

**Cour
Pénale
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**International
Criminal
Court**

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

Date: 23 April 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 Response to "Defence's Appeal against 'Decision on Defence Motions
Alleging Defects in the Confirmation Decision'"**

Source: Office of Public Counsel for Victims

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I. INTRODUCTION

1. The Common Legal Representative of Victims¹ (the “CLR”) opposes in whole all the four grounds of appeal advanced by the Defence in its Appeal against the Decision on Defence Motions Alleging Defects in the Confirmation Decision (the “Defence’s Appeal”).²

2. The CLR submits that the first ground of appeal should be dismissed *in limine* since the Defence impermissibly raises a matter outside of the scope of the issue certified for appeal by the Trial Chamber. In relation to the second ground of appeal, the CLR posits that the Trial Chamber correctly interpreted rule 134 of the Rules of Procedure and Evidence (the “Rules”) in accordance with its clear and unambiguous terms. In relation to the third ground of appeal, the CLR argues that, in applying rule 134(2) of the Rules, the Trial Chamber did not misappreciate the facts and circumstances concerning the Defence’s Motions Alleging Defects in the Confirmation Decision, did not take into account irrelevant facts or failed to take into account relevant facts; nor did the Trial Chamber exercise its discretion erroneously or incorrectly as to constitute an abuse of discretion. Finally, in relation to the fourth ground of appeal, the CLR submits that it is framed in an overly broad manner as the Defence fails to demonstrate any specific legal, factual or procedural error(s) that the Trial Chamber allegedly committed in rendering the Impugned Decision. Consequently, the Defence’s Appeal should be dismissed in its entirety.

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’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 (the “Defence’s Appeal”).

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 Initial Requests”).³ On 5 February 2019, the Prosecution requested Trial Chamber IX (the “Trial Chamber”) to dismiss *in limine* the Initial Requests.⁴ 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 2019.⁵ On 25 February 2019, the CLRV,⁶ the Prosecution⁷ and the Legal Representatives of Victims⁸ filed their responses to the Initial Requests.

4. On 7 March 2019, the Trial Chamber issued the “Decision on Defence Motions Alleging Defects in the Confirmation Decision” (the “Impugned Decision”).⁹ On 14 March 2019, the Defence filed a Request seeking leave to appeal the Impugned

³ 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”).

⁴ 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.

⁵ 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.

⁶ 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.

⁷ 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.

⁸ 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.

⁹ 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”).¹⁰ On 18 March 2019, the Prosecution¹¹ and the CLRV¹² responded to the Leave to Appeal Request.

5. On 1 April 2019, the Trial Chamber granted the Leave to Appeal Request in respect of one issue (the “Decision Certifying Appeal”).¹³ On 11 April 2019, the Defence filed its Appeal Brief.¹⁴

III. SUBMISSIONS

A. Applicable law

6. In accordance with the applicable jurisprudence, the legal standard for the Appeals Chamber’s review of interlocutory decisions is the following:

“[Parties] may raise (i) procedural errors, (ii) errors of fact, or (iii) errors of law, as well as (iv) ‘[a]ny other ground that affects the fairness or reliability of the proceedings or decision’. [...] [The Appeals Chamber] will not defer to the Trial Chamber’s interpretation of the law. Rather, it will arrive at its own conclusions as to the appropriate law and determine whether or not the Trial Chamber misinterpreted the law. If the Trial Chamber committed such an error, the Appeals Chamber will only intervene if the error materially affected the Impugned Decision. [An Impugned Decision] is ‘materially affected by an error of law’ if the Trial Chamber ‘would have rendered a judgment that is substantially different from the decision that was affected by the error, if it had not made the error’. [...] Regarding factual errors, the Appeals Chamber [...] will not interfere with factual findings of the first-instance Chamber unless it is shown that the Chamber committed a clear error, namely, misappreciated

¹⁰ 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”).

¹¹ 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.

¹² 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.

¹³ 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 (the “Decision Certifying Appeal”).

¹⁴ See the Defence’s Appeal, *supra* note 2.

the facts, took into account irrelevant facts, or failed to take into account relevant facts. As to the 'misappreciation of facts', [the Appeals Chamber] will interfere only in the case where it cannot discern how the Chamber's conclusion could have reasonably been reached from the evidence before it'. [...] Accordingly, when a factual error is alleged, the Appeals Chamber will determine whether a reasonable Trial Chamber could have been satisfied beyond reasonable doubt as to the finding in question. The Appeals Chamber will not assess the evidence de novo with a view to determining whether it would have reached the same factual conclusion as the Trial Chamber".¹⁵

7. Moreover, the Appeals Chamber held that *"as part of the reasons in support of a ground of appeal, an appellant is obliged not only to set out the alleged error, but also to indicate, with sufficient precision, how this error would have materially affected the impugned decision"*.¹⁶

8. Finally, in respect to the exercise of discretion, the Appeals Chamber clarified that:

"[It] will not interfere with [a lower] Chamber's exercise of discretion [...] merely because the Appeals Chamber, if it had the power, might have made a different ruling. [...] The function of the Appeals Chamber [is to review] the exercise of discretion by [a lower] Chamber to ensure that the Chamber properly exercised its discretion. However, the Appeals Chamber will not interfere with [a lower] Chamber's exercise of discretion [...], save where it is shown that that determination was vitiated by an error of law, an error of fact, or a procedural error, and then, only if the error materially affected the determination. This means in effect that the Appeals Chamber will interfere with a discretionary decision only under limited conditions [including]: (i) where the exercise of discretion is based on an erroneous interpretation of the law; (ii) where it is exercised on patently incorrect conclusion of fact; or (iii) where the decision is so unfair and unreasonable as to constitute an abuse of discretion".¹⁷

¹⁵ See the "Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction (Appeals Chamber), No. ICC-01/04-01/06-3121-Red A5, 01 December 2014, paras. 16-27. See also the "Judgment on the appeal of the Defence against the 'Decision on the admissibility of the case under article 19 (1) of the Statute' of 10 March 2009 (Appeals Chamber)", No. ICC-02/04-01/05-408 OA3, 16 September 2009, paras. 46-48.

¹⁶ See the "Judgment on the appeal of the Defence against the 'Decision on the admissibility of the case under article 19 (1) of the Statute' of 10 March 2009 (Appeals Chamber)", *supra* note 15, para. 48. See also the "Corrigendum to Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against the decision of Trial Chamber III of 24 June 2010 entitled 'Decision on the Admissibility and Abuse of Process Challenges'", (Appeals Chamber), No. ICC-01/05-01/08-962-Corr OA3, 26 October 2010, para. 103.

¹⁷ See the "Judgment on the appeal of the Defence against the 'Decision on the admissibility of the case under article 19 (1) of the Statute' of 10 March 2009, *supra* note 15, paras. 79-80. See also the "Judgment on the appeals of the Prosecutor and Mr Thomas Lubanga Dyilo against the 'Decision on Sentence

B. Merits of the Grounds of Appeal

1. First Ground of Appeal

9. The Defence argues that “*the Trial Chamber’s characterization of the issue and the Defence’s submissions on same is erroneous as a matter of law.*”¹⁸ The Defence further contends that “[i]n granting the leave to appeal, the Trial Chamber reframed the Defence position on the issue of notice in order to reach its conclusion that ‘the First Issue does not therefore require an assessment of whether notice in accordance with Article 67(1)(a) of the Statute has been provided properly.’ [Thus] the Trial Chamber incorrectly exercised its discretion by mischaracterizing the issue at stake [...] which amounts to an error of law that materially affects the Impugned Decision. [...] As a result, the Trial Chamber’s leave was not properly granted in respect to the formulation of the issue as the Trial Chamber concluded that it does not require an assessment of notice”.¹⁹

10. The CLRV stresses at the outset that this matter is essentially not a ground of appeal *per se* against the Impugned Decision. The Defence fails to demonstrate an alleged error that was committed in the reasoning or the rulings contained in the Impugned Decision. In fact, the Defence challenges the Decision Certifying Appeal via this purported ground of appeal. Moreover, the Defence’s reliance on the Appeals Chamber’s jurisprudence in the *Lubanga* case is misplaced since, in that decision, the Appeals Chamber was discussing its power to determine “*the true nature of an impugned decision*”, rather than a decision granting leave to appeal.²⁰

pursuant to Article 76 of the Statute” (Appeals Chamber), No. ICC-01/04-01/06-3122 A4 A6, 1 December 2014, paras. 41-42.

¹⁸ See the Defence’s Appeal, *supra* note 2, p. 6.

¹⁹ *Idem*, paras. 11, 14-15.

²⁰ See the “Decision on the admissibility of the appeals against Trial Chamber I’s ‘Decision establishing the principles and procedures to be applied to reparations’ and directions on the further conduct of proceedings” (Appeals Chamber), No. ICC-01/04-01/06-2953 A2 A3 OA21, 14 December 2012, para. 50 (emphasis added). The relevant part of the decision reads as follows: “*At the outset, the Appeals Chamber notes that the Trial Chamber itself did not consider the Impugned Decision to be an ‘order for reparations’ that could be appealed pursuant to article 82 (4) of the Statute. The Appeals Chamber has carefully taken into account the view of the Trial Chamber. Nevertheless, the Appeals Chamber finds that the Trial Chamber’s own*

11. Moreover, the Defence ignores the Trial Chamber's power to reformulate issues when granting leave to appeal. In this regard, the Appeals Chamber ruled that *"article 82 (1) (d) of the Statute clearly vests power solely in the Pre-Trial and Trial Chambers to certify appealable issues and to determine whether appellate resolution will materially advance the proceedings."*²¹ In particular, the Appeals Chamber underlined that *"it is for the Pre-Trial or Trial Chamber to determine not only whether a decision may be appealed, but also to what extent."*²² Certainly, in order to reflect its understanding of the issue at hand, the Trial Chamber has discretionary power to reformulate issues in granting leave to appeal.²³

12. As a result, this purported ground of appeal should be dismissed *in limine* since the content of the Decision Certifying Appeal cannot be appealed and reviewed before the Appeals Chamber in such a manner. Thus, the Appeals Chamber routinely declines to conduct its own assessment of the criteria of article 82 (1) (d) of the Rome Statute (the "Statute").²⁴ Additionally, the Appeals Chamber ruled that a party's

characterisation of the Impugned Decision is not determinative. Where necessary, the Appeals Chamber itself has to establish the true nature of an impugned decision, in order to ensure that the decision in question is appropriately before it, and that the appeal is determined pursuant to the correct legal basis".

²¹ See the "Judgment on the appeal of Mr Laurent Gbagbo against the decision of Trial Chamber I entitled 'Decision giving notice pursuant to Regulation 55(2) of the Regulations of the Court'" (Appeals Chamber), No. ICC-02/11-01/15-369 OA7, 18 December 2015, para. 18.

²² See the "Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 3 June 2013 entitled 'Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute'" (Appeals Chamber), No. ICC-02/11-01/11-572 OA5, 16 December 2013, para. 63. See also the "Judgment on the appeals of Mr Laurent Gbagbo and Mr Charles Blé Goudé against the decision of Trial Chamber I of 9 June 2016 entitled 'Decision on the Prosecutor's application to introduce prior recorded testimony under Rules 68(2)(b) and 68(3)'" (Appeals Chamber), No. ICC-02/11-01/15-744 OA8, 1 November 2016, para. 13.

²³ See the "Decision on the Prosecutor's request for leave to appeal the 'Decision on the 'Application for Judicial Review by the Government of the Union of the Comoros'" (Pre-Trial Chamber I). No. ICC-01/13-73, 18 January 2019, paras. 23 and 39.

²⁴ See the "Judgment on the appeals of Mr Laurent Gbagbo and Mr Charles Blé Goudé against the decision of Trial Chamber I of 9 June 2016 entitled 'Decision on the Prosecutor's application to introduce prior recorded testimony under Rules 68(2)(b) and 68(3)'" *supra* note 22, para. 13. See also "Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I of 8 July 2010 entitled 'Decision on the Prosecution's Urgent Request for Variation of the Time-Limit to Disclose the Identity of Intermediary 143 or Alternatively to Stay Proceedings Pending Further Consultation with the WVU'" (Appeals Chamber), 8 October 2010, ICC-01/04-01/06-2582 OA 18, para. 45.

attempt to directly appeal a decision granting leave to appeal, parallel to its challenge of an Impugned Decision, is not permissible under the Statute.²⁵

13. *Arguendo*, if the Trial Chamber's leave was not properly granted, then the Appeals Chamber should dismiss the Defence's Appeal in its entirety. In fact, in case the leave was granted improperly (or without a proper ground), the Appeals Chamber would be acting beyond the scope of the powers vested in it by the Statute in reviewing the Impugned Decision on the basis of an erroneous decision granting leave to appeal since said appeal will be without foundation.²⁶ Consequently, the first ground of appeal should be dismissed.

2. *Second Ground of Appeal*

14. The Defence argues that the Trial Chamber's interpretation of rule 134 of the Rules is restrictive, violating the requirements of fair and expeditious trial and the Accused's rights.²⁷ The Defence contends that "[the Trial Chamber] *misunderstood the general purpose of Rule 134 of the Rules as a whole, which is directed toward dealing with matters that may arise throughout the trial proceedings. [...] Since not all trial objections can be foreseen at the commencement of trial, [...] Rule 134 of the Rules provides the opportunity for the parties to raise such issues that are relevant to the proceedings and requires the Trial Chamber to rule on them. [...] Rule 134(3) of the Rules permits the Trial Chamber to deal with continuing effects of motions related to the trial proceedings after the commencement of the trial. [...] [Thus] the Trial Chamber erred in its restrictive interpretation of Rule 134 of the Rules as a whole and by not relying on Rule 134(3) of the Rules*".²⁸

²⁵ See the "Judgment on the appeal of Mr Laurent Gbagbo against the decision of Trial Chamber I entitled "Decision giving notice pursuant to Regulation 55(2) of the Regulations of the Court", *supra* note 21, para. 18.

²⁶ See the "Decision on the 'Urgent Request for Directions' of the Kingdom of the Netherlands of 17 August 2011" (Appeals Chamber), No. ICC-01/04-01/06-2799-Conf OA 19, 26 August 2011, para. 8. (Reclassified as public on 27 January 2012).

²⁷ See the Defence's Appeal, *supra* note 2, p. 8.

²⁸ *Idem*, paras. 18-21 and 24.

15. The CLRV submits that the wording of rule 134 of the Rules is clear and unambiguous in providing that:

“Motions relating to the trial proceedings

1. Prior 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. Any request from the Prosecutor or the defence shall be in writing and, unless the request is for an ex parte procedure, served on the other party. For all requests other than those submitted for an ex parte procedure, the other party shall have the opportunity to file a response.

2. At 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. Such objections or observations may not be raised or made again on a subsequent occasion in the trial proceedings, without leave of the Trial Chamber in this proceeding.

3. 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”.²⁹

16. Hence, the Trial Chamber found in the Impugned Decision that the Initial Requests do not fall under rule 134(3) of the Rules since they do not concern issues which arose during the course of trial.³⁰ The Trial Chamber further reasoned that rule 134(2) of the Rules precludes the parties from raising challenges concerning the conduct of the proceedings such as those contained in the Initial Requests for the first time during trial if they had a reasonable opportunity to do so earlier.³¹ However, the Trial Chamber added that, said provision does not entirely foreclose late challenges as it allows the Trial Chamber to eventually consider them after granting leave.³²

17. Therefore, in rendering the Impugned Decision, the Trial Chamber correctly interpreted rule 134 of the Rules and strictly followed the course of action demanded by its clear and unambiguous terms. Indeed, as the Appeals Chamber held, the statutory provisions are to be interpreted in good faith in accordance with the

²⁹ See Rule 134 of the Rules of Procedure and Evidence (emphasis added.)

³⁰ See the Impugned Decision, *supra* note 9, para. 22.

³¹ *Idem*, para. 14.

³² *Ibidem*, para. 24.

ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.³³ Consequently, the Trial Chamber's interpretation of the terms such as at the commencement of the trial and after the commencement of the trial contained in rule 134 (2) and (3) firmly complies with the rules of judicial interpretation, tracking the ordinary meaning of those terminologies in said provision. As held by the International Court of Justice, the first duty of a court of law called upon to interpret and apply the provisions of a treaty "*is to endeavour to give effect to them in their natural and ordinary meaning in the context in which they occur. If the relevant words in their natural and ordinary meaning make sense in their context, that is an end of the matter*".³⁴

18. Yet, the Defence argues that "*Rule 134(3) of the Rules permits the Trial Chamber to deal with continuing effects of motions related to the trial proceedings after the commencement of the trial*".³⁵ Such interpretation will obfuscate the intention of the drafters to ensure the expeditious conduct of the proceedings by giving some other unintended meaning to the provisions in question. In this regard, the International Court of Justice held that "[w]hen the Court can give effect to a provision of a treaty by giving to the words used in it their natural and ordinary meaning; it may not interpret the

³³ See the "Judgment 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, 13 July 2006, para. 33. The interpretation of the Statute is governed by the general principle of interpretation of treaties as set out in article 31(1) of the Vienna Convention on the Law of Treaties, according to which a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose. The same principle of interpretation applies to the Rules. See also the "Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008" (Appeals Chamber), No. ICC-01/04-01/06-1432 OA9 OA10, 11 July 2008, para. 55 and the "Judgment on the Appeal Against the 'Decision on Joinder rendered on 10 March 2008 by the Pre-Trial Chamber in the Germain Katanga and Mathieu Ngudjolo Chui Cases'" (Appeals Chamber), No. ICC-01/04-01/07-573 OA6, 09 June 2008, para. 5.

³⁴ See International Law Commission, Yearbook of the International Law Commission, 1966, Vol. II, p 219-223 U.N. Doc. A/CN.4/SER.A/1966/Add.1, p. 221, citing ICJ, *Competence of the General Assembly for the Admission of a State to the United Nations*, Advisory Opinion, I.C.J. Reports 1950, p. 8 (emphasis added).

³⁵ See the Defence's Appeal, *supra* note 2, para. 21.

words by seeking to give them some other meaning”.³⁶ Indeed, the approach advocated by the Defence will undoubtedly lead to a blatant revision of the meaning of the words contained in rule 134 of the Rules. However, it is not the function of interpretation to revise treaties or read into them what they do not, expressly or by implication, contain.³⁷

19. The CLRV submits that the choice of words used in rule 134 of the Rules, in particular, those showing the clear intention of the drafters to limit the parties’ ability to raise objections relating to the trial proceedings at three specific stages, namely (i) *prior to the commencement of the trial*, (ii) *at the commencement of the trial*, and (iii) *after the commencement of the trial*, was indeed deliberate and well thought-through. On the contrary, the Defence’s approach would suggest that these explicit restrictions are meaningless, serving no purposes. Yet, no word in a treaty should be presumed to be superfluous or to lack meaning or purpose.³⁸ Indeed, “[i]t is an elementary rule of interpretation that one should not construe a provision or part of a provision as if it were superfluous and hence pointless: the presumption is warranted that law-makers enact or agree upon rules that are well thought out and meaningful in all their elements”.³⁹ Accordingly, the second ground of appeal should be dismissed.

³⁶ See ICJ, *Competence of the General Assembly for the Admission of a State to the United Nations*, Advisory Opinion of 3 March 1950, p. 8.

³⁷ See ICJ, *United States Nationals in Morocco case (France v. USA)*, I.C.J reports 1952, pp. 196 and 199.

³⁸ See ICTY, *The Prosecutor v. Stanislav Galic*, Judgment (Trial Chamber), Case No. IT-98-29-T, 5 December 2003, para. 91.

³⁹ See ICTY, *The Prosecutor v. Duško Tadić*, Appeals Judgement, Case No. IT-94-1-A, 15 July 1999, para. 284. See also. ICTY, *The Prosecutor v. Zejnil Delalić et al*, “Decision on the Motion on Presentation of Evidence by the Accused, Esad Landžo (Trial Chamber)”, Case No. IT-96-21, 1 May 1997, para. 17. In the relevant part the decision reads as follows: “[...] Of the many rules, one of the most familiar and commonly used is the literal or golden rule of construction. By this rule, the interpreter is expected to rely on the words used in the Statute, and to give such words their plain natural import in the order in which they are placed. The rationale is that the law maker should be taken to mean what is plainly expressed. The underlying principle which is also consistent with common sense is that the meaning and intention of a statutory provision should be discerned from the plain and unambiguous expression used therein rather than from any notions which may be entertained as just and expedient”.

3. *Third Ground of Appeal*

20. The Defence argues that “*should the Appeals Chamber find that the Trial Chamber correctly relied on Rule 134(2) of the Rules, then it incorrectly exercised its Article 64(2) discretion by refusing to rule on the merits of the [Initial Requests]*”.⁴⁰ The Defence further contends that the Trial Chamber concluded that the procedural factors should take precedence over the Accused’s right to a fair trial and decided not to rule on the substance of the Initial Requests.⁴¹ The Defence adds that thus the Trial Chamber paid paramount importance to the expeditiousness of the proceedings and committed an error of law which materially affects the Impugned Decision.⁴²

21. The CLRV submits that the Appeals Chamber pronounced itself on a similar matter in the *Katanga and Ngudjolo* case (the “*Katanga and Ngudjolo Decision*”)⁴³ addressing the discretionary power of the Trial Chambers to entertain or dismiss untimely motions related to the conduct of the trial proceedings.

22. In particular, the Appeals Chamber ruled that:

“The question that arises in this appeal is whether in the absence of an express time limit in the Statute, Rules of Procedure and Evidence and the Regulations of the Court, the Trial Chamber erred when it dismissed the Defence Motion as having been filed too late. The Appeals Chamber notes the Prosecutor’s submission that the Impugned Decision was a ‘matter of trial management pursuant to [the Trial Chamber’s] discretionary power under Article 64(2) and based on the facts and circumstances of the case’. The Appeals Chamber agrees with this characterisation of the Trial Chamber’s powers. [...] [A]rticle 64 (2) obliges the Trial Chamber to ensure that the trial is fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses. In carrying out its obligation, the Trial Chamber thus has to undertake a judicious balancing of all of

⁴⁰ See the Defence’s Appeal, *supra* note 2, p. 10.

⁴¹ *Idem*, para. 32.

⁴² *Ibidem*, para. 34.

⁴³ 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.

these competing interests. The question whether an accused person's rights have been violated depends on how the Trial Chamber weighed these factors in arriving at its conclusions. This turns on the specific facts and circumstances of each case".⁴⁴

23. This is exactly what the Trial Chamber did in rendering the Impugned Decision. Firstly, the Chamber correctly considered that "*Rule 134(2)'s purpose is to ensure procedural economy and enable trial chambers to focus on the evidence at trial*"⁴⁵ in line with the Appeals Chamber's ruling which also indicates that the Trial Chambers should give high importance to the expeditiousness of the proceedings.⁴⁶

24. Secondly, the Trial Chamber carefully examined the specific facts and circumstances surrounding the Initial Requests in order to determine whether to grant leave pursuant to rule 134(2) of the Rules. In particular, the Trial Chamber found that (i) the Defence waited over two years after the commencement of the trial to file the Initial Requests without offering any reasonable explanation for doing so; (ii) at the commencement of the trial, the Defence did not raise any concrete objections to the charges and did not object to the trial proceedings; (iii) the Defence is in possession of the materials on which the Prosecution relies and conducted an

⁴⁴ *Idem*, para. 33.

⁴⁵ See the Impugned Decision, *supra* note 9, para. 23.

⁴⁶ See the Katanga and Ngudjolo Decision, *supra* note 43, paras. 40-47. The Appeals Chamber held that "[t]he Statute and the Rules of Procedure and Evidence place an onus on all those involved in the trial to act in a diligent and expeditious manner in the performance of their obligations. The duty applies to the Chambers of the Court, the parties and participants. As regards the accused person, where he or she is represented by counsel, the Code of Professional Conduct for counsel enjoins counsel to represent him or her 'expeditiously with the purpose of avoiding unnecessary delay in the conduct of the proceedings'. [...] The need to act expeditiously must also be viewed in the context in which the Court operates. The crimes under the Court's jurisdiction are by their nature complex and their adjudication takes time. It is vital for cases to be properly managed from the start to forestall unnecessary delays. Undoubtedly, delays in proceedings are inimical to the proper administration of justice. For instance, witnesses to the alleged crime may become unavailable, or may, with the passage of time, forget what transpired. Material evidence, both incriminatory and exculpatory, may disappear or may be rendered useless by exposure to the elements. In this case, both the prosecution and the accused may be prejudiced. An expeditious trial is beneficial to victims. It assures them of receiving justice and of going through the healing process quickly. For witnesses, it relieves them as soon as possible of the anxiety of having to appear in court to give evidence. Unreasonable delay in commencing or finalising a trial may also diminish public interest and public support for, and cooperation with, the Court. Without such support and cooperation the Court would find it difficult to have its decisions and orders respected or enforced. [...] Expeditiousness is thus an independent and important value in the Statute to ensure the proper administration of justice, and is therefore more than just a component of the fair trial rights of the accused. For this reason, article 64 (2) enjoins the Trial Chamber to ensure that the trial is both fair and expeditious".

extensive defence throughout the Prosecution's case; (iv) the Defence has the opportunity to raise the potentially prejudicial effect of every item of evidence submitted during trial; and (v) the Defence enjoyed an opportunity to question every witness who appeared before the Chamber.⁴⁷ Upon judiciously assessing these factors, the Trial Chamber declined to grant leave. This was also in line with the above mentioned Appeals Chamber's ruling which indicates that the Trial Chambers should regulate the conduct of the parties and participants so as to ensure, among other considerations, that such conduct (including, raising objections in a timely manner) does not cause undue delay to the proceedings.⁴⁸

25. Consequently, there is no showing that the Trial Chamber misappreciated the facts and circumstances concerning the Initial Requests, took into account irrelevant facts or failed to take into account relevant facts. Neither does the Defence demonstrate that the Trial Chamber's exercise of discretion in dismissing the Initial Requests was either based on an erroneous legal interpretation and on incorrect conclusion of fact or so unfair and unreasonable as to constitute an abuse of discretion. As a result, the third ground of appeal should be dismissed.

⁴⁷ See the Impugned Decision, *supra* note 9, paras. 24-28.

⁴⁸ See the Katanga and Ngudjolo Decision, *supra* note 43, paras. 53-54. The Appeals Chamber ruled that "[...] [t]he object of article 64 (2) is to ensure that the trial is managed properly and expeditiously whilst giving full respect to the rights of the accused. However, full respect for the rights of the accused does not mean that a Trial Chamber may not control the manner in which an accused person acts in the proceedings. Under article 64 (2) of the Statute, the Trial Chamber has the power to regulate the conduct of the parties and participants so as to ensure, among other considerations, that such conduct does not cause undue delay to the proceedings. [...] In the view of the Appeals Chamber, a party to a proceeding who claims to have an enforceable right must exercise due diligence in asserting such a right. This is as it should be in order for the Trial Chamber to take account of the interests of the other parties to and participants in the proceedings and of the statutory injunction for fairness and expeditiousness. The Appeals Chamber agrees with the Trial Chamber's conclusion that parties must submit motions that have repercussions on the conduct of the trial in 'a timely manner'. The Appeals Chamber interprets "timely manner" to mean that the parties must act within a reasonable time. However, what is reasonable or unreasonable in relation to time always turns on all the circumstances of the case, including the conduct of the person seeking the Court's assistance."

4. *Fourth Ground of Appeal*

26. The Defence argues that “[t]he purpose of the procedural rules concerning the conduct of proceedings cannot be antithetical to the core principles of the Rome Statute, including the fair trial rights of the accused”.⁴⁹ The Defence further contends that “in taking the Impugned Decision under Article 64(2) of the Statute, the Trial Chamber failed to ensure that, as required under Article 21(3) of the Statute, the law is interpreted and applied in line with internationally recognized human rights, including Mr Ongwen’s fair trial rights under Articles 67(1)(a) and (e) of the Statute. This amounted to an error of law, which materially affects the Impugned Decision”.⁵⁰

27. The CLRV submits that, in the Impugned Decision, the Trial Chamber never made such a sweeping ruling as now alleged by the Defence. Yet, this ground of appeal is framed in an overly broad manner without demonstrating specific legal, factual or procedural error(s) that the Trial Chamber allegedly committed in rendering the Impugned Decision. Indeed, it should not be the Appeals Chamber's duty to decompose a broadly formulated ground of appeal in order to identify the exact matter that requires an appellate review. As recalled *supra*, an appellant is obliged not only to set out the alleged error, but also to indicate, with sufficient precision, how said error would have materially affected the Impugned Decision.⁵¹ The Defence fails to do so.

28. The main finding of the Trial Chamber in the Impugned Decision was the untimeliness of the Initial Requests.⁵² Therefore, the Trial Chamber did not grant leave to appeal in respect of a generic question of whether the purpose of the procedural rules concerning the conduct of the proceedings can or cannot be antithetical to the core principles of the Statute, including the fair trial rights of the

⁴⁹ See the Defence’s Appeal, *supra* note 2, p. 16.

⁵⁰ *Idem*, para. 41.

⁵¹ See *supra* note 16.

⁵² See the Impugned Decision, *supra* note 9, paras. 11, 36-37.

Accused. Yet, the Defence attempts to impermissibly widen the scope of the appellate review of the Impugned Decision via this ground of appeal, going well beyond the parameters of the issue of timeliness. Therefore, as the Appeals Chamber ruled previously, there is no need to respond to arguments of the Defence that go beyond the precise issue on appeal.⁵³

29. Lastly, the fourth ground of appeal appears to be nothing more than an overblown effort to litigate *ex novo* before the Appeals Chamber the entirety of the Impugned Decision, disregarding the narrow scope of the appellate review. In this regard, it should be recalled that the Appeals Chamber's review function is "*corrective in nature and not de novo*."⁵⁴ Consequently, the Appeals Chamber cannot engage in a hollow academic exercise, exceeding the boundaries of the real issue on appeal - which is the correctness of the Trial Chamber's interpretation of the rule 134 of the Rules. Therefore, the fourth ground of appeal should be dismissed.

CONCLUSION

30. For the foregoing reasons, the Common Legal Representative of the Victims requests the Appeals Chamber to reject the Defence's Appeal.

⁵³ See the "Judgment on the appeals of the Defence against the decisions entitled 'Decision on victims' applications for participation a/0010/06, a/0064/06 to a/0070/06, a/0081/06, a/0082/06, a/0084/06 to a/0089/06, a/0091/06 to a/0097/06, a/0099/06, a/0100/06, a/0102/06 to a/0104/06, a/0111/06, a/0113/06 to a/0117/06, a/0120/06, a/0121/06 and a/0123/06 to a/0127/06' of Pre-Trial Chamber II" (Appeals Chamber), No. ICC-02/04-179 OA and ICC-02/04-01/05 OA 2, 23 February 2009, para. 32. See also the "Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I of 3 June 2013 entitled 'Decision adjourning the hearing on the confirmation of charges pursuant to article 61(7)(c)(i) of the Rome Statute'", *supra* note 22, para. 63.

⁵⁴ 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.

A handwritten signature in black ink, reading "Paolina Massidda". The signature is written in a cursive style with a horizontal line underneath the name.

Paolina Massidda
Principal Counsel

Dated this 23rd day of April 2019

At The Hague, The Netherlands