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**International
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Court**



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Date: 27 September 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***

Confidential

**CLRV Response to “Motions on Defects in the Confirmation
Decision Regarding SGBC”**

Source: Office of Public Counsel for Victims

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

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I. INTRODUCTION

1. The Common Legal Representative of Victims¹ (the “CLR”) opposes the Defence “Motions on Defects in the Confirmation Decision Regarding SGBC” (the “Fifth Motion”).²

2. The CLR submits that the reliefs requested by the Defence in the Fifth Motion are almost identical in their nature to the ones already rejected *in limine* by a previous decision of Trial Chamber IX (the “Chamber”) which was confirmed on appeal. Indeed, the Defence raises again a new challenge of the decision confirming the charges against Mr Ongwen (the “Confirmation Decision”)³ two full years and a half after the start of the trial without any reasonable explanation for doing so. However, the Defence fails to meet the relevant requirements for raising jurisdictional challenge under article 19(4) of the Rome Statute (the Statute) or requesting leave of the Chamber under rule 134(2) of the Rules of Procedure and Evidence (the “Rules”) to place objections concerning the conduct of the proceedings which have arisen since the confirmation hearing.

3. Finally, the CLR further contends that the Fifth Motion is frivolous and abusive of a party’s right to file documents and make submissions before the Court.

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 “Motions on Defects in the Confirmation Decision Regarding SGBC”, No. ICC-02/04-01/15-1603-Conf, 20 September 2019 (the “Fifth Motion”).

³ See the “Decision on the confirmation of charges against Dominic Ongwen” (Pre-Trial Chamber II), No. ICC-02/04-01/15-422-Red, 23 March 2016 (the “Confirmation Decision”).

II. PROCEDURAL BACKGROUND

4. On 1 February 2019, the Defence filed four motions alleging, *inter alia*, lack of notice to the Accused and certain deficiencies in the Confirmation Decision (“the Four Motions”).⁴ Pursuant to the Chamber’s instruction,⁵ the CLRV,⁶ the Prosecution⁷ and the Legal Representatives of Victims⁸ filed their responses on 25 February 2019.

5. On 7 March 2019, the Chamber issued the “Decision on Defence Motions Alleging Defects in the Confirmation Decision” (the “Decision on the Four Motions”).⁹ On 14 March 2019, the Defence filed a Request seeking leave to appeal said decision on two issues (the “Leave to Appeal Request”).¹⁰ On 18 March 2019, the

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 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 Motions”).

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. See also 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 “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, 25 February 2019 (notified on 26 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 “Decision on the Four Motions”).

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”).

Prosecution¹¹ and the CLRV¹² filed their responses. On 1 April 2019, the Chamber granted leave to appeal in respect of one issue.¹³

6. On 11 April 2019, the Defence filed its Appeal Brief (the Defence's Appeal).¹⁴ On 23 April 2019, the Prosecution¹⁵ and the CLRV¹⁶ filed their responses. Pursuant to the Appeals Chamber's instruction,¹⁷ the Prosecution¹⁸ and the Legal Representative of Victims¹⁹ filed their further submissions on 31 May 2019. The Defence²⁰ and the CLRV²¹ filed their further submissions on 3 June 2019 with leave of the Appeals Chamber.²² On 17 July 2019, the Appeals Chamber rendered its Judgment on the Defence's appeal and confirmed the Chamber's Decision on the Four Motions.²³

7. On 20 September 2019, the Defence filed the Fifth Motion.²⁴

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.

¹⁴ 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").

¹⁵ See the "Prosecution's Response to 'Defence's appeal against the 'Decision on Defence Motion Alleging Defects in the Confirmation Decision'", No. ICC-02/04-01/15-1502 OA4, 23 April 2019.

¹⁶ See the "CLRV's Response to 'Defence's Appeal Against the Decision on Defence Motions Alleging Defects in the Confirmation Decision'", No. ICC-02/04-01/15-1503 OA4, 23 April 2019.

¹⁷ See "Order for Further Submissions" (Appeals Chamber), No. ICC-02/04-01/15-1524 OA4, 24 May 2019, p. 3.

¹⁸ See the "Prosecution's Submission in response to 'Order for Further Submissions' (ICC-02/04-01/15-1524)", No. ICC-02/04-01/15-1532 OA4, 31 May 2019.

¹⁹ See the "Victims' submissions in response to the Order for Further Submissions", No. ICC-02/04-01/15-1531 OA4, 31 May 2019.

²⁰ See the "Defence's Further Submissions", No. ICC-02/04-01/15-1536 OA4, 03 June 2019.

²¹ See the "CLRV's Further Submissions Pursuant to the Appeals Chamber's Order", No. ICC-02/04-01/15-1537 OA4, 03 June 2019.

²² See the "Decision on the Victims' request for time extension (Appeals Chamber)", No. ICC-02/04-01/15-1530 OA4, 31 May 2019. See also the "CLRV's Request for an Extension of Time Limit", No. ICC-02/04-01/15-1529-Conf OA4, 31 May 2019.

²³ See the "Judgment on the appeal of Mr Dominic Ongwen against Trial Chamber IX's 'Decision on Defence Motions Alleging Defects in the Confirmation Decision'" (Appeals Chamber), No. ICC-02/04-01/15-1562 OA4, 17 July 2019.

²⁴ See the Fifth Motion, *supra* note 2.

III. CONFIDENTIALITY

8. The present submission is filed confidential in accordance with regulation 23bis (2) of the Regulations of the Court, following the classification chosen by the Defence. However, the CLRV indicates that this document does not contain any confidential information and thus can be reclassified as public.

IV. SUBMISSIONS

9. In the Fifth Motion, the Defence seeks leave from the Chamber to amend its Four Motions, *"particularly regarding defects in the Confirmation Decision in respect to SGBC, related to individual criminal responsibility (Counts 50-60)"*.²⁵

10. At the outset, the CLRV notes that the Chamber rejected the Four Motions ruling that: (i) the vast majority of the Defence's arguments concerned whether sufficient information is included in the Confirmation Decision; (ii) all potential defects in the charges arising from the Confirmation Decision should have been raised prior to trial, pursuant to rule 134(2) of the Rules which was specifically designed to ensure that procedures which occurred between the confirmation hearing and the commencement of the trial are settled before the trial commences; (iii) although said provision does not entirely foreclose late challenges, allowing the Chamber to consider them after granting leave, the Defence cannot raise such challenges over two years after the commencement of the trial without reasonable explanations for doing so; (iv) article 19(4) of the Statute also requires jurisdictional challenges to be entertained prior to or at the commencement of the trial in the absence of exceptional circumstances; and (v) the Defence was manifestly too late in filing a jurisdictional challenge and failed to justify any exceptional circumstances for raising its challenges at the time.²⁶ For these reasons, the Chamber dismissed the Four

²⁵ See the Fifth Motion, *supra* note 2, para. 2.

²⁶ See the Decision on the Four Motions, *supra* note 9, paras. 11-35.

Motions *in limine* for their lack of timeliness.²⁷ The Appeals Chamber confirmed the Chamber's legal and factual findings and rejected all grounds of the Defence Appeal.²⁸

11. The CLRV submits that the reliefs requested in the Fifth Motion are almost identical to those contained in the Four Motions. Firstly, the majority of the arguments concerns alleged insufficiency or alleged lack of temporal or territorial jurisdiction in respect of sexual and gender based crimes as charged against the Accused in the Confirmation Decision.²⁹ Secondly, these alleged defects should have been raised prior to trial, pursuant to article 19(4) of the Statute or rule 134(2) of the Rules³⁰. Since its previous motions were dismissed due to their untimeliness, the Defence must be fully aware of this fact. Yet, it raises another challenge, albeit dressed differently, two full years and a half after the commencement of the trial and without providing any reasonable explanation for proceeding in such manner. Literally, *no explanation* is provided by the Defence as to why it waited until now. It merely states that [its Motion] "*is timely because the lack of specificity in the allegations continues to impact on Mr Ongwen's fair trial rights and the conduct of the Defence presentation of evidence*".³¹ Needless to say, this cannot possibly constitute in any sense a reasonable explanation, justifying a significant delay measuring no less than two and a half years.

12. Consequently, the Chamber should dismiss the Fifth Motion *in limine*, for the same reason of untimeliness that it rejected the Four Motions. There is no valid reason for the Chamber to depart from its previous legal and factual findings since the Defence yet again failed to raise any justification for the timing of its motion. As

²⁷ *Idem*, paras. 36-37.

²⁸ See the "Judgment on the appeal of Mr Dominic Ongwen against Trial Chamber IX's 'Decision on Defence Motions Alleging Defects in the Confirmation Decision'", *supra* note 23, paras. 49-163.

²⁹ See the Fifth Motion, *supra* note 2, paras. 3-6, 16-23 and 57-58.

³⁰ See the Decision on Four Motions, *supra* note 9, paras. 36-37. See also the "Judgment on the appeal of Mr Dominic Ongwen against Trial Chamber IX's 'Decision on Defence Motions Alleging Defects in the Confirmation Decision'", *supra* note 23, para. 163.

³¹ See the Fifth Motion, *supra* note 2, para. 2.

held by the Appeals Chamber, the duty to act in a diligent and expeditious manner applies to all those involved in the proceedings, including the accused.³² While having had ample opportunity to raise challenges against the Confirmation Decision much earlier,³³ the fact that the Defence waited until now to file the Fifth Motion and failed to establish any justification for its delay (especially, following the issuance of the Decision on the Four Motions and its confirmation by the Appeals Chamber) is simply inexcusable.

13. As a consequence, the Fifth Motion is further frivolous and vexatious given that the Defence does not even attempt to satisfy any of the requirements under article 19(4) of the Statute or rule 134(2) of the Rules, especially after its similar motions in the recent past were rejected for untimeliness.³⁴ Entertaining its merits will cause duplication of proceedings and waste precious time and resources of the Court.³⁵ Indeed, as held by Pre-Trial Chamber I, continued filing of an inordinate number of baseless motions that are frivolous and vexatious should be deemed as abusive of a party's right to file documents and make submissions before the Court.³⁶

³² See the Judgment on the appeal of Mr Dominic Ongwen against Trial Chamber IX's 'Decision on Defence Motions Alleging Defects in the Confirmation Decision', *supra* note 23, para. 152.

³³ *Idem*, para. 153.

³⁴ See ICTY, *Prosecutor v. Dragomir Milosevic*, Decision on Dragomir Milosevic's Third Motion to Present Additional Evidence (Appeals Chamber), Case No. IT-98-29/1-A, 8 September 2009, para. 17.

³⁵ See ICTR, *Prosecutor v. Edouard Karemera et al*, Decision on Prosecutor's Interlocutory Appeal Against Trial Chamber III Decision of 8 October 2003 Denying Leave to File an Amended Indictment (Appeals Chamber), Case No. ICTR-98-44-AR73, 10 December 2003, para. 18.

³⁶ See the "Decision on the Request for Review of the Registry's decision of 13 February 2007 (Pre-Trial Chamber I)", No. ICC-02/05-66, 15 March 2007, pp. 6-7.

V. CONCLUSION

14. For the foregoing reasons, the Common Legal Representative of the Victims respectfully requests the Chamber to dismiss the Fifth Motion *in limine*.

A handwritten signature in black ink, which appears to read "Paolina Massidda". The signature is written in a cursive style and is underlined.

Paolina Massidda
Principal Counsel

Dated this 27th day of September 2019

At The Hague, The Netherlands