for Further Submissions’ (ICC-02/04-01/15-1524)”, No. ICC-02/04-01/15-1532 OA4, 31 May 2019.

¹⁹ See the “Victims’ submissions in response to the Order for Further Submissions”, No. ICC-02/04-01/15-1531 OA4, 31 May 2019.

²⁰ Emphasis added.

²¹ Emphasis added.

tribunals were being delayed by endless procedural challenges,²² there is no indication in the definitive texts of these provisions that the drafters of the Rules intended to limit potential objections or observations concerning the conduct of the proceedings only to procedural aspects of the trial. There appears simply no qualification to that effect. Rather these texts clearly provide for *any* issue or *any* objections or observations concerning the conduct of the proceedings. Thus, it could be concluded that these terms are inclusive of *any* issue concerning substantive aspects of the trial as well. For this reason, sub-rule 134(2) of the Rules ensures that both *procedural* and *substantive* issues are well settled before the trial commences.²³

7. This is contrasted with sub-rule 134(3) which states that “[a]fter the commencement of the trial, the Trial Chamber, on its own motion, or at the request of the Prosecutor or the defence, may rule on issues that arise during the course of the trial”.²⁴ In other words, after the start of the trial, only those issues that rose during the trial proceedings may be raised pursuant to said sub-rule, not *any* issues as provided in sub-rules 134(1) and (2) of the Rules. Therefore, it is apparent that the object and purpose of these sub-rules are to reinforce the letter and spirit of the Statute that ensure the predictability, legal certainty and fair and expeditious conduct of the proceedings for the benefit of all parties and participants who are expected to act with due diligence.²⁵

8. Therefore, the CLRV posits that the Trial Chamber correctly reasoned in the Impugned Decision that, in providing that objections or observations concerning the conduct of the proceedings may not be raised or made again on a subsequent occasion, sub-rule 134(2) of the Rules precludes the parties from raising such

²² See PETER (L), *Trial Procedure*, in LEE (R.S.) (Ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence*, Ardsley, N.Y., Transnational Publishers, 2001, p. 543.

²³ *Idem*.

²⁴ Emphasis added.

²⁵ See the “Judgment on the Appeal of Mr Katanga Against the Decision of Trial Chamber II of 20 November 2009 Entitled ‘Decision on the Motion of the Defence for Germain Katanga for a Declaration on Unlawful Detention and Stay of Proceedings’” (Appeals Chamber), No. ICC-01/04-01/07-2259 OA10, 12 July 2010, paras. 43 and 53-54.

challenges for the first time during the trial when they had a reasonable opportunity to do so earlier.²⁶ While the Trial Chamber did not make an explicit distinction between such issues being labelled either as *procedural* or *substantive* or both in the Impugned Decision, the alleged defects in charges arising from the confirmation decision can certainly be characterised as a substantive aspect of the trial.

9. Consequently, the CLRV further submits that the Trial Chamber did correctly rule that sub-rule 134(2) of the Rules is specifically designed to ensure that procedures which occurred between the confirmation hearing and the commencement of the trial are settled before the latter commences and thus challenges to the sufficiency of the confirmation decision fall within both the letter and intended purpose of said provision.²⁷ This interpretation is also in conformity with the established jurisprudence of the Appeals Chamber's that the provisions of the Rules must be interpreted according to their ordinary meaning in their context and in light of their object and purpose.²⁸

Respectfully submitted,



Paolina Massidda
Principal Counsel

Dated this 3rd day of June 2019

At The Hague, The Netherlands

²⁶ See the Impugned Decision, *supra* note 7, para. 14.

²⁷ *Idem*, paras. 22-23.

²⁸ See the "Judgment on the appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled 'Judgment pursuant to Article 74 of the Statute'" (Appeals Chamber), No. ICC-01/05-01/13-2275-Red A A2 A3 A4 A5, 08 March 2018, para. 675.