

**Cour
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**International
Criminal
Court**

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

Date: **14 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

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: Defence for Dominic Ongwen

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

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I. INTRODUCTION

1. Pursuant to Article 82(1)(d) of the Rome Statute ('Statute'), the Defence for Dominic Ongwen ('Defence') seeks leave to appeal the 'Decision on Defence Motions Alleging Defects in the Confirmation Decision' ('Decision').¹
2. The Defence incorporates by reference the jurisprudence of the Appeals Chamber with respect to seeking leave to appeal as set out in prior requests.²

II. APPELLATE ISSUES

3. The appellate issues arising out of the Decision are:
 1. 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" consistent with Article 67(1) ('Issue 1').
 2. Whether the Decision's finding, at paragraph 37, that jurisdictional arguments on forced marriage are untimely, is accurate ('Issue 2').

III. SUBMISSIONS

A. Issue 1

4. The central appellate issue is whether the fundamental fair trial issue of lack of notice to the Accused can be circumvented by the Trial Chamber via procedural rules.
5. At **paragraph 36**, the Decision dismisses the Defence arguments, holding that "Rule 134(2) of the Rules requires that motions alleging defects in the confirmation decision may not, as a general rule, be brought after the commencement of trial."

¹ ICC-02/04-01/15-1476, 7 March ('Decision').

² ICC-02/04-01/15-1334-Red, paras 4 to 10.

6. The Decision fails to address the provision of Rule 134(3), which states: after 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**. (bold added).
7. The Defence contends that issues of defective notice arise during the course of the trial, because the Accused has the right to know in detail with what he is being charged, and by what means or mode or liability, should he choose to defend himself. Where the notice is deficient, the Defence is prejudiced because the defendant cannot be informed in detail of the charges including modes of liability on which the trial is proceeding, and the Trial Chamber is hearing evidence.
8. The Decision, at **paragraph 11**, lists the nine areas (which includes charged crimes and modes of liability) identified by the Defence as deficiently pleaded in the Confirmation of Charges of Decision ('CoC Decision'). The Defence maintains that the failure to provide notice violates the fair trial rights of Mr Ongwen.
9. The Decision makes no findings in respect to the substantive defects alleged in the charges and modes of liability in the CoC Decision or to the prejudice to the Accused identified in the Defects Series.³
10. Rather, the Decision has used Rules 122(4) and 134(2) to reject, 'lock, stock, and barrel', the content of the Defence assertions of defects in the CoC Decision, and the prejudicial impact on the proceedings for Mr Ongwen.
11. Hence, it is the Defence position that the Trial Chamber's Decision rejecting the Defects Series is based on a restrictive interpretation of procedural rules, rather than on the fair trial principles of notice under Article 67(1).
12. The Defence notes that a subsidiary, but key issue is what constitutes "notice" under Article 67(1)(a). The Decision, however, is silent on this issue.
13. Given that the Decision takes no position on what constitutes notice, the Defence can only conclude that the Decision indicates that the Trial Chamber implicitly takes the position that notice in respect to charged modes of liability and charged crimes is sufficient. This would mean

³ ICC-02/04-01/15-1430, Part I of the Defects Series, Section D "Prejudice".

that the pleading of modes of liability under Article 25(3) (direct perpetration, indirect co-perpetration and (b) ordering; under Article 28(a) command responsibility; under Article 25(3)(d)(i) and (ii), common purpose liability is sufficient. This would also mean that the pleading of the charges of persecution as a crime against humanity, forced marriage as a crime against humanity, enslavement as a crime against humanity, conscription of children under 15 years of age into an armed group and use of children under the age of 15 to participate actively in hostilities as a war crime is also sufficient.

14. In short, the Defence understands the Trial Chamber's implicit position to be that the nine areas identified in the Decision, at **paragraph 11**, are consistent with the requirements of Article 67(1)(a).
15. The Defence respectfully disagrees.
16. The Defence also notes that in support of its position, the Trial Chamber has misinterpreted the *ad hoc* tribunals jurisprudence on this issue. At **paragraph 21**, the Decision interprets the jurisprudence cited (at **footnote 42**) as a bar to raising issues that "could have been raised as preliminary motions."
17. The Defence reads the **footnote 42** differently: the "takeaway" legal point is that a showing of prejudice or material impairment to the Defence is required but it is not supportive of a bar to raising issues.
18. The *ad hoc* appellate jurisprudence also holds that issues of fair trial, including defects in the indictment can be raised at any time, even post trial.⁴ When lack of notice is raised during trial, the Trial Chamber must consider whether fairness requires amendment of the indictment, an adjournment, or exclusion of the evidence.⁵ The *Ntagerura* Appeals Chamber also holds that defects in an indictment may arise during the trial.⁶

⁴ ICC-02/04-01/15-1430, Part I of the Defects Series, fn. 33.

⁵ *Muvunyi* case, ICTR-2000-55A-A, Judgment, 29 August 2008, para. 18, available at: http://www.worldcourts.com/ict/eng/decisions/2008.08.29_Muvunyi_v_Prosecutor.pdf; *Mpambara* case, ICTR-01-65-T, Judgment, 12 September 2006, para 29, available at: http://hrlibrary.umn.edu/instate/ICTR/MPAMBARA_ICTR-01-65/MPAMBARA_ICTR-01-65-T.pdf.

⁶ *Ntagerura et al.* case, ICTR -99-46-A, Judgement and Sentence, 7 July 2006, para. 27, available at: <https://www.refworld.org/cases,ICTR,40446a0b4.html>.

19. A case in point is the Appellate Decision in the “Military II” case, in respect to Nzuwonemeye, where the Appeals Chamber reversed a conviction based on lack of notice, *i.e.* defects in the indictment.
20. The Appeals Chamber reversed Nzuwonemeye’s conviction for 6(3) [superior responsibility] for the murder of the Belgian peacekeepers based on lack of notice. The Appeals Chamber held that the indictment was defective and uncured, because it failed to plead any specific conduct to support the second and third elements of superior responsibility (knowledge and failure to prevent and punish) or 6(3),⁷ and that simply restating the language of Article 6(3) did not provide required material facts.⁸ Since Nzuwonemeye was not adequately informed of the allegations against him it “was not open to the Trial Chamber to convict him pursuant to 6(3).”⁹
21. Because the issue of notice and fair trial is so fundamental to the Defence, and to the integrity of the proceedings, the Defence wants to be sure it has clearly comprehended the Trial Chamber’s position. It would appear, based on the Decision that the Trial Chamber believes that the CoC Decision provides notice consistent with the requirements of Article 67(1). If this is not the case, the Defence would request additional clarity from the Trial Chamber.
22. The Defence has raised jurisdictional objections and objections as to lack of notice throughout the trial. The framing of the notice objections was raised in reference to lack of specificity of the charges. The Chamber has generally entertained these objections without citing a procedural bar to the ability of the Accused to assert his fair trial rights in raising these objections.¹⁰

⁷ *Ndindiliyimana et al.* case, ICTR-00-56-A, Appeals Judgment, 11 February 2014, paras 237-241, 254, available at: <http://unictr.irmct.org/sites/unictr.org/files/case-documents/ict-00-56/appeals-chamber-judgements/en/140211.pdf>.

⁸ *Ibid.*, para 238.

⁹ *Ibid.*, para 240.

¹⁰ ICC-02/04-01/15-147-CONF-ENG ET, p. 5, ll. 11-17: (Mr Taku: The Prosecutor should indicate, by the time the witness to testify, which specific modes of liability if the Prosecutor is relying on the same evidence to prove the charges and the multiple modes of liability. Lack of specificity and notice to an accused as to which specific modes of liability, that evidence of uncharged allegations or let out of the temporary – out of the temporal jurisdiction of the charges, or even of the Court, your Honours, it becomes – it causes prejudice); p. 6, ll. 12-14: (Mr Taku: But we would merely say that there is a specific issue of notice in this case which we would say are multiple time in multiple form, and as this witness testifies, we want to place this again among our standing objections, your Honours). ICC-02/04-01/15-148-CONF-ENG ET, p. 4, ll. 21-25: (Mr Ayena Odongo: Before they commence, we have – I have a preliminary objection to make, a point of law. Mr President and your Honours, in as much as we are aware of your rulings about the question of jurisdiction, it remains a weighty burden on us to keep on repeating our standing objection in respect to temporal jurisdiction); p. 6, ll. 1-12: (Mr Gumpert: Your Honour, I want to propose a way forward. The Defence appear to be under the apprehension that if they don’t make their objection every time a witness comes to whom this objection, they argue, applies, they may be at a

23. The Defence keeps pressing this point because of its fundamental importance to the rights of Mr Ongwen, and also because it affects the legitimacy of the whole proceeding and the verdict which will be rendered. If the trial proceeding is conducted based on a defective CoC Decision, and there is either no notice of the elements of the crimes and modes of liability charged, and/or the notice provided is deficient – the whole proceeding is tainted.
24. The Defence position is that procedural rules, where there is a fundamental violation of fair trial such as defective notice, should not be used as a shield against the rights of the Accused.
25. The Defence, in good faith, expected the Trial Chamber to use the opportunity of a decision on the substantive legal issues in the Defects Series, to resolve some of the fair trial issues which are plaguing this proceeding.
26. The Defence submits that the essence of the Issue is fair trial, and its resolution would significantly affect the fair and expeditious conduct of the proceedings and the outcome of the trial. To the extent that these Issues are not substantively resolved at the Trial Chamber level, they will again be raised on appeal.

B. Issue 2

27. The Defence respectfully disagrees with the Decision's finding of untimeliness, and thus dismissal of the jurisdictional argument in respect to forced marriage.¹¹
28. The argument was first articulated by the Defence at the CoC hearings in January 2016. Thus, the argument of untimeliness is unfounded. Ms. Bridgman argued that forced marriage does not exist within the Rome Statute, but is subsumed under sexual slavery.¹²
29. In addition, the Defence maintains that because a jurisdictional defect is fundamentally an issue of fair trial, the arguments apply that it can be raised at any time during the proceedings.

disadvantage at some later stage. Either that they won't be able to argue to you, or possibly even on appeal, that this was unfair, because they didn't raise it. I wonder if I can put that to bed. I solemnly undertake that the Prosecution will not seek to argue that the Defence is foreclosed from making any such argument at the conclusion of this case when we make our legal submissions to you. We will argue vigorously the merits of the case, as we have done, but we won't try and make some cute argument about the Defence not having raised it at the time. They have raised it aplenty and the proceedings aren't being helped by them feeling that they have to do it with every single witness).

¹¹ Decision, para. 37

¹² ICC-02/04-01/15-T-23-CONF-ENG ET, pp. 14-22; *see also*, ICC-02/04-01/15-423, para. 2(e) and paras 40 to 44: (The Defence preserved the issue in its leave to appeal the CoC Decision in 2016).

C. Issues 1 and 2 satisfy the legal criteria under Article 82(1)(d)

30. The core of appealable Issues 1 and 2 is whether the Decision is consistent with the fair trial rights of the Accused. A decision on these Issues significantly affects the fair and expeditious conduct of the proceedings and also the outcome of the trial. If there is a conviction based on a defective charging instrument, then the basis of the conviction would be challenged by the Defence and litigated on appeal. A ruling during trial on defects in notice has the possibility – depending of course on its content – to avoid more litigation.
31. Both these Issues warrant immediate resolution by the Appeals Chamber. This Decision forecloses the possibility of raising fair trial violations, especially in respect to defects in notice, during the course of trial. Such a foreclosure renders the trial proceeding unfair.
32. Thus, in the interests of implementing both Articles 64(2) and Article 67(1)(a), an immediate resolution of the Issues presented would materially advance these proceedings.
33. Lastly, the Defence would like to underscore that the concerns about possible dangers if Rule 134(2) were not strictly imposed with time limits, identified in **paragraphs 20 and 23** are all hypothetical and not based on any cited examples in this case. There have been no “significant delays in the conduct of the proceedings,” nor has the Defence “sprung” objections without notice and without substantive legal argument to the parties or undertaken “strategic efforts to undermine the conduct of proceedings.”
34. It should be of greater concern, to all of us involved in the proceedings, as to whether the process will be viewed as fair to the Accused, a litmus test for its legitimacy.

IV. RELIEF

35. For the reasons stated above, the Defence respectfully requests that leave is granted by the Trial Chamber to appeal the two Issues cited above.

Respectfully submitted,



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Hon. Krispus Ayena Odongo
On behalf of Dominic Ongwen

Dated this 14th day of March, 2019

At The Hague, The Netherlands