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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

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'"

Source: Office of Public Counsel for Victims

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

The Office of the Prosecutor

Ms Fatou Bensouda

Mr Benjamin Gumpert

Counsel for the Defence

Mr Krispus Ayena Odongo

Mr Chief Charles Achaleke Taku

Legal Representatives of the Victims

Ms Paolina Massidda

Ms Jane Adong

Mr Joseph Akwenyu Manoba

Mr Francisco Cox

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
Victims**

Ms Paolina Massidda

Mr Orchlon Narantsetseg

Ms Caroline Walter

**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 Common Legal Representative of Victims¹ (the “CLR”) submits that the Defence’s “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” (the “Request”) should be rejected.²

2. The CLR contends that the two purported issues identified in the Request either do not properly arise from the “Decision on Defence Motions Alleging Defects in the Confirmation Decision” (the “Impugned Decision”),³ or fail to properly constitute appealable issues. Should the Trial Chamber (the “Chamber”) deem otherwise, the CLR submits that the Request further fails to meet the remaining criteria for granting interlocutory appeals under Article 82(1)(d) of the Rome Statute (the “Statute”).

II. PROCEDURAL BACKGROUND

3. 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 Four Requests”).⁴ On 5 February 2019, the Prosecution

¹ See the “Decision on contested victims’ applications for participation, legal representation of victims and their procedural rights” (Pre-Trial Chamber II, Single Judge), No. ICC-02/04-01/15-350, 27 November 2015, p. 19; the “Decision on issues concerning victims’ participation” (Pre-Trial Chamber II, Single Judge), No. ICC-02/04-01/15-369, 15 December 2015, pp. 10-11; the “Second decision on contested victims’ applications for participation and legal representation of victims” (Pre-Trial Chamber II, Single Judge), No. ICC-02/04-01/15-384, 24 December 2015, pp. 20-22; and the “Decision on the ‘Request for a determination concerning legal aid’ submitted by the legal representatives of victims” (Trial Chamber IX, Single Judge), No. ICC-02/04-01/15-445, 26 May 2016, para. 13.

² 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 “Request”).

³ 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”).

⁴ 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

requested the Chamber to dismiss *in limine* the Four Requests.⁵ On 6 February 2019, the 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 2019.⁶ On 25 February 2019, the CLRV,⁷ the Prosecution⁸ and the Legal Representatives of Victims⁹ filed their responses to the Four Requests.

4. On 7 March 2019, the Chamber issued the Impugned Decision.¹⁰ On 14 March 2019, the Defence filed the Request.¹¹

III. SUBMISSIONS

A. Applicable law

5. Article 82(l)(d) of the Statute sets out the criteria for granting a request for leave to appeal as follows: (a) the decision shall involve an issue that would significantly affect: (i) the fair and expeditious conduct of proceedings; or (ii) the outcome of the trial; and (b) for which, in the opinion of the relevant Chamber, an immediate resolution by the Appeals Chamber may materially advance the

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 "Four Requests").

⁵ 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.

⁶ 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.

⁷ See the "CLRV 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.

⁸ 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.

⁹ 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 (corrigendum notified on 26 February 2019), 25 February 2019.

¹⁰ See the Impugned Decision, *supra* note 3.

¹¹ See the Request, *supra* note 2.

proceedings. Due to the cumulative nature of the criteria set out in Article 82(1)(d) of the Statute, the failure to satisfy any one of them must result in the rejection of a request for leave to appeal.¹²

6. For the purposes of the first prong of the above mentioned test, the Appeals Chamber defined an “issue” as “an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion”.¹³ Moreover, the Appeals Chamber ruled that “the Pre-Trial or Trial Chamber is vested with power to state, or more accurately still, to certify the existence of an appealable issue”.¹⁴

7. Consequently, it must first be determined whether the purported “issues” in the Request are “appealable issues” within the meaning of Article 82(1)(d) of the Statute as interpreted by the jurisprudence of the Court. Indeed, “while an application for leave to appeal should not contain in detail the arguments which the party intends to raise before the Appeals Chamber, it must still identify clearly the appealable issue, including by way of indicating a specific factual and/or legal error. Only in this case can the Chamber assess whether the issue, provided it was wrongly decided, may have implications on the fairness and expeditiousness of the proceedings or outcome of the trial”.¹⁵

¹² See the “Decision on Defence Request for Leave to Appeal Decision 1248” (Trial Chamber IX), No. ICC-02/04-01/15-1263, 22 May 2018, para. 10. See also the “Decision on Defence Request for Leave to Appeal the Trial Chamber’s Oral Decision on the Exclusion of Certain Parts of the CLRV Expert Report” (Trial Chamber IX), No. ICC-02/04-01/15-1268, 01 June 2018, para. 8; and the “Decision on Defence Request for Leave to Appeal the Decision on Prosecution Request to Introduce Evidence of Defence Witnesses via Rule 68(2)(b)” (Trial Chamber IX), No. ICC-02/04-01/15-1331, 5 September 2018, para. 8.

¹³ See the “Judgement on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal” (Appeals Chamber), No. ICC-01/04-168 OA3, 13 July 2006, para. 9.

¹⁴ *Idem*, para. 20.

¹⁵ See the “Decision on three applications for leave to appeal” (Pre-Trial Chamber I), No. ICC-02/11-01/11-307, 29 November 2012, para. 70.

B. Merits of the Purported “Issues”

8. The Defence identifies two purported issues in the Request. At the outset, the CLRV underlines that the Defence does not clearly indicate whether these matters constitute legal, factual or procedural error(s).

9. In any case, the first purported issue is framed as follows:

*“Whether the [Impugned] 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)”.*¹⁶

10. The Defence further argues, *inter alia*, that “[t]he 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” and “[t]he 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”.¹⁷

11. The CLRV submits that this purported issue fails to constitute a proper appealable issue. As it currently stands, it is framed in an extremely general manner without pointing to specific legal, factual or procedural error(s) that the Chamber would have allegedly committed. The main finding of the Chamber in the Impugned Decision was the untimeliness of the Four Motions.¹⁸ The Chamber’s reasoning contained many references to statutory provisions (such as Rule 122(3), Rule 122(4), Rule 134, 134(2) of the Rules of Procedure and Evidence (the “Rules”) and Article 67(1)(a)-(b), Article 61(9), Article 61(11) of the Statute) and to the jurisprudence of the Court, including the judgments of the Appeals Chamber.¹⁹ Yet, the Defence only

¹⁶ See the Request, *supra* note 2, para. 3(1).

¹⁷ *Idem*, paras. 4-24.

¹⁸ See the Impugned Decision, *supra* note 3, paras. 36-37.

¹⁹ *Idem*, paras. 10-30.

argues around whether the fair trial issues “*can be circumvented by the Trial Chamber via procedural rules*”²⁰ in general.

12. The Defence thus challenges the entirety of the Impugned Decision via this issue. Yet, in accordance with the established jurisprudence of the Court, Article 82(l)(d) of the Statute “*requires the parties to articulate discrete issues for Appeals Chamber’s resolution and [...] it is generally insufficient to argue that the entirety of the Chamber’s reasoning is erroneous when requesting leave to appeal*”.²¹

13. Moreover, the issues for which a party seeks leave to appeal must not be “*generic assertions*”.²² In other words, issues whose formulation is exceedingly broad or so general, essentially challenging the entirety of the Chamber’s reasoning, are not sufficiently discrete to qualify as appealable issues.²³ Indeed, “[i]t is not the Chamber’s duty to decompose broadly formulated issues in order to identify potential issues for certification”.²⁴ A party seeking leave to appeal a decision must “*identify clearly the appealable issue, including by way of indicating a specific factual and/or legal error*” and “[l]eave to appeal cannot be granted if the party seeking to appeal, instead of identifying

²⁰ See the Request, *supra* note 2, para. 4.

²¹ See the “Decision on the joint defence request for leave to appeal the decision on witness preparation” (Trial Chamber V), No. ICC-01/09-01/11-596, 11 February 2013, para. 11. See also the “Decision on Defence Request for Reconsideration of or Leave to Appeal/Decision on ‘Defence Request for Disclosure and Judicial Assistance’” (Trial Chamber VII), No. ICC-01/05-01/13-1282, 22 September 2015, para. 10.

²² See the “Decision on Defence Request for Leave to Appeal Decision on the Request to strike two witnesses from the Prosecution’s Witness List” (Trial Chamber VII), No. ICC-01/05-01/13-1307, 28 September 2015, para. 14.

²³ See the “Decision on the joint defence request for leave to appeal the decision on witness preparation”, *supra* note 21, para. 17. See also the “Decision on the ‘Defence Application for Leave to Appeal the ‘Decision on the defence request for a temporary stay of proceedings’” (Trial Chamber IV), No. ICC-02/05-03/09-428, 13 December 2012, para. 28; and the “Decision on Babala Defence request for leave to appeal ICC-01/05-01/13-800” (Trial Chamber VII), No. ICC-01/05-01/13-877, 27 March 2015, para. 7.

²⁴ See the “Decision on the Prosecutor’s and Defence requests for leave to appeal the decision adjourning the hearing on the confirmation of charges” (Pre-Trial Chamber I), No. ICC-02/11-01/11-464, 31 July 2013, para. 70.

appealable issues, seeks leave to litigate ex novo before the Appeals Chamber the entire decision".²⁵

14. Consequently, the CLRV posits that the first purported issue fails to properly constitute an appealable issue since it is not only formulated in an overly broad manner, but also is a challenge to the entirety of the Impugned Decision. As a result, it should be rejected.

15. Moreover, the Defence argues that:

"[...] a subsidiary, but key issue is what constitutes 'notice' under Article 67(1)(a). The [Impugned] Decision, however, is silent on this issue. [...] Given that the [Impugned] Decision takes no position on what constitutes notice, the Defence can only conclude 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 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. [...] The Defence respectfully disagrees".²⁶

16. The CLRV submits that the Defence clearly misrepresents the findings of the Impugned Decision. As a general principle, purported silence of the Chamber on a particular matter does not necessarily imply its acceptance or rejection of a party's arguments in any way.²⁷ As recalled earlier,²⁸ the Chamber's main findings in the Impugned Decision focused on the untimeliness of the Four Motions, thus not addressing the merits of the issues raised in said Motions. Consequently, the

²⁵ See the "Decision on three applications for leave to appeal", *supra* note 15, para. 70 (Emphasis added).

²⁶ See the Request, *supra* note 2, paras. 12-15 (Emphasis added).

²⁷ See the "Decision on the content of the updated document containing the charges" (Trial Chamber V), No. ICC-01/09-01/11-522, 28 December 2012, para. 19. See also the "Decision on witness preparation" (Trial Chamber V), No. ICC-01/09-01/11-524, 3 January 2013, para. 27.

²⁸ See *supra* para. 11.

Defence's inference from the alleged silence of the Impugned Decision that "[the Chamber took] *the position that notice in respect to charged modes of liability and charged crimes is sufficient*"²⁹ is particularly incorrect and unjustified. As a result, the first purported issue fails to arise from the Impugned Decision.

17. In addition, the Defence openly admits that "[it] *disagrees*" with the outcome of the Impugned Decision.³⁰ In this regard, arguments expressing nothing more than a mere disagreement³¹ with the Chamber's conclusions do not constitute an "*appealable issue*" within the meaning of Article 82(1)(d) of the Statute.³² Indeed, when a party challenges a judicial decision, more is needed than simply expressing a difference of opinion regarding the question *sub judice*.³³ Consequently, the Chamber should reject the first purported issues.

18. The second purported issue is phrased as follows:

*"Whether the [Impugned] Decision's finding, at paragraph 37, that jurisdictional arguments on forced marriage are untimely, is accurate".*³⁴

19. The Defence further argues that "[it] *disagrees with the Decision's finding of untimeliness, and thus dismissal of the jurisdictional argument in respect to forced marriage. [...] The argument was first articulated by the Defence at the CoC hearings in January 2016. Thus, the argument of untimeliness is unfounded. [The Defence] argued that forced marriage does not exist within the Rome Statute, but is subsumed under sexual slavery. [...]*

²⁹ See the Request, *supra* note 2, para. 13.

³⁰ *Idem*, para. 15.

³¹ See the "Decision on the 'Request for Leave to Appeal against the 'Decision on the Request for an order for the commencement of the pre-confirmation phase by the Defence of Saif Al-Islam Gaddafi'" (Pre-Trial Chamber I), No. ICC-01/11-01/11-490, 11 December 2013, para. 31; and the "Decision on Defence requests for leave to appeal the 'Order setting the commencement date for trial'" (Trial Chamber I), No. ICC-02/11-01/15-117, 2 July 2015, para. 22.

³² See the "Judgement on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal", *supra* note 13, para. 9.

³³ See the "Decision on the 'Requête de la Défense sollicitant l'autorisation d'interjeter appel de la Décision sur la confirmation des charges datée du 9 juin 2014'" (Pre-Trial Chamber II), No. ICC-01/04-02/06-322, 4 July 2014, para. 33.

³⁴ See the Request, *supra* note 2, para. 3(2).

*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”.*³⁵

20. The CLRV submits that the Defence again misrepresents the Impugned Decision. The Chamber did not make any finding or ruling in relation to whether the Defence raised or not the matters contained in the Four Requests before the Pre-Trial Chamber during the confirmation of the charges hearings. Rather, the Chamber only found that the Defence failed to do so *at the trial phase* when it had a reasonable opportunity to do so earlier, pursuant to Rule 134(2) of the Rules.³⁶ Therefore, the Defence’s contention that it did raise the matter previously before the Pre-Trial Chamber is extraneous to the Impugned Decision. As a result, the second purported issue does not arise from the Impugned Decision.

21. Moreover, the Defence again openly acknowledges that “[it] disagrees with the Decision’s finding of untimeliness, and thus dismissal of the jurisdictional argument in respect to forced marriage”,³⁷ without offering further arguments in support of its contention. As articulated above, a “mere disagreement” or “conflict of opinion” does not constitute an “appealable issue” within the meaning of Article 82(1)(d) of the Statute.³⁸ Hence, the second purported issue should be equally dismissed.

22. Even if the Chamber considers that the two purported issues properly arise from the Impugned Decision or constitute appealable issues, the CLRV further contends that the remaining requirements of Article 82(1)(d) of the Statute have not been met.

³⁵ *Idem*, paras. 27-29.

³⁶ See the Impugned Decision, *supra* note 3, para. 15.

³⁷ See the Request, *supra* note 2, para. 27 (Emphasis added).

³⁸ See the “Judgement on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal”, *supra* note 13, para. 9.

23. Firstly, these purported issues would not significantly affect the fair and expeditious conduct of the proceedings. The trial has reached an advanced stage as the Defence has already presented almost one-third of its witnesses. The Defence's argument that the Chamber's decision not to address the merits of the Four Requests would lead to more litigation on appeal³⁹ is grossly speculative and unsubstantiated. Furthermore, these issues would not significantly affect the outcome of the trial since "[t]he Defence has all the materials on which the Prosecution relies, and conducted an extensive defence throughout the Prosecution's evidence presentation. The Defence has had the opportunity to raise the potentially prejudicial effect of every item of evidence submitted during trial, and such arguments will be considered during deliberations".⁴⁰

24. Moreover, an immediate resolution of the purported issues by the Appeals Chamber would not materially advance the proceedings. Indeed, the Appeals Chamber's review function is "*corrective in nature and not de novo*."⁴¹ As elaborated above, the purported issues either do not arise from the Impugned Decision or fail to properly constitute appealable issue(s). Consequently, the Appeals Chamber cannot be asked to engage in an academic exercise, supported by speculative arguments. Therefore, the CLRV posits that none of the issues identified by the Request constitutes an appealable issue, nor do they meet the stringent requirements for granting interlocutory appeal under Article 82(1)(d) of the Statute.

³⁹ See the Request, *supra* note 2, para. 30.

⁴⁰ See the Impugned Decision, *supra* note 3, para. 28.

⁴¹ See the "Judgment on the appeal of the Prosecutor against the decision of Trial Chamber IV of 12 September 2011 entitled 'Reasons for the Order on translation of witness statements (ICC-02/05-03/09-199) and additional instructions on translation'" (Appeals Chamber), No. ICC-02/05-03/09-295 OA2, 17 February 2012, para. 20.

IV. CONCLUSION

25. For the foregoing reasons, the Common Legal Representative of the Victims respectfully requests the Chamber to reject the Request.

A handwritten signature in black ink, appearing to read 'Paolina Massidda', with a horizontal line underneath the name.

Paolina Massidda
Principal Counsel

Dated this 18th day of March 2019

At The Hague, The Netherlands