

1 International Criminal Court  
2 Appeals Chamber  
3 Situation: Republic of Uganda  
4 In the case of The Prosecutor v. Dominic Ongwen - ICC-02/04-01/15  
5 Presiding Judge Luz del Carmen Ibáñez Carranza  
6 Delivery of Judgment - Courtroom 1  
7 Wednesday, 17 July 2019  
8 (The hearing starts in open session at 14.30 p.m.)  
9 THE COURT USHER: [14:30:46] All rise.  
10 The International Criminal Court is now in session.  
11 Judge Ibáñez Carranza, presiding.  
12 Please be seated.  
13 PRESIDING JUDGE IBÁÑEZ CARRANZA: [14:31:19] Good afternoon.  
14 Before we start the hearing, there is a photographer in the room. Please, for issues of  
15 press, you can take pictures for two minutes.  
16 Thank you very much.  
17 I am Judge Luz del Carmen Ibáñez Carranza, presiding in this appeal arising from the  
18 case of the Prosecutor v. Dominic Ongwen.  
19 My fellow judges in this appeal are Judge Chile Eboe-Osuji, Judge Howard Morrison,  
20 Judge Piotr Hofmański and Judge Solomy Balungi Bossa.  
21 May I ask now the parties and participants to introduce themselves for the record,  
22 please, starting with the Defence.  
23 MR TAKU: [14:34:07] May it please, Madam President. I, Chief Charles Achaleke  
24 Taku, appear for Mr Ongwen, who is here present. With me today is Mr Tibor  
25 Bajnovic, Eniko Sandor, Gordon Kifudde, Michael Rowse, Scott Davidson and

1 Professor Doctor Laura Graham.

2 PRESIDING JUDGE IBÁÑEZ CARRANZA: [14:34:38] Thank you.

3 And now the Office of the Prosecutor, please.

4 MS BRADY: [14:34:43] Good afternoon, your Honour. My name is Helen Brady.

5 I'm the senior appeals counsel for the Prosecution and I'm here today with Mr Ben

6 Gumpert, who is the senior trial lawyer in the Ongwen case; Mr George Mugwanya,

7 appeals counsel; and Mr Reinhold Gallmetzer, appeals counsel.

8 Thank you very much.

9 PRESIDING JUDGE IBÁÑEZ CARRANZA: [14:35:04] Thank you.

10 Now the Legal Representative of Victims, please.

11 MS MASSIDDA: [14:35:12] Good afternoon, Madam President. The victims are

12 represented by two teams in these proceedings. For the common legal

13 representative team appearing today, Ms Caroline Walter, legal officer and I am

14 Paolina Massidda, principal counsel.

15 PRESIDING JUDGE IBÁÑEZ CARRANZA: [14:35:27] Thank you.

16 MR MAWIRA: [14:35:33] Good afternoon, Madam President. For the Legal

17 Representative of Victims, I am James Mawira.

18 PRESIDING JUDGE IBÁÑEZ CARRANZA: [14:35:38] Thank you very much.

19 There is an office of Public Counsel for Victims? Okay, it's the same. Thank you

20 very much.

21 Today, the Appeals Chamber will deliver its judgment in the interlocutory appeal of

22 Mr Dominic Ongwen in a challenge against the decision of Trial Chamber IX of 7

23 March 2019 entitled, "Decision on Defence Motions Alleging Defects in the

24 Confirmation Decision".

25 For the reasons that will follow, the Appeals Chamber unanimously confirms the

1 decision of the Trial Chamber. This is a non-authoritative summary of the  
2 Appeals Chamber's written judgment in the appeal. The written judgment will be  
3 notified to the parties and participants after this hearing.

4 I shall now briefly outline the procedural history of this appeal.

5 On 23 March 2016, the Pre-Trial Chamber confirmed the charges against Mr Ongwen  
6 for war crimes and crimes against humanity. On 6 December 2016, the trial  
7 commenced. On 13 April 2018, the Prosecutor completed her presentation of  
8 evidence and on 18 September 2018, the Defence for Mr Ongwen opened its case.

9 On 1 February 2019, Mr Ongwen filed four motions alleging that the confirmation  
10 decision suffers various defects. He requested that the Trial Chamber dismiss the  
11 charges and modes of liability which he alleged were deficient and violated his  
12 fundamental fair trial right to notice.

13 The Trial Chamber decided to dismiss the four motions *in limine*. It is this decision  
14 that is the object of Mr Ongwen's appeal. The Trial Chamber subsequently granted  
15 Mr Ongwen leave to appeal the decision on one issue.

16 That issue was whether the impugned decision, based on procedural grounds under  
17 Rules 122(4) and 134(2) of the Rules of Procedure and Evidence, implements the Trial  
18 Chamber's responsibility under Article 64(2) of the Statute to ensure that a trial is fair  
19 and is conducted with full respect for the rights of the accused in accordance with  
20 Article 67(1) of the Statute.

21 Mr Ongwen raises four grounds of appeal in relation to that issue.

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

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

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

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

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

17 Under these grounds of appeal, Mr Ongwen is in essence challenging the Trial  
18 Chamber's interpretation of the applicable law, in particular of Rule 134 of the Rules.  
19 Rule 134(2) provides that at the commencement of the trial, the Trial Chamber shall  
20 ask the parties whether they have any objections or observations regarding the  
21 conduct of the proceedings which have arisen since the confirmation hearing, and  
22 that such objections or observations may not be raised again without the leave of the  
23 Trial Chamber. In contrast, Rule 134(3) provides that the Trial Chamber may rule on  
24 matters that arise in the course of the trial.

25 The principal question arising under these grounds of appeal is whether the four

1 motions brought by the Defence fell under Rule 134(2) or Rule 134(3) of the Rules, and  
2 whether the Trial Chamber's application of Rule 134 of the Rules is compatible with  
3 the requirements of a fair and expeditious trial and the rights of the accused.

4 Mr Ongwen argues that the Trial Chamber erred when it found that the alleged  
5 defects in the confirmation decision fell under Rule 134(2) of the Rules, rather than  
6 under Rule 134(3) of the Rules.

7 He further submits that the Trial Chamber's purportedly restrictive interpretation of  
8 Rules 122(4) and 134 of the Rules opposes the core principles of the Statute, in  
9 particular Article 21(3). This provision obliges the Court to interpret and apply its  
10 applicable law in accordance with international human rights.

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

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

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

24 In the view of the Appeals Chamber, imposing such time limits that foreclose parties  
25 from raising issues if they were not raised in time does not lead to unfairness to the

1 accused person. Rather, such time limits are applied in search of expeditiousness in  
2 the trial proceedings.

3 The Appeals Chamber also notes that Rule 134(2) provides for some flexibility by  
4 giving the Trial Chamber the discretionary power to grant leave to a party to raise an  
5 issue, regardless of the missed time limit.

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

7 Under the third ground of appeal, which is raised in the alternative, Mr Ongwen  
8 essentially argues that the Trial Chamber incorrectly exercised its discretion by  
9 refusing to grant leave under Rule 134(2), dismissing the four motions *in limine*.

10 The Appeals Chamber notes that the four motions contained two types of challenges.

11 First, Mr Ongwen raises challenges to the formulation of the charges in the  
12 confirmation decision. Second, he challenges the subject-matter jurisdiction of the  
13 Court.

14 The Appeals Chamber finds that whether motions that could have been presented  
15 prior to the commencement of the trial may, nonetheless, be presented at a later stage  
16 always depends on the facts and circumstances of the case, and due regard must be  
17 given to fairness to the other parties and participants and the statutory requirement of  
18 expeditiousness.

19 In this regard, the Appeals Chamber notes that Mr Ongwen did not raise objections to  
20 the formulations of the charges in this case at any of the four points in time at which  
21 he could have been expected to raise any objections he may have had.

22 The Appeals Chamber recalls that the duty to act in a diligent and expeditious  
23 manner applies to all those involved in the proceedings, including the accused  
24 person.

25 In this case, even though he could have raised much earlier specific and concrete

1 objections concerning the charges as confirmed by the Pre-Trial Chamber,  
2 Mr Ongwen waited until February 2019 to file the defects series, which set out for the  
3 first time those specific challenges.

4 Therefore, the Appeals Chamber finds that the Trial Chamber was correct when it  
5 determined that no concrete objections or challenges were made at the  
6 commencement of the trial, such as those raised in the four motions, despite the fact  
7 that Mr Ongwen had ample opportunity to do so.

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

12 Moreover, the new arguments of Mr Ongwen's further submissions as to why it was  
13 not possible to challenge the formulation of charges in the confirmation decision  
14 earlier were never presented before the Trial Chamber, and were therefore not  
15 considered and addressed in the impugned decision.

16 In these circumstances, the Appeals Chamber will not address these arguments as  
17 doing so would be tantamount to making factual findings for the first time on appeal.

18 Furthermore, if the Appeals Chamber were to decide on the new arguments advanced  
19 on appeal, this would mean that it would have advanced an opinion on issues that  
20 may eventually be presented before the Trial Chamber and potentially the  
21 Appeals Chamber in subsequent proceedings.

22 Accordingly, the new arguments containing new factual allegations advanced by  
23 Mr Ongwen in this regard are dismissed.

24 With respect to Mr Ongwen's jurisdictional challenges contained in the four motions,  
25 the Appeals Chamber notes that the Trial Chamber correctly found that Article 19(4)

1 of the Statute requires jurisdictional challenges to take place prior to or at the  
2 commencement of the trial, and that Mr Ongwen failed to justify any exceptional  
3 circumstances for raising such arguments at this time.

4 Therefore, the Trial Chamber did not err when it declined to consider the merits of  
5 Mr Ongwen's jurisdictional challenges contained in the four motions.

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

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

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

12 I would like now to thank the court reporters, the interpreters, and other Registry  
13 staff for their assistance today in holding this hearing.

14 Now, the hearing is adjourned.

15 THE COURT USHER: [14:56:59] All rise.

16 (The hearing ends in open session at 2.57 p.m.)