



SUMMARY

Judgment of the Appeals Chamber

in

The Prosecutor v Dominic Ongwen

read by

Judge Luz del Carmen Ibáñez Carranza

Presiding

The Hague, 17 July 2019

1. Today the Appeals Chamber will deliver its judgment in the interlocutory appeal of Mr Dominic Ongwen in a challenge against the decision of Trial Chamber IX of 7 March 2019, entitled ‘Decision on Defence Motions Alleging Defects in the Confirmation Decision’.
2. For the reasons that will follow, the Appeals Chamber unanimously confirms the decision of the Trial Chamber. This is a non-authoritative summary of the Appeals Chamber’s written judgment in the appeal. The written judgment will be notified to the parties and participants after this hearing.
3. I shall briefly outline the procedural history of this appeal. On 23 March 2016, the Pre-Trial Chamber confirmed the charges against Mr Ongwen for war crimes and crimes against humanity. On 6 December 2016, the trial commenced. On 13 April 2018, the Prosecutor completed her presentation of evidence and, on 18 September 2018, the defence for Mr Ongwen opened its case.
4. On 1 February 2019, Mr Ongwen filed four motions alleging that the Confirmation Decision suffers various defects. He requested that the Trial Chamber dismiss the charges and modes of liability which he alleged were deficient and violated his fundamental fair trial right to notice. The Trial Chamber decided to dismiss the four motions *in limine*. It is this decision that is the object of Mr Ongwen’s appeal. The Trial Chamber subsequently granted Mr Ongwen leave to appeal that decision on one issue.
5. That issue was: whether the impugned decision, based on procedural grounds under rules 122(4) and 134(2) of the Rules of Procedure and Evidence, implements the Trial Chamber’s responsibility under article 64(2) of the Statute to ensure that a trial is fair and is conducted with full respect for the rights of the accused in accordance with article 67(1) of the Statute. Mr Ongwen raises four grounds of appeal in relation to that issue.

6. I shall first address how the Appeals Chamber resolved the first ground of appeal. I shall then address the second and fourth grounds of appeal, which, in the view of the Appeals Chamber, belong together. Finally, I shall address the third ground of appeal.

7. Under the first ground of appeal, Mr Ongwen primarily questions the Trial Chamber's finding in its decision granting leave to appeal. He argues that, in certifying the issue for appeal, the Trial Chamber reframed the Defence position on the requirement of notice to effectively remove from the issue on appeal the question of whether notice in accordance with article 67(1)(a) of the Statute was properly provided.

8. This first ground of appeal is dismissed *in limine*. While the right to notice is of crucial importance for a fair trial, the arguments raised by Mr Ongwen seem to be based on a misunderstanding of the impugned decision. That decision did not consider whether Mr Ongwen received sufficient notice of the charges. The Appeals Chamber thus finds that the Trial Chamber did not err when it stated that the issue of notice did not arise from the impugned decision.

9. Furthermore, the Appeals Chamber notes that an alleged error in the decision granting leave to appeal cannot have a material impact on the impugned decision because the former was rendered after the latter.

10. I shall now turn to the second and fourth grounds of appeal.

11. Under these grounds of appeal, Mr Ongwen is in essence challenging the Trial Chamber's interpretation of the applicable law, in particular of rule 134 of the Rules. Rule 134(2) provides that, at the commencement of the trial, the Trial Chamber shall ask the parties whether they have any objections or observations regarding the conduct of the proceedings which have arisen since the confirmation hearing, and that such objections and

observations may not be raised again without the leave of the Trial Chamber. In contrast, rule 134(3) provides that the Trial Chamber may rule on matters that arise in the course of the trial.

12. The principal question arising under these grounds of appeal is whether the four motions brought by the Defence fell under rule 134(2) or rule 134(3) of the Rules and whether the Trial Chamber's application of rule 134 of the Rules is compatible with the requirements of a fair and expeditious trial and the rights of the accused. Mr Ongwen argues that the Trial Chamber erred when it found that the alleged defects in the Confirmation Decision fell under rule 134(2) of the Rules rather than under rule 134(3) of the Rules. He further submits that the Trial Chamber's purportedly 'restrictive' interpretation of rules 122(4) and 134 of the Rules opposes the core principles of the Statute, in particular article 21(3). This provision obliges the Court to interpret and apply its applicable law in accordance with international human rights.

13. In the view of the Appeals Chamber, the purpose of rule 134 of the Rules is to safeguard the nature of the judicial process as an orderly succession of procedural acts provided by law that ensure the proper administration of justice, including the expeditious conduct of proceedings. Parties are required to raise objections at a given point in time during the proceedings and are prevented from raising them subsequently without proper justification.

14. In the present case, since the challenges in the four motions were directed against purported errors and flaws in the charges, as set out in the Confirmation Decision, the Trial Chamber was correct in finding that the issues raised by Mr Ongwen would thus have fallen to be determined in the period prior to the commencement of the trial. They therefore fell within rule 134(2), rather than rule 134(3) of the Rules.

15. Accordingly, Mr Ongwen could not raise these issues without the leave of the Trial Chamber.

16. In the view of the Appeals Chamber, imposing such time limits that foreclose parties from raising issues if they were not raised in time does not lead to unfairness to the accused person. Rather, such time limits are applied in search of expeditiousness in the trial proceedings. The Appeals Chamber also notes that rule 134(2) provides for some flexibility, by giving the Trial Chamber the discretionary power to grant leave to a party to raise an issue regardless of the missed time limit.

17. The Appeals Chamber therefore rejects the second and fourth grounds of appeal.

18. Under the third ground of appeal, which is raised in the alternative, Mr Ongwen essentially argues that the Trial Chamber incorrectly exercised its discretion by refusing to grant leave under rule 134(2), dismissing the four motions *in limine*. The Appeals Chamber notes that the four motions contained two types of challenges. First, Mr Ongwen raises challenges to the formulation of the charges in the Confirmation Decision. Second, he challenges the subject-matter jurisdiction of the Court.

19. The Appeals Chamber finds that whether motions that could have been presented prior to the commencement of trial may nonetheless be presented at a later stage always depends on the facts and circumstances of the case and due regard must be given to fairness to the other parties and participants and the statutory requirement of expeditiousness. In this regard, the Appeals Chamber notes that Mr Ongwen did not raise objections to the formulation of the charges in this case at any of the four points in time at which he could have been expected to raise any objections he may have had. The Appeals Chamber recalls that the duty to act in a diligent and expeditious manner applies to all those involved in the proceedings, including the accused person. In this case, even though he could have raised

much earlier specific and concrete objections concerning the charges as confirmed by the Pre-Trial Chamber, Mr Ongwen waited until February 2019 to file the Defects Series which set out for the first time those specific challenges. Therefore, the Appeals Chamber finds that the Trial Chamber was correct when it determined that no concrete objection or challenges were made at the commencement of the trial, such as those raised in the four motions, despite the fact that Mr Ongwen had ample opportunity to do so.

20. The Trial Chamber was also reasonable in determining that Mr Ongwen did not advance any reasonable justification for raising challenges to the Confirmation Decision before the Trial Chamber more than three years after that decision was issued and after the Prosecutor presented her case at trial.

21. Moreover, the new arguments, in Mr Ongwen's Further Submissions, as to why it was not possible to challenge the formulation of charges in the Confirmation Decision earlier, were never presented before the Trial Chamber and were therefore not considered and addressed in the impugned decision. In these circumstances, the Appeals Chamber will not address these arguments as doing so would be tantamount to making factual findings for the first time on appeal. Furthermore, if the Appeals Chamber were to decide on the new arguments advanced on appeal, this would mean that it would have advanced an opinion on issues that may eventually be presented before the Trial Chamber and potentially the Appeals Chamber in subsequent proceedings. Accordingly, the new arguments containing new factual allegations advanced by Mr Ongwen in this regard are dismissed.

22. With respect to Mr Ongwen's jurisdictional challenges contained in the four motions, the Appeals Chamber notes that the Trial Chamber correctly found that article 19(4) of the Statute 'requires jurisdictional challenges to take place prior to or at the commencement of the trial' and that Mr Ongwen failed to justify any exceptional

circumstances for raising such arguments at this time. Therefore, the Trial Chamber did not err when it declined to consider the merits of Mr Ongwen's jurisdictional challenges contained in the four motions.

23. Accordingly, the Appeals Chamber rejects the third ground of appeal.

24. In an appeal pursuant to article 82 (1) (d) of the Statute, the Appeals Chamber may confirm, reverse or amend the decision appealed. In the present case, given that the Appeals Chamber has rejected all grounds of appeal, it is appropriate to confirm the impugned decision.

25. This brings us to the end of the summary of the Appeals Chamber's judgment.