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TRIAL CHAMBER IX

Before: Judge Bertram Schmitt, Presiding Judge
Judge Péter Kovács
Judge Raul C. Pangalangan

SITUATION IN UGANDA

**IN THE CASE OF
*THE PROSECUTOR v. DOMINIC ONGWEN***

Public

**CLRV Response to the Defence's Four Requests on Defects in the Confirmation of
Charges Decision**

Source: Office of Public Counsel for Victims

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

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I. INTRODUCTION

1. The Common Legal Representative of Victims¹ (the “CLR V”) submits that the Defence’s “Motion on Defects in the Confirmation of Charges Decision: Defects in Notice and Violations of Fair Trial” (the “First Request”),² the “Motion on Defects in the Confirmation of Charges Decision: Defects in the Modes of Liability” (the “Second Request”),³ the “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)” (the “Third Request”),⁴ and the “Motion on Defects in the Confirmation of Charges Decision: Defects in the Charged Crimes” (the “Fourth Request”)⁵ (together as the “Four Requests”) should be rejected in their entirety.

2. In particular, the CLR V argues that the issues raised in the Four Requests are matters already adjudicated and previously rejected by the Pre-Trial and Trial Chambers and/or premature at this stage of the proceedings since they shall ultimately be addressed and ruled upon by the Trial Chamber at the end of the trial.

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 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, 1st February 2019 (the “First Request”).

³ See 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, 1st February 2019 (the “Second Request”).

⁴ See 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, 1st February 2019 (the “Third Request”).

⁵ See 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, 1st February 2019 (the “Fourth Request”).

Indeed, the Defence's arguments advanced in the Four Requests appear to constitute attempts to re-litigate matters already adjudicated and the Defence cannot now circumvent the legal texts of the Court in order to compensate its failures to properly seek leave to appeal, or eventually re-consideration, of decisions issued by the Pre-Trial and Trial Chambers at the appropriate junctions of the proceedings.

II. PROCEDURAL BACKGROUND

3. On 23 March 2016, Pre-Trial Chamber II issued its decision on the confirmation of charges against Mr Ongwen (the "Confirmation Decision"), confirming partially the charges brought against him.⁶ On 29 March 2016, the Defence filed a leave to appeal the Confirmation Decision (the "Defence's Appeal of the Confirmation Decision").⁷ On 29 April 2016, the Pre-Trial Chamber rejected the request for leave to appeal (the "Decision on the Appeal of the Confirmation Decision").⁸

4. On 5 December 2016, the Defence requested a stay of the proceedings (the "Stay of Proceedings Request"), alleging, *inter alia*, that Mr Ongwen does not understand the charges brought against him.⁹ On 6 December 2016, at the commencement of the trial, the Trial Chamber issued an oral decision, rejecting, in

⁶ See the "Decision on the confirmation of charges against Dominic Ongwen (With public annex: List of participating victims)" (Pre-Trial Chamber II), No. ICC-02/04-01/15-422-Red, 23 March 2016 (the "Confirmation Decision").

⁷ See the "Defence Request for Leave to Appeal Issues in the Confirmation of Charges Decision, No. ICC-02/04-01/15-423, 29 March 2016 (the "Defence's Appeal of the Confirmation Decision").

⁸ See the "Decision on the Defence request for leave to appeal the decision on the confirmation of charges", No. ICC-02/04-01/15-428, 29 April 2016 (the "Decision on the Appeal of the Confirmation Decision").

⁹ See the "Defence Request for a Stay of the Proceedings and Examinations Pursuant to Rule 135 of the Rules of Procedure and Evidence", Confidential with Public Annex A and Confidential Annex B, No. ICC-02/04-01/15-620-Conf, 05 December 2016, para. 76 (A public redacted version was filed on the same day, See No. ICC-02/04-01/15-620-Red).

part, the Stay of Proceedings Request and finding that Mr Ongwen understood the nature of the charges against him.¹⁰

5. On 8 January 2018, the Defence requested the Trial Chamber to make findings on alleged fair trial violations due to the lack of translation of the Confirmation Decision into Acholi (the “Defence’s Request related to Fair Trial Violations”).¹¹ On 24 January 2018, the Trial Chamber rejected said request (the “Decision on Request related to Fair Trial Violations”).¹² On 30 January 2018, the Defence sought leave to appeal this ruling.¹³ On 12 February 2018, the Trial Chamber dismissed the request for leave to appeal.¹⁴

6. On 5 July 2018, the Defence requested leave to file a no case to answer motion (the “No Case to Answer Request”).¹⁵ On 18 July 2018, the Trial Chamber rejected said request (the “Decision on No Case to Answer Request”).¹⁶

7. On 1 February 2019, the Defence filed the Four Requests.¹⁷ On 5 February 2019, the Prosecution filed a response, requesting the Chamber to dismiss *in limine*

¹⁰ See the Transcript of the hearing held on 6 December 2016, No. ICC-02/04-01/15-T-26-ENG CT WT, page 17 line 11 to page 19 line 15.

¹¹ See the Defence Request for Findings on Fair Trial Violations and Remedy, Pursuant to Articles 67 and 64 of the Rome Statute, No. ICC-02/04-01/15-1127, 8 January 2018 (the “Defence’s Request related to Fair Trial Violations”).

¹² See the “Decision on Defence Request for Findings on Fair Trial Violations Related to the Acholi Translation of the Confirmation Decision” (Trial Chamber IX), 24 January 2018, No. ICC-02/04-01/15-1147 (the “Decision on Request related to Fair Trial Violations”).

¹³ See the “Defence Request for Leave to Appeal ‘Decision on Defence Request for Findings on Fair Trial Violations Related to the Acholi Translation of the Confirmation Decision’ ICC-02/04-01/15-1147, 24 January 2018”, No. ICC-02/04-01/15-1156, 30 January 2018.

¹⁴ See the “Decision on Defence Request for Leave to Appeal Decision 1147” (Trial Chamber IX), No. ICC-02/04-01/15-1176, 12 February 2018.

¹⁵ See the “Defence Request for Leave to File a No Case to Answer Motion and Application for Judgment of Acquittal”, No. ICC-02/04-01/15-1300, 5 July 2018 (the “Defence No Case To Answer Request”).

¹⁶ See the “Decision on Defence Request for Leave to File a No Case to Answer Motion” (Trial Chamber IX), No. ICC-02/04-01/15-1309, 18 July 2018 (the “Decision on No Case to Answer Request”).

¹⁷ See the Four Requests, *supra* notes 2 to 5.

the Four Requests (the “Prosecution’s Response”).¹⁸ On 6 February 2019, the Trial Chamber declined to dismiss the Four Requests, instructing the Prosecution and the Legal Representatives of Victims to file their consolidated responses to the Defence’s submissions by 25 February 2019.¹⁹

III. SUBMISSIONS

A. Preliminary Observations

8. At the outset, the CLRV stresses that the Trial Chamber has already found, in its oral decision issued at the commencement of the trial,²⁰ and, subsequently, in the Decision on Request related to Fair Trial Violations,²¹ that Mr Ongwen understands the charges brought against him, meaning that he is put on proper notice about the crimes he allegedly committed and the circumstances surrounding said crimes, including the possible mode(s) of liability. These judicial findings remain valid. Therefore, since the Defence’s arguments advanced in the Four Requests appear to constitute attempts to re-litigate matters already adjudicated in previous rulings, the CLRV addresses in the present submission only the matters of principle in response to the main arguments raised in said Requests. As for the Defence’s arguments in relation to the adequacy of the pre-confirmation brief and pre-trial briefs, the CLRV considers that it is for the Prosecution to address comprehensively these matters.

9. The CLRV also indicates that she shares the arguments in the Prosecution’s Response related to the untimely filing of the Four Requests²² and repetition of arguments already dismissed.²³

¹⁸ 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 (the “Prosecution’s Response”).

¹⁹ 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.

²⁰ See Transcript of the hearing held on 6 December 2016, *supra* note 10.

²¹ See the Decision on Request related to Fair Trial Violations, *supra* note 12, paras. 6-8.

²² See the Prosecution’s Response, *supra* note 18, paras. 5-12.

B. *The First Request*

10. In the First Request, the Defence addresses: (i) the basic principles of fair trial and notice; (ii) where notice is to be found; (iii) timeliness of the motion; and (iv) alleged prejudice caused to the Accused due to the lack of notice;²⁴ requesting the Chamber to dismiss the charges and modes of liability brought against Mr Ongwen.²⁵

11. The CLRV notes that the Defence itself admits, referring to the Decision on No Case to Answer Request, that “[a]n issue has already arisen in this trial as to what constitutes proper notice in the [Confirmation Decision]: Whether or not it is simply a recitation of charges, or does it include the reasoning of the Pre-Trial Chamber or Trial Chamber in the Ongwen case”.²⁶ Then, the Defence argues that the Trial Chamber made a distinction between the Confirmation Decision’s reasoning and being informed of the charges, allegedly violating Mr Ongwen’s fair trial rights.²⁷ Additionally, the Defence argues that the Trial Chamber’s denial of the Defence’s No Case To Answer Request “at the end of the Prosecution’s case means that [it] has been left in a position of not knowing exactly what must be addressed, if it so chooses,[...] in respect to the modes of liability [of the Accused]”.²⁸

12. The CLRV posits that the Defence is hereby challenging the merits of the Decision on No Case to Answer Request which it did not challenge – by way of leave to appeal – at the proper juncture of the proceedings. The time limits for requesting leave to appeal have passed long ago. No party should be allowed to re-litigate matters already ruled upon by the Chamber by masking its disagreement in a form

²³ *Idem*, paras. 16-19.

²⁴ See the First Request, *supra* note 2, para. 3.

²⁵ *Idem*, para. 59.

²⁶ *Ibidem*, para. 13.

²⁷ *Ibid.*, para. 14.

²⁸ *Ibid.*, para. 57.

of a new request seeking the same relief previously rejected. Therefore, these submissions should be dismissed.

13. The Defence also argues that the Confirmation Decision is “*factually deficient*” and falls short of giving “*detailed notice, as mandated by the Article 67(1)(a) of the Statute.*”²⁹ Thus, the Defence seems to challenge the merits of the Confirmation Decision via the First Request. In this regard, the CLRV notes that, in its Appeal of the Confirmation Decision, the Defence did raise a general issue framed as “[w]hether the Chamber erred in the Decision by failing to issue a well-reasoned decision” complaining, *inter alia*, about the alleged factual deficiency of the Confirmation Decision.³⁰ Pre-Trial Chamber II addressed these matters and rejected the Defence’s Appeal of the Confirmation Decision.³¹ Therefore, the First Request also amounts to an attempt to re-litigate matters already decided upon by the Pre-Trial Chamber. Incidentally, the Defence’s reliance on the separate opinion of Judge Perrin de Brichambaut³² is inconsequential since the rulings of the Pre-Trial Chamber remain valid, despite the separate opinion of one of the judges.

14. *Arguendo*, even if the Defence now considers that the matters raised in the First Request were not treated in the Decision on the Appeal of the Confirmation Decision, then it should have raised them before the Pre-Trial Chamber when it sought leave to appeal. Again, the time limits for requesting leave to appeal of the Confirmation Decision have expired nearly three years ago. Orbiting outside of the statutory provisions of the Court, the Defence cannot simply grant itself a remedy to rectify the alleged deficiencies of the Confirmation Decision before the Trial Chamber. Consequently, these submissions should also be dismissed.

²⁹ *Ibid.*, paras. 18-27.

³⁰ See the Defence’s Appeal of the Confirmation Decision, *supra* note 7, paras. 25-35.

³¹ See the Decision on the Appeal of the Confirmation Decision, *supra* note 8, paras. 21-27.

³² See the First Request, *supra* note 2, paras. 40-50.

15. Moreover, the Defence argues that the First Request is not untimely since the Statute, along with international human rights instruments, does not contain “*time bars for litigating defects in the notice*”.³³ In this regard, the CLRV submits that it is clearly wrong to suggest that there is no time bar for litigating alleged defects since the Defence intentionally ignores the wording of rule 134(2) of the Rules of Procedure and Evidence (the “Rules”) which require the parties to raise any objections or observations concerning the conduct of the proceedings which have arisen since the confirmation hearings no later than at the commencement of the trial. These specific issues raised in the First Request were not invoked by the Defence before the start of the trial proceedings pursuant to said provision.

16. Indeed, in the Decision on Request related to Fair Trial Violations, the Trial Chamber articulated clearly that “[p]rior to trial, when a post-confirmation issue of such significance arises that the moving party considers that failure to resolve it would warrant a stay of proceedings, Rule 134(2) of the Rules requires that this issue be raised no later than the commencement of trial. For the Defence to frame the lack of an Acholi translation as a trial-halting proposition 13 months after its commencement is plainly untimely. Noting that no leave from the Chamber is sought to raise this objection now, the Request is dismissible for its untimeliness alone”.³⁴

17. Nonetheless, the Defence claims that all the Four Requests are filed pursuant to rule 134(3) of the Rules.³⁵ Yet, this provision clearly states that “[a]fter 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” (emphasis added). It is thus grossly self-contradictory and illogical that the Defence attacks the merits of the Confirmation Decision while arguing that the issues in question arose somehow during the trial proceedings – a circumstance which is

³³ *Idem*, paras. 33-39.

³⁴ See the Decision on Request related to Fair Trial Violations, *supra* note 12, para. 18.

³⁵ See for example the First Request, *supra* note 2, para. 1.

incorrect in law and factually. Consequently, the CLRV submits that the First Request should be rejected.

C. *The Second Request*

18. In the Second Request, the Defence alleges certain defects in pleading of the modes of liability under article 25(3)(a) and (b) of the Statute which purportedly violate Mr Ongwen's right to notice under article 67(1) of the Statute.³⁶ Thus, the Defence requests the Trial Chamber to dismiss - as a matter of law - the modes of individual criminal liability pleaded against the Accused, including direct perpetration, indirect co-perpetration and ordering.³⁷

19. The Defence argues, *inter alia*, that “[f]or every mode of liability, there are two parts: conduct (actus reus) and mental state (mens rea)” and that “[t]he Reasoning section of the [Confirmation Decision] fails to identify the mens rea elements for the modes of liability, especially in regard to Articles 25 (3)(a), 25(3)(b), and 28(a) of the Statute”.³⁸ As submitted above, these so called deficiencies purportedly contained in the Confirmation Decision should have been raised before the Pre-Trial Chamber when the Defence did seek leave to appeal said Decision. Now, at this advanced stage of the trial proceedings, the Trial Chamber cannot possibly review the correctness of every ruling contained in the Confirmation Decision as if it were to act *in lieu* of the Appeals Chamber. Therefore, these submissions should be rejected.

20. Moreover, the Defence contends, *inter alia*, that the confirmation of indirect co-perpetration against the Accused was *ultra vires* “since it is not a theory within the statutory language of Article 25(3)(a) [of the Statute]”.³⁹ Consequently, the Defence is requiring the Trial Chamber to make a ruling on whether the theory of indirect co-

³⁶ See the Second Request, *supra* note 3, para. 4.

³⁷ *Idem*, para. 4.

³⁸ *Ibidem*, paras. 6-22.

³⁹ *Ibid.*, paras. 23-31.

perpetration is in line with the language of the Statute as a mode of liability. In this regard, the Appeals Chamber already found that the concept of co-perpetration is provided for in article 25(3)(a) of the Statute.⁴⁰ Therefore, the Chamber cannot possibly make a new ruling regarding the lawfulness of the concept of co-perpetration in contradiction of the clear statement of the applicable law made by the Appeals Chamber. Later and surprisingly, the Defence also seems to acknowledge the fact that co-perpetration is an established form of a criminal liability under article 25(3)(a) of the Statute since it argues at length that the Pre-Trial Chamber failed to properly apply the ruling of the Appeals Chamber with regards to the constitutive elements of the very concept of co-perpetration.⁴¹ In any case, these arguments go to the heart of the merits of the Confirmation Decision which is not anymore appealable at the trial stage of the proceedings.

21. *Arguendo*, even if the Defence was somehow prevented from requesting leave to appeal - or asking for re-consideration - of the relevant rulings contained in the Confirmation Decision before the Pre-Trial Chamber, the alleged defects in pleading the modes of liability under article 25(3)(a) and (b) and 28(a) of the Statute should have been raised prior to the start of the trial proceedings pursuant to rule 134(2) of the Rules. The Defence failed to do so. Therefore, as submitted previously, these alleged errors cannot now be litigated before the Trial Chamber pursuant to rule 134(3) of the Rules since they were admittedly made in the Confirmation Decision, not during the course of the trial.

22. In addition, the CLRV underlines that the alleged deficiencies in relation to the charges concerning the attack on Pajule had already been raised by the Defence, albeit formulated differently, in its No Case to Answer Request.⁴² In this regard, the Trial Chamber held that “[a]s for the arguments about Mr Ongwen’s involvement in the

⁴⁰ 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, 1 December 2014, paras. 434-473.

⁴¹ See the Second Request, *supra* note 3, paras. 37-49.

⁴² See the Defence’s No Case to Answer Request, *supra* note 15, paras. 28-32.

alleged planning of the Pajule attack, even if the Defence could persuade the Chamber that evidence was lacking on these points, this would not meaningfully affect the scope of the trial. Mr Ongwen is charged with attacking Pajule under several alternative modes of liability, not all of which necessarily require him to be involved in a common plan or be in a position of authority. In other words, the Defence's proposed arguments in relation to Pajule would not lead to removing any of the charges related to this alleged incident".⁴³ The Defence chose not to appeal this Decision.

23. Even if the Defence insists that the modes of criminal liability charged against the Accused under article 25(3)(a) and (b) of the Statute do lack factual support and thus would be somehow deficient, such arguments about the sufficiency or weight of the evidence should only be made at the end of the trial when the Trial Chamber will evaluate the guilt or innocence of the Accused,⁴⁴ not during the trial. Consequently, the Second Request should be rejected.

D. The Third Request

24. In the Third Request, the Defence alleges defects in pleading of (i) command responsibility under article 28(a) of the Statute; and (ii) common purpose liability under article 25(3)(d)(i) or (ii) of the Statute;⁴⁵ requesting the dismissal of said modes of liability based on deficiency and lack of notice.⁴⁶

25. In particular, in relation to command responsibility under article 28(a) of the Statute, the Defence argues that: (i) the legal elements are incomplete; (ii) where cited, they simply track the language of the Statute; and (iii) there are no factual

⁴³ See the Decision on No Case to Answer Request, *supra* note 16, para. 11.

⁴⁴ See the "Judgment on the appeals of Mr Jean-Pierre Bemba Gombo and the Prosecutor against the decision of Trial Chamber III entitled 'Decision on the admission into evidence of materials contained in the prosecution's list of evidence' (Appeals Chamber), No. ICC-01/05-01/08-1386 OA 5 OA 6, 3 May 2011, para. 37.

⁴⁵ See the Third Request, *supra* note 4, para. 3.

⁴⁶ *Idem*, para. 4.

allegations in support of the legal elements of the mode of liability.⁴⁷ Yet, the CLRV submits that the crux of these arguments is again the correctness of the Confirmation Decision. Therefore, these so called deficiencies should have been raised before the Pre-Trial Chamber when the Defence sought leave to appeal.

26. Moreover, the Defence argues that the Pre-Trial Chamber held that the contribution under article 25(3)(d) of the Statute is not required to be significant or to reach a certain minimum degree and by doing so, violated the basic principles of criminal law.⁴⁸ However, this purported error contained in the Confirmation Decision was not appealed or presented for reconsideration before the Pre-Trial Chamber. On the other hand, the Defence did seek leave to appeal the Confirmation Decision in relation to the Pre-Trial Chamber's ruling made on the requisite level of contribution required under article 25(3)(c) of the Statute, raising similar arguments to those contained in the Third Request.⁴⁹ The Pre-Trial Chamber ultimately rejected said issue.⁵⁰ This fact shows that the Defence could indeed have raised the present arguments concerning the proper interpretation of article 25(3)(d)(i) or (ii) of the Statute before the Pre-Trial Chamber, but failed to do so. Needless to say, a party to the proceedings cannot freely and arbitrarily select issues to be presented before various Chambers while disregarding the proper *forum* available for appeals.

27. As for the Defence's arguments about the lack of factual support underlying the modes of criminal liability under article 28(a) and article 25(3)(d)(i) or (ii) of the Statute, the CLRV reiterates that any determination about the sufficiency of the evidence should be made at the end of the trial.

28. Lastly, the Defence argues that “[e]specially in light of the Trial Chamber’s denial of the Defence request for leave to file a no-case-to-answer motion, there is a need [...] to

⁴⁷ *Ibidem*, para. 9.

⁴⁸ *Ibid.*, paras. 31-40.

⁴⁹ See the Defence's Appeal of the Confirmation Decision, *supra* note 7, paras. 36-39.

⁵⁰ See the Decision on the Appeal of the Confirmation Decision, *supra* note 8, paras. 28-32.

streamline the plethora of modes of liability against a single accused in this case. Dismissal of modes of liability based on lack of notice provides an avenue to pare down the ‘charge sheet’”.⁵¹ In this regard, the Chamber noted already that “[i]t is more the factual scope of a case – rather than the number of legal characterisations within it – that drives the time and resources needed during trial. Properly formulated charges can be sub-divided in different ways, meaning that the number of charges is not necessarily a good indicator of a case’s complexity or the burdens on the defence in meeting it. Similarly, when the same acts and conduct of an accused are charged under alternative modes of liability, the additional burden on the defence would typically stem from longer legal submissions at the end of trial rather than from having a larger ‘case to answer’”.⁵² As a result, the Third Request should be rejected as well.

E. The Fourth Request

29. In the Fourth Request, the Defence alleges defects in the pleading of the crimes of persecution, forced marriage, enslavement, and conscription and use of children under the age of 15 in hostilities, purportedly violating Mr Ongwen’s right to notice;⁵³ requesting the dismissal of said allegations based on their deficiency and lack of notice.⁵⁴

30. Except for the crime of forced marriage, the allegations of defects in the pleading of the specific crimes challenge the merits of the Confirmation Decision whose time limit for lodging an appeal has long expired. As for the crime of forced marriage, the Defence did seek leave to appeal the Confirmation Decision and made similar arguments before the Pre-Trial Chamber.⁵⁵ The Pre-Trial Chamber ultimately dismissed the Defence’s arguments and held, *inter alia*, that “*Dominic Ongwen is charged with the crime of ‘other inhumane acts’ which is a crime listed in the Statute at*

⁵¹ See the Third Request, *supra* note 4, para. 5.

⁵² See the Decision on No Case to Answer Request, *supra* note 16, para. 14.

⁵³ See the Fourth Request, *supra* note 5, para. 3.

⁵⁴ *Idem*, para. 4.

⁵⁵ See the Defence’s Appeal of the Confirmation Decision, *supra* note 7, paras. 40-44.

article 7(1)(k) and which can be committed through different conducts insofar as they are of a similar character to those explicitly enumerated by article 7(1) of the Statute and intentionally cause grave suffering or serious physical or mental injury. [In any case] questions concerning concurrence of offences are better addressed by the Trial Chamber upon airing the entirety of the evidence. The same consideration applies as far as an interlocutory appeal is concerned, considering that the Defence may raise the question of whether the crime of other inhumane acts in the form of forced marriage is subsumed by the crime of sexual slavery before the Trial Chamber, which is obviously not legally bound by the interpretation provided by the [Pre-Trial Chamber] as part of its reasoning in the Confirmation Decision”.⁵⁶ Moreover, in the Decision on No Case to Answer Request, the Trial Chamber also ruled that “[f]or a pure question of legal interpretation, like the pillaging example raised by the Defence, the answer to this question does not necessarily require presentation of additional Defence evidence to resolve it. The Defence will have the opportunity to present its legal arguments in relation to this issue. The Request in this respect is tantamount to asking for the Chamber’s understanding of the applicable law prior to its judgment. The Chamber sees no justification for making such an advance determination in the present proceedings”.⁵⁷

31. Therefore, the Defence arguments concerning the completeness of the legal elements of or the factual sufficiency underlying the crimes of persecution, forced marriage, enslavement, and conscription and use of children under the age of 15 in hostilities should only be made at the end of the trial when the Trial Chamber will assess the totality of the evidence and determine the guilt or innocence of the Accused, not at the present stage of the ongoing trial proceedings.

32. Lastly, the CLRV wishes to express the concerns of the Victims about the Defence’s strategy over the last months to continuously re-litigate matters already adjudicated, insisting on arguments previously presented and dismissed by the

⁵⁶ See the Decision on the Appeal of the Confirmation Decision, *supra* note 8, paras. 33-39.

⁵⁷ See the Decision on No Case to Answer Request, *supra* note 16, para. 10 (Emphasis added).

Chamber. This strategy has indeed the potential of prolonging proceedings affecting their right to an expeditious trial.

33. **For the foregoing reasons**, the Common Legal Representative of Victims respectfully requests the Chamber to reject the Four Requests in their entirety.

A handwritten signature in black ink, reading "Paolina Massidda". The signature is written in a cursive style and is underlined.

Paolina Massidda
Principal Counsel

Dated this 25th February 2019

At The Hague, The Netherlands