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PRE-TRIAL CHAMBER II

Before: Judge Cuno Tarfusser, Presiding Judge
Judge Marc Perrin de Brichambaut
Judge Chang-ho Chung

SITUATION IN UGANDA

IN THE CASE OF

THE PROSECUTOR v. DOMINIC ONGWEN

Public

**Victims' response to the "Defence Request for Leave to Appeal Issues in the
Confirmation of Charges Decision"**

Source: Victims' Legal Representatives

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

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I. INTRODUCTION

1. This response is filed by the external Legal Representatives of Victims (“the Legal Representatives”) on behalf of the victims they represent (“the participating victims”). It is filed pursuant to article 68(3) of the Statute, Regulation 65(3) of the Regulations of the Court, and the decision of the Single Judge prescribing participatory rights of victims.¹
2. The Legal Representatives request that the Chamber reject the Defence Request for Leave to Appeal Issues in Confirmation of Charges Decision (“the Defence Request”).

II. PROCEDURAL HISTORY

3. Aspects of the procedural history relevant to this response are as follows:
4. In 2005 warrants of arrest for Mr Ongwen and other commanders of the Lords’ Resistance Army (“LRA”) were issued (initially under seal), and were subsequently unsealed.
5. On 26 January 2015 Mr Ongwen had his first appearance before the Court.
6. On 6 February 2015 Mr Ongwen’s case was severed from the case against the other LRA commanders.²
7. On 27 February 2015 then Single Judge Trendifilova issued her Decision Setting the Regime for Evidence Disclosure and Other Related Matters, which among other things ruled on the extent to which material disclosed by the Prosecutor must be translated into Acholi.³

¹ *Prosecutor v. Dominic Ongwen*, Decision on contested victims’ applications for participation, legal representation of victims and their procedural rights, ICC-02/04-01/15-350, 27 November 2015.

² *Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo, Dominic Ongwen*, Decision Severing the Case Against Dominic Ongwen, ICC-02/04-01/05-424, 6 February 2015.

³ *Prosecutor v. Dominic Ongwen*, Decision Setting the Regime for Evidence Disclosure and Other Related Matters, ICC-02/04-01/15-203, 27 February 2015.

8. On 30 December 2015 the Defence filed a (second) request for the postponement of the confirmation hearing.⁴ On 12 January 2016 the Chamber rejected that request.⁵
9. On 21 December 2015 the Prosecutor filed the Document Containing the Charges (“the DCC”), her Pre-Confirmation Brief, and the list of evidence relied on for the confirmation proceedings.⁶ On 18 January 2016 written submissions on the confirmation process were respectively submitted by the Defence⁷ and the Legal Representatives.⁸
10. From 21 to 27 January 2016 the confirmation hearing was held.
11. On 23 March 2016 the Chamber issued its Decision on the confirmation of charges against Dominic Ongwen (“the Confirmation Decision”).⁹
12. On 29 March 2016 the Defence filed the Defence Request.¹⁰

III. SUBMISSIONS

13. The participating victims respectfully request that the Chamber refuse the Defence Request and deny leave to appeal the Confirmation Decision.
14. For the reasons explained below, none of the five issues raised in the Defence Request meets the requirements set out in article 82(1)(d) as elaborated by the Court’s jurisprudence.

⁴ *Prosecutor v. Dominic Ongwen*, Corrected Version of Defence Request for Postponement of the Confirmation of Charges Hearing, ICC-02/04-01/15-385-Conf-Corr (See also the public redacted version: ICC-02/04-01/15-385-Red-Corr).

⁵ *Prosecutor v. Dominic Ongwen*, Decision on requests to postpone the hearing on the confirmation of charges, ICC-02/04-01/15-396, 12 January 2016.

⁶ *Prosecutor v. Dominic Ongwen*, Prosecution’s Submission of the document containing the charges, the pre-confirmation brief, and the list of evidence, ICC-02/04-01/15-375, 21 December 2015.

⁷ *Prosecutor v. Dominic Ongwen*, Defence Brief for the Confirmation of Charges Hearing, ICC-02/04-01/15-404-Conf, 18 January 2016 (See also further public redacted version: ICC-02/04-01/15-404-Red2).

⁸ *Prosecutor v. Dominic Ongwen*, Victims’ Pre-Confirmation Brief, ICC-02/04-01/15-403, 18 January 2016.

⁹ *Prosecutor v. Dominic Ongwen*, Decision on the confirmation of charges against Dominic Ongwen, ICC-02/04-01/15-422-Conf, 23 March 2016. (See also the public redacted version: ICC-02/04-01/15-422-Red).

¹⁰ *Prosecutor v. Dominic Ongwen*, Defence Request for Leave to Appeal Issues in Confirmation of Charges Decision, ICC_02/04-01/15-423, 29 March 2016.

15. The object of the confirmation process is, as the Chamber stated in the Confirmation Decision, to protect suspects from trial on “wrongful and unfounded accusations.”¹¹ Given the weight of the evidence produced against Mr Ongwen throughout the confirmation process, and the rigor of the procedures which have been followed, there is no danger that this case is proceeding on the basis of unfounded accusations. The participating victims have already waited more than ten years for this trial, and should not face further delays due to unwarranted interlocutory appeals.

(i) Conditions for leave to appeal

16. A chamber may grant leave to appeal under article 82(1)(d) where a decision involves an issue:

- (i) which would significantly affect either the fair and expeditious conduct of the proceedings or the outcome of the trial; and
- (ii) of which an immediate resolution by the Appeals Chamber would materially advance the proceedings.

17. An issue is a subject requiring a decision for its resolution, and not “merely a question over which there is disagreement or conflicting views”.¹² The issue in question must emanate from the decision concerned¹³ and may not be merely an abstract or hypothetical question.¹⁴ Moreover it must be “essential for the

¹¹ Confirmation Decision, para.14.

¹² *Situation in the Democratic Republic of the Congo*, Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal, ICC-01/04-168, 13 July 2006, para.9.

¹³ *Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on the Prosecutor’s application for leave to appeal Pre-Trial Chamber III’s decision on disclosure, ICC-01/05-01/08-75, 25 August 2008, para. 11; *Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on the Prosecutor’s Application for Leave to Appeal the “Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo”, ICC-01/05-01/08-532, 18 September 2009, para.17

¹⁴ *Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on the Prosecutor’s Application for Leave to Appeal the “Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo”, ICC-01/05-01/08-531, 18 September 2009, para.17.

determination of matters arising in the judicial cause under examination”¹⁵: in other words, the approach taken on the issue must have had an impact on the outcome of the decision (here, whether or not charges would be confirmed).¹⁶

(ii) *The first issue*

18. The first issue identified in the Defence Request is the Chamber’s refusal to exclude a batch of non-translated statements and transcripts disclosed by the Prosecution to the Defence on 21 December 2015.

19. The Legal Representatives submit that properly framed, this issue does not arise from the Confirmation Decision. They note in particular the then Single Judge’s decision of 27 February 2015. It determined that rule 76(3) does not demand the translation in its entirety of all material relied on by the Prosecution at the confirmation hearing; and established a scheme whereby the Defence must identify portions of that evidence to be translated.¹⁷ Leave to appeal that decision was not requested at the relevant time.

20. Despite this, the arguments now made in the Defence Request under the first issue amount to nothing more than a re-opening of matters decided prior to the Confirmation Decision. The Defence does not claim that the Confirmation Decision failed to comply with the scheme established in the 27 February decision. (Indeed it appears to have been the Defence which failed to comply with that scheme by not requesting the translation of the documents in question.) Instead the Defence Request sets out two arguments:

- (i) First, by claiming that the non-translation of certain disclosed material must *per se* violate rule 76(3), it impliedly argues that rule 76(3) requires the

¹⁵ *Situation in the Democratic Republic of the Congo*, Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal, ICC-01/04-168, 13 July 2006, para.9.

¹⁶ *Prosecutor v. Laurent Gbagbo*, Decision on the Defence request for leave to appeal the “Decision on the Confirmation of Charges against Laurent Gbagbo”, ICC-02/11-01/11-680, 11 September 2014, para.11.

¹⁷ *Prosecutor v. Dominic Ongwen*, Decision Setting the Regime for Evidence Disclosure and Other Related Matters, ICC-02/04-01/15-203, 27 February 2015, paras 30-36 especially para.35.

translation of all evidentiary material to be relied on by the Prosecution.¹⁸ However this argument was rejected by the 27 February decision. To the extent that this argument is relied on then, this issue clearly arises out of the 27 February decision rather than out of the Confirmation Decision.

- (ii) Secondly, the Defence argues that the Single Judge's refusal to postpone the confirmation hearing denied it time to properly review the disclosed material and request translations.¹⁹ This is a matter arising out of the Single Judge's decision on 12 January 2016 in which the requested postponement of the confirmation hearing was refused.²⁰ Again, no request was made for leave to appeal that decision.

21. The first issue therefore effectively amounts to an attempt to re-litigate questions already determined in previous decisions, and for which the time has long passed for requesting leave to appeal. Properly understood, the issue does not arise from the Confirmation Decision.

22. Further, and in any event, the Defence Request does not show how this question impacted on the outcome of the decision. It is merely asserted that the statements in question "were relied upon by the Prosecutor for the Hearing, and relied upon by the Chamber for the Decision". No reference is made to any specific findings of the Chamber which used this material or which would have been resolved differently had the material been excluded. Indeed, nothing is said to address the fact that far from relying on the contested material as central to its decision Chamber described the untranslated statements and transcripts as comprising a "limited amount of material concerned within the broader scope of the evidence relied upon by the Prosecutor".²¹ It is recalled that an applicant for leave to appeal

¹⁸ Defence Request, especially at paras 12, 13, 16.

¹⁹ Defence Request, paras 14, 16.

²⁰ *Prosecutor v. Dominic Ongwen*, Decision on requests to postpone the hearing on the confirmation of charges, ICC-02/04-01/15-396, 12 January 2016.

²¹ Confirmation Decision, para.22.

bears the burden of satisfying the Chamber that the relevant requirements are met.²² That burden has not been met by the Defence Request on the first issue.

(iii) The second issue

23. The second issue raised in the Defence Request is the failure by the Chamber to consider Defence evidence regarding the age of Mr Ongwen.

24. The Defence Request claims that the Chamber dismissed the “Defence submission on the age of Mr Ongwen”, and refers to paragraph 150 of the Confirmation Decision. In doing so the Defence mischaracterizes the latter paragraph. In fact, what the Chamber dismissed as “entirely without legal basis” was the Defence’s argument that Mr Ongwen’s own abduction as a child could, in and of itself, exclude his criminal responsibility for acts committed as an adult. Having rejected that argument the question of Mr Ongwen’s age became irrelevant. It was not a matter which was decided in the Confirmation Decision. The second issue identified in the Defence Request is therefore also an issue not arising from the Confirmation Decision.

25. The second issue must also fail because even if the Chamber had accepted the Defence submissions regarding Mr Ongwen’s age, this would have had no impact on the outcome of the Confirmation Decision. The Defence Request appears to suggest that such a finding would have assisted in establishing the defence of duress.²³ However the Chamber rejected the duress argument for fundamental reasons²⁴ which made it entirely unnecessary to consider the question of Ongwen’s

²² *Situation in Uganda*, Decision on Prosecutor’s Application for Leave to Appeal in Part Pre-Trial Chamber II’s Decision on the Prosecutor’s Applications for Warrants of Arrest under Article 58, ICC-02/04-01/05-20-US-Exp, 19 August 2005 (unsealed pursuant to Decision ICC-02/04-01/05-52, 13 October 2005), para. 15; *Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Decision on the Defences’ Applications for Leave to Appeal the Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ICC-01/09-01/11-399, 9 March 2012, para.12; *Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta*, Decision on the Defence Applications for Leave to Appeal the Decision on the Confirmation of Charges, ICC-01/09-02/11-406, 9 March 2012, para.20; *Prosecutor v. Bosco Ntaganda*, 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”, ICC-01/04-02/06-322, 4 July 2014, para.7.

²³ Defence Request, para.21.

²⁴ Confirmation Decision, paras 151-155.

age. No possible finding concerning Mr Ongwen's age could have salvaged the Defence's reliance on duress. Likewise once the Chamber determined that the law does not provide for a defence based on an accused's abduction as a child, no finding on Mr Ongwen's age could not have exculpated Mr Ongwen on that basis. It is clear that a finding on Mr Ongwen's age would have made no difference to the outcome of the Confirmation Decision.

26. The Legal Representatives note that paragraphs 22 and 24 of the Defence Request, while included under the heading of the second issue, raise an altogether different matter. They appear to argue that the person currently appearing before the Court in these proceedings is not the person named in the warrant of arrest and in the charges. No such claim was made in the Defence Brief for the Confirmation of Charges Hearing,²⁵ in oral submissions during the confirmation hearing, nor at any time previously in these proceedings. While a person's age may be used as one means by which to identify a suspect, it is not determinative of a person's identity: a disagreement about a suspect's age cannot be equated to a disagreement about the identity of a suspect. The arguments raised previously by the Defence regarding Mr Ongwen's age were not an argument that the "Mr Ongwen is not the person named in the DCC or the [Confirmation] Decision."²⁶

27. Because no question had (until now) been raised regarding the identity of the suspect, this was quite rightly a matter not dealt with in the Confirmation Decision. Accordingly, to the extent that this appears to be argued as a part of the second issue, it is not a question arising from the Confirmation Decision.

(iv) The third issue

28. The third issue argued in the Defence Request is that the Chamber did not issue a "well-reasoned decision." In support of this argument the Defence provides "examples" of where the Chamber's references to supporting material are said to

²⁵ *Prosecutor v. Dominic Ongwen*, Defence Brief for the Confirmation of Charges Hearing, ICC-02/04-01/15-404-Conf, 18 January 2016 (See also further public redacted version: ICC-02/04-01/15-404-Red2).

²⁶ Defence Request, paragraph 24.

have lacked “specificity”. In fact, rather than arguing that the Confirmation Decision was unreasoned, the Defence Request claims that insufficient detail was provided regarding the sources of evidence relied on. Thus the Defence claims that it is inadequate for the Chamber to indicate the witnesses on whose testimony it relies regarding a particular issue, and that more precision must be given as to “the specificity of their testimony” which is relied on.²⁷ Likewise identifying the dates of intercepted radio communications relied on is said to insufficient identify the evidence used to make a finding.²⁸

29. The Appeals Chamber has made clear that it is within the discretion of a Chamber to determine the extent of the reasoning provided in its decisions, so long as the reasons given “indicate with sufficient clarity the basis of the decision.”²⁹ This requires that the Chamber identify the facts which it found relevant in reaching its decision.³⁰

30. In fact, despite the Defence claims, the Confirmation Decision meets and surpasses this requirement. It identifies the facts relevant to its reasoning, as well as the sources of evidence which support them. It is therefore a misrepresentation of the Confirmation Decision to claim that it is not well-reasoned, and insofar as it is presented in this way the third issue is not an issue arising from the Confirmation Decision.

31. However in any event the proceedings would not be materially advanced by an intervention by the Appeals Chamber to review whether the evidence identified in support of the Confirmation Decision’s reasons demonstrates sufficient “specificity”. The Defence Request appears to consider that the proceedings would be advanced because it would result in the Defence having “proper guidelines for

²⁷ Defence Request, para.30.

²⁸ Defence Request, para.31.

²⁹ *Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled “First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81”, ICC-01/04-01/06-773, 14 December 2006, para.20.

³⁰ *Ibid.*

the facts and circumstances of the case”³¹ and give “proper structure and boundaries to the proceedings.”³² In this the Defence appears to have misunderstood the confirmation process. It is correct that the parameters of the case are determined by the charges which have been confirmed by the Chamber. However it is the charges themselves and not the reasoning or references in the confirmation decision, which provides “structure and boundaries” at trial (subject to Regulation 55). Adding even more detail to the Chamber’s evidentiary references in the Confirmation Decision would therefore not affect the clarity of the case’s scope at trial.

32. Indeed as mentioned above, the purpose of the confirmation process is to avoid baseless prosecutions. The process is not designed or intended to provide a decision which will guide the defence “when investigating the case”.³³ Nor would a confirmation decision necessarily be useful for this purpose given that the evidence it refers to and accepts on does not limit the evidence which may be relied on by the parties or the Trial Chamber at trial. To the contrary, the Prosecutor need not use all available evidence in the confirmation process and may continue to investigate following confirmation;³⁴ meaning that a trial can involve evidence never reviewed in the relevant confirmation decision. Creating a more detailed “guide” to the evidence for the Defence by requiring greater “specificity” in the referencing of the Confirmation Decision would in no way materially advance the proceedings.

33. Indeed, the intervention of the Appeals Chamber at this point in order to consider the sufficiency of the detail provided in the Confirmation Decision would provide

³¹ Defence Request, para.33.

³² Defence Request, para.35.

³³ Defence Request, para.33.

³⁴ *Prosecutor v. Laurent Gbagbo*, Decision on the Prosecutor’s and Defence requests for leave to appeal the decision adjourning the hearing on the confirmation of charges, ICC-02/11-01/11-464, 31 July 2013, para.24.

no advancement in the terms of article 82(1)(d). To the contrary, it would merely cause delay in the proceedings.³⁵

(v) *The fourth issue*

34. The fourth issue concerns the Chamber's determination that article 25(3)(c) does not require a substantial contribution to the crime. However the arguments made in the Defence Request under this head reveal clearly that it amounts to a "mere disagreement" with the Chamber's approach. Moreover, obtaining a "proper determination"³⁶ or a "definitive answer"³⁷ on the interpretation of a legal provision from the Appeals Chamber is insufficient to demonstrate that an appeal would materially advance the proceedings. In deciding on a materially identical "issue" proposed as a basis for leave to appeal in the *Bemba et al.*, case, the Chamber explained that:

It is obvious that any interpretation of a legal provision favoured by a Chamber will have an impact on its assessment of the evidence pertaining to that provision and hence to its determinations, including those made pursuant to article 61 of the Statute. This, however, is not and cannot be tantamount to saying that proposing an alternative interpretation of the same relevant provision is enough to frame an issue which might qualify as an appealable issue for the purposes of granting leave to lodge an interlocutory appeal; holding otherwise would result in obliterating the difference between interlocutory appeals and appeals pursuant to article 81 of the Statute, which is the proper procedural avenue where alternative views to the ones held by the Trial Chamber can be subjected to the scrutiny of the Appeals Chamber, once the matter has been extensively debated at trial. The material advance to the proceedings entailed by the pre-emptive submission of an issue to the Appeals Chamber, which a Chamber must be satisfied exists before granting leave to appeal under article 82(1)(d), cannot simply consist of the fact that the interlocutory appeal "would provide the parties and the Trial Chamber with an authoritative interpretation of the elements required", as purported by the Defence for Mr Arido; if that were the case, all issues would be suitable

³⁵ As reasoned by this Chamber previously in *Prosecutor v Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, Joint decision on the applications for leave to appeal the "Decision pursuant to Article 61(7)(a) and (b) of the Rome Statute, ICC-01/05-01/13-801, 23 January 2015, para.24.

³⁶ Defence Request, para.38.

³⁷ Defence Request, para.39.

*to trigger an interlocutory appeal and the restrictive nature of the remedy enshrined in article 82(1)(d) would be nullified.*³⁸

35. Since the Defence has provided no other justification in support of this issue, it too must fail.

(vi) The fifth issue

36. The fifth issue is the Chamber's ruling "that forced marriage was not subsumed by the crime of sexual slavery." The Defence's submissions on this issue mischaracterize both the Pre-Trial Division's jurisprudence and the effect of the Confirmation Decision.

37. First the Defence argues that the issue arises from the Chamber's failure to refer to comments on sexual slavery made by Pre-Trial Chamber I in its confirmation decision in the *Katanga* case.³⁹ However to suggest that the *Katanga* confirmation decision is on point with the question arising about forced marriage in the present case simply misrepresents the latter decision. It in fact it involved an interpretation of the scope of sexual slavery under article 7(1)(g).⁴⁰ Pre-Trial Chamber I held that an article 7(1)(g) crime of sexual slavery can occur in situations of forced marriage.⁴¹ This in no way implies that forced marriage cannot constitute an "other inhuman act" under article 7(1)(k). That question simply did not arise in the *Katanga* case. No appealable issue can arise from the fact that the Chamber did not address itself to a judicial decision which had no relevance to the matter under consideration.

38. The Defence Request next claims that the issue arises because Chamber has created "a new element for a non-existent crime" and that Mr Ongwen is "being charged with crimes that are not even enshrined in the Statute." However it is clear from the Confirmation Decision (and the DCC) that the charge of forced marriage is

³⁸ *Prosecutor v Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, Joint decision on the applications for leave to appeal the "Decision pursuant to Article 61(7)(a) and (b) of the Rome Statute, ICC-01/05-01/13-801, 23 January 2015, para.17.

³⁹ Defence Request, para.41.

⁴⁰ *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the confirmation of charges, ICC-01/04-01/07-717, 30 September 2008, paras 428-436.

⁴¹ *Ibid.*, para.431.

brought under article 7(1)(k); that is, as a form of a crime which is incontrovertibly within the Statute. This therefore again, is not an issue arising from the Confirmation Decision.

39. Once these arguments are revealed as flawed it is apparent that the fifth issue is in fact nothing more than a mere disagreement with the Chamber's decision on this question. Moreover, the claim that an intervention from the Appeals Chamber will materially advance proceedings because it will clarify the law in this area⁴² suffers from the same defect as the argument made in respect of issue four, and is equally addressed by the Chamber's explanation set out above at paragraph 34.

IV. RELIEF SOUGHT

40. For above reasons, none of the five issues identified by the Defence meets the requirements for leave to appeal.

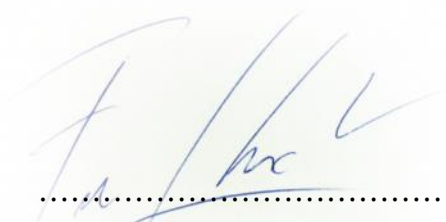
41. The participating victims are anxious for the trial to proceed. Mr Ongwen should not be permitted to delay proceedings through an appeal process that would in no way advance the proceedings.

42. The Legal Representatives therefore request that the Chamber refuse the Defence Request.



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JOSEPH AKWENYU MANOBA



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FRANCISCO COX

Dated this 1st day of April 2016
At Kampala, Uganda and Santiago, Chile

⁴² Defence Request, para.44.