

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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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

Decision on Defence Motions Alleging Defects in the Confirmation Decision

To be notified, in accordance with Regulation 31 of the Regulations of the Court, to:

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Trial Chamber IX ('Chamber') of the International Criminal Court ('Court' or 'ICC'), in the case of *The Prosecutor v. Dominic Ongwen*, having regard to Articles 19(4), 61(9) and 64(2) of the Rome Statute ('Statute') and Rules 122(3)-(4) and 134 of the Rules of Procedure and Evidence ('Rules'), issues the following 'Decision on Defence Motions Alleging Defects in the Confirmation Decision'.

I. Procedural history

1. On 23 March 2016, the Pre-Trial Chamber confirmed the charges against Mr Ongwen ('Confirmation Decision').¹ This Chamber was constituted just over a month later.²
2. In the course of the preparation of the trial, the Chamber set a deadline to file any motions requiring resolution prior to the commencement of the trial by 28 October 2016.³ It resolved all motions received on or prior to that date before the trial commenced.
3. On 6 December 2016, the trial commenced.⁴ The following month, the Office of the Prosecutor ('Prosecution') called its first witness.⁵
4. On 13 April 2018, the Prosecution completed its presentation of evidence.⁶
5. On 18 September 2018, the defence for Mr Ongwen ('Defence') gave its opening statement.⁷ The Defence called its first witness two weeks later⁸ and has been conducting its evidence presentation ever since.
6. On 1 February 2019, the Defence filed four motions alleging that the Confirmation Decision suffers various defects (collectively, 'Defects Series').⁹ Across the Defects

¹ Decision on the confirmation of charges against Dominic Ongwen, [ICC-02/04-01/15-422-Red](#) (with two annexes; confidential version notified same day).

² Decision constituting Trial Chambers VIII and IX and referring to them the cases of *The Prosecutor v. Ahmad Al Faqi Al Mahdi* and *The Prosecutor v. Dominic Ongwen*, 2 May 2016, [ICC-02/04-01/15-430](#).

³ See Decision Setting the Commencement Date of the Trial, 30 May 2016, [ICC-02/04-01/15-449](#), para. 11, p. 7.

⁴ Transcript of hearing, [ICC-02/04-01/15-T-26-ENG](#) ('Trial Commencement').

⁵ Transcript of hearing, 16 January 2017, [ICC-02/04-01/15-T-28-ENG](#).

⁶ Notice of the Prosecution's completion of evidence presentation, [ICC-02/04-01/15-1225](#).

⁷ Transcript of hearing, [ICC-02/04-01/15-T-179-Red-ENG](#).

⁸ Transcript of hearing, 1 October 2018, [ICC-02/04-01/15-T-180-Red-ENG](#).

Series, the Defence requests that the Chamber dismiss the charges and modes of liability which are facially deficient and violate the fundamental fair trial right of notice to Mr Ongwen.¹⁰ Specifically, the Defence requests that the Chamber dismiss:

- (i) The charged modes of liability under Article 25(3)(a) (direct perpetration, indirect co-perpetration) and (b) (ordering) of the Statute.¹¹
- (ii) All allegations under the charged modes of liability of command responsibility (Article 28(a) of the Statute) and common purpose liability (Article 25(3)(d)(i) and (ii) of the Statute).¹²
- (iii) The charges of persecution as a crime against humanity, forced marriage as a crime against humanity, enslavement as a crime against humanity, conscription of children under 15 years of age into an armed group, as a war crime, and use of children under the age of 15 to participate actively in hostilities, as a war crime.¹³

7. On 5 February 2019, the Prosecution sought a ruling dismissing the Defects Series *in limine* because, amongst other reasons, these motions: (i) are manifestly out of time and (ii) repeat arguments that have already been dismissed by the Chamber.¹⁴
8. On 6 February 2019, the Single Judge of the Chamber deferred ruling on these arguments on an understanding that they constituted part of the Prosecution's overall response to the Defects Series.¹⁵

⁹ Defence Motion on Defects in the Confirmation of Charges Decision: Defects in Notice and Violations of Fair Trial (Part I of the Defects Series), [ICC-02/04-01/15-1430](#) ('Defects Series Part I'); Defence Motion on Defects in the Confirmation of Charges Decision: Defects in the Modes of Liability (Part II of the Defects Series), [ICC-02/04-01/15-1431](#) ('Defects Series Part II'); 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), [ICC-02/04-01/15-1432](#) ('Defects Series Part III'); Defence Motion on Defects in the Confirmation of Charges Decision: Defects in the Charged Crimes (Part IV of the Defects Series), [ICC-02/04-01/15-1433](#) ('Defects Series Part IV').

¹⁰ Defects Series Part I, [ICC-02/04-01/15-1430](#), para. 59.

¹¹ Defects Series Part II, [ICC-02/04-01/15-1431](#), para. 79.

¹² Defects Series Part III, [ICC-02/04-01/15-1432](#), para. 64.

¹³ Defects Series Part IV, [ICC-02/04-01/15-1433](#), para. 71.

¹⁴ 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, 5 February 2019, [ICC-02/04-01/15-1436](#) (notified 6 February 2019) ('First Prosecution Response').

¹⁵ Decision on Responses to the 'Defects Series' Following Prosecution Request for Dismissal, [ICC-02/04-01/15-1438](#).

9. On 25 February 2019,¹⁶ the Prosecution filed the remainder of its response¹⁷ and the Legal Representatives of Victims filed their responses.¹⁸ All responding participants seek that the Defect Series be denied.

II. Analysis

10. Noting the extensive submissions on whether these motions should be considered on their merits,¹⁹ the Chamber will first engage with the timeliness of the Defects Series. Most of the Defence's arguments concern the formulation of the charges. The Chamber will consider the timeliness of these submissions first. The remaining Defence arguments primarily concern two jurisdictional challenges against indirect co-perpetration and forced marriage. The Chamber will address these arguments in a second sub-section.

A. Formulation of the charges

11. The vast majority of the arguments in the Defects Series concern whether sufficient information is included in the Confirmation Decision. The Defence asserts defects in the following aspects:
- (i) The Confirmation Decision generally fails to specify the evidence underlying the charges or the contextual elements.²⁰
 - (ii) The reasoning section of the Confirmation Decision fails to identify the *mens rea* elements for the modes of liability.²¹

¹⁶ The responding participants were given extended time and pages. [ICC-02/04-01/15-1438](#), paras 6-8, p. 5.

¹⁷ 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, [ICC-02/04-01/15-1463](#) ('Second Prosecution Response').

¹⁸ Corrigendum to the Victims' Response to "Defence Motion on Defects in the Confirmation of Charges Decision" (Parts I-IV), [ICC-02/04-01/15-1464-Corr](#) (corrigendum notified 26 February 2019) ('LRV Response'); CLRV Response to the Defence's Four Requests on Defects in the Confirmation of Charges Decision, [ICC-02/04-01/15-1461](#) ('CLRV Response').

¹⁹ Defects Series Part I, [ICC-02/04-01/15-1430](#), paras, 33-39; First Prosecution Response, [ICC-02/04-01/15-1436](#), paras 5-13, 16-19; Second Prosecution Response, [ICC-02/04-01/15-1463](#), paras 3-9; CLRV Response, [ICC-02/04-01/15-1461](#), paras 8-17; LRV Response, [ICC-02/04-01/15-1464-Corr](#), paras 5-22.

²⁰ Defects Series Part I, [ICC-02/04-01/15-1430](#), paras 40-58, *responded to in* Second Prosecution Response, [ICC-02/04-01/15-1463](#), paras 10-17.

- (iii) Certain elements of indirect co-perpetration are not pled, and the *mens rea* elements under Article 25(3)(a) of the Statute were defectively pled.²²
 - (iv) Command responsibility is pled with incomplete legal elements and insufficient factual allegations in support of the legal elements.²³
 - (v) Liability under Article 25(3)(d) is not set out clearly, and thus fails to provide proper notice.²⁴
 - (vi) The pleading of the crime of persecution is deficient.²⁵
 - (vii) The elements of the sexual and gender based violence crimes are not properly set out, especially as regards *mens rea*.²⁶
 - (viii) The definition of enslavement is not specified.²⁷
 - (ix) The charges related to alleged child soldiers are deficient.²⁸
12. For the reasons below, and noting the requirements of Rule 134(2) of the Rules in particular, the Chamber considers all these arguments to be untimely.
13. Rule 134(2) of the Rules provides as follows:

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.

²¹ Defects Series Part II, [ICC-02/04-01/15-1431](#), paras 6-16, *responded to in* Second Prosecution Response, [ICC-02/04-01/15-1463](#), paras 18-19, 35, 39; CLR V Response, [ICC-02/04-01/15-1461](#), paras 18-23; LRV Response, [ICC-02/04-01/15-1464-Corr](#), paras 23-34, 62-71.

²² Defects Series Part II, [ICC-02/04-01/15-1431](#), paras 17-22, 32-78, *responded to in* Second Prosecution Response, [ICC-02/04-01/15-1463](#), paras 18-34; CLR V Response, [ICC-02/04-01/15-1461](#), paras 18-23; LRV Response, [ICC-02/04-01/15-1464-Corr](#), paras 24-34.

²³ Defects Series Part III, [ICC-02/04-01/15-1432](#), paras 7-30, *responded to in* Second Prosecution Response, [ICC-02/04-01/15-1463](#), paras 39-49; CLR V Response, [ICC-02/04-01/15-1461](#), paras 24-28; LRV Response, [ICC-02/04-01/15-1464-Corr](#), paras 35-48.

²⁴ Defects Series Part III, [ICC-02/04-01/15-1432](#), paras 31-63, *responded to in* Second Prosecution Response, [ICC-02/04-01/15-1463](#), paras 50-57; CLR V Response, [ICC-02/04-01/15-1461](#), paras 24-28; LRV Response, [ICC-02/04-01/15-1464-Corr](#), paras 35-48.

²⁵ Defects Series Part IV, [ICC-02/04-01/15-1433](#), paras 7-33, *responded to in* Second Prosecution Response, [ICC-02/04-01/15-1463](#), paras 58-65; CLR V Response, [ICC-02/04-01/15-1461](#), paras 29-31.

²⁶ Defects Series Part IV, [ICC-02/04-01/15-1433](#), paras 34-38 (focusing on forced marriage specifically), *responded to in* Second Prosecution Response, [ICC-02/04-01/15-1463](#), paras 89-98; CLR V Response, [ICC-02/04-01/15-1461](#), paras 29-31; LRV Response, [ICC-02/04-01/15-1464-Corr](#), paras 49-62.

²⁷ Defects Series Part IV, [ICC-02/04-01/15-1433](#), paras 54-60, *responded to in* Second Prosecution Response, [ICC-02/04-01/15-1463](#), paras 66-72.

²⁸ Defects Series Part IV, [ICC-02/04-01/15-1433](#), paras 61-70, *responded to in* Second Prosecution Response, [ICC-02/04-01/15-1463](#), paras 73-88.

14. By providing that objections or observations concerning the conduct of the proceedings ‘may not *be raised or* made again on a subsequent occasion’,²⁹ the rule precludes parties from raising such challenges for the first time during trial when they had a reasonable opportunity to do so earlier. The Chamber previously determined that Rule 134(2) of the Rules extends to objections related to the charges.³⁰

1. *Rule 134(2) in statutory context*

15. The Court’s statutory regime sets out a detailed framework for determining the charges. This role is tasked primarily to pre-trial chambers, and it must be emphasised that trial chambers do not have appellate jurisdiction over the work of pre-trial chambers.³¹

16. Suspects receive the Prosecution’s document containing the charges at least one month before the confirmation hearing,³² and thus should be in a position to raise most objections to the charges at the confirmation hearing itself. Rule 122(3) of the Rules requires the pre-trial chamber to ask the parties at the confirmation hearing whether they intend to raise objections or make observations concerning an issue related to the proper conduct of the proceedings prior to the confirmation hearing. Rule 122(4) of the Rules requires that ‘at no subsequent point may the objections and observations made under subrule 3 be raised or made again in the confirmation or trial proceedings’. Rules 122(4) and 134(2) of the Rules have a complementary relationship with each other. In combination, these rules give the general framework on the

²⁹ Emphasis added.

³⁰ Decision on Defence Request for Findings on Fair Trial Violations Related to the Acholi Translation of the Confirmation Decision, 24 January 2018, [ICC-02/04-01/15-1147](#) (‘Acholi Charges Decision’), paras 13, 17-18 (related to receiving a translation of the charges).

³¹ Trial Chamber I, *The Prosecutor v Thomas Lubanga Dyilo*, Decision on the status before the Trial Chamber of the evidence heard by the Pre-Trial Chamber and the decisions of the Pre-Trial Chamber in trial proceedings, and the manner in which evidence shall be submitted, 13 December 2007, [ICC-01/04-01/06-1084](#), para. 43.

³² Article 61(3) of the Statute; Rule 121(3) of the Rules.

timing of objections arising from the beginning of the proceedings through the commencement of trial.

17. Suspects can – and often do – raise challenges before pre-trial chambers that certain charges fail to provide sufficient notice or are overbroad in scope. Such challenges arising from the document containing the charges should be raised by the confirmation hearing at the latest, and Rule 122(4) of the Rules confirms that the parties have no entitlement to a subsequent trial chamber ruling on such matters. This is especially true for charges like those in the present case, where Pre-Trial Chamber II confirmed the charges presented almost verbatim.³³
18. Following the confirmation hearing, pre-trial chambers must decide whether to confirm or decline to confirm charges based on the sufficiency of the evidence.³⁴ However, because of the accused's rights under Article 67(1)(a)-(b) of the Statute,³⁵ pre-trial chambers must also ensure that the charges confirmed are sufficiently clear to be considered at trial.
19. This statutory framework for determining charges means that, at the very latest, an ICC accused knows the full content of the charges upon notification of the pre-trial chamber's confirmation decision. All potential charges 'defects' arising from the confirmation decision can therefore be raised prior to trial. Rule 134(2) would then apply to all such challenges not already time-barred by Rule 122(4) of the Rules.
20. If Rule 134(2) did not place time-limits on objections on the notice and scope of the charges, then the Defence would be able to spring such objections at any

³³ See Confirmation Decision, [ICC-02/04-01/15-422-Red](#), para. 158.

³⁴ Article 61(7) of the Statute.

³⁵ Article 67(1)(a)-(b) of the Statute provides that '[i]n the determination of any charge, the accused shall be entitled to a public hearing, having regard to the provisions of this Statute, to a fair hearing conducted impartially, and to the following minimum guarantees, in full equality: (a) To be informed promptly and in detail of the nature, cause and content of the charge, in a language which the accused fully understands and speaks; (b) To have adequate time and facilities for the preparation of the defence and to communicate freely with counsel of the accused's choosing in confidence'.

moment during trial. This could lead to significant delays in the conduct of the proceedings and detract from the core focus of the trial. Such tactics are particularly problematic given the framework for amending the charges under Article 61(9) of the Statute.³⁶ Should the confirmed charge have any ‘defect’, one natural response would be for the Prosecution to resolve these defects by way of amendments. But Article 61(9) only permits the Prosecution to amend the charges with leave of the pre-trial chamber before the trial commencement, and Article 61(11) of the Statute³⁷ prohibits trial chambers from assuming this same power.³⁸ By waiting until after the trial commencement to raise such concerns, the Defence could effectively foreclose any possibility of the Prosecution fixing a ‘defective’ charge. Such a result would be unacceptable.

2. Drafting history and purpose of Rule 134(2)

21. The drafting history of Rule 134 of the Rules reveals that the provision was a direct response to concerns that *ad hoc* tribunal proceedings were being delayed

³⁶ Article 61(9) provides, in relevant part: ‘[a]fter the charges are confirmed and before the trial has begun, the Prosecutor may, with the permission of the Pre-Trial Chamber and after notice to the accused, amend the charges. If the Prosecutor seeks to add additional charges or to substitute more serious charges, a hearing under this article to confirm those charges must be held’.

³⁷ Article 61(11) provides (emphasis added): ‘[o]nce the charges have been confirmed in accordance with this article, the Presidency shall constitute a Trial Chamber which, subject to paragraph 9 and to article 64, paragraph 4, shall be responsible for the conduct of subsequent proceedings and may exercise any function of the Pre-Trial Chamber that is relevant and capable of application in those proceedings’.

³⁸ For jurisprudence supporting this interpretation of Article 61(9), see Appeals Chamber, *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Decision on the Prosecutor's appeal against the “Decision on the Prosecution’s Request to Amend the Updated Document Containing the Charges Pursuant to Article 61(9) of the Statute”, 13 December 2013, [ICC-01/09-01/11-1123](#), OA6, paras 27, 32 (‘[t]he wording of [Article 61(9)] prescribes that an amendment of the charges is no longer possible after the trial has begun.’); Appeals Chamber, *The Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the appeals of Mr Lubanga Dyilo and the Prosecutor against the Decision of Trial Chamber I of 14 July 2009 entitled “Decision giving notice to the parties and participants that the legal characterisation of the facts may be subject to change in accordance with Regulation 55(2) of the Regulations of the Court”, 8 December 2009, [ICC-01/04-01/06-2205](#), OA15-OA16, para. 77 (distinguishing Article 61(9) from the trial chamber power under Regulation 55 of the Regulations of the Court by explaining that these provisions ‘address different powers of different entities at different stages of the procedure’). For a different interpretation, see Appeals Chamber, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Concurring Separate Opinion of Judge Eboe-Osuji on the Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III’s “Judgment pursuant to Article 74 of the Statute”, 14 June 2018, [ICC-01/05-01/08-3636-Anx3](#), A, paras 94-150. On any interpretation of Article 61(9) of the Statute, the Chamber’s remaining considerations and overall conclusion would not change.

by endless procedural challenges.³⁹ In this respect, Rule 134's wording is more restrictive as compared to analogous provisions at these tribunals.⁴⁰ The Chamber therefore considers that the jurisprudence of the *ad hoc* tribunals – on which the Defence relies⁴¹ - is inapposite in light of the specific statutory framework of Rule 134(2) of the Rules. This jurisprudence also does not uniformly support the Defence's position, as the *ad hoc* tribunals impose meaningful constraints on the accused's ability to raise pleading challenges which could have been raised as preliminary motions.⁴²

22. Rule 134(2) was specifically designed to ensure that procedures which occurred between the confirmation hearing and the commencement of trial 'are settled before the trial commences'.⁴³ The rendering of the confirmation decision falls within this period, which is why Defence reliance on Rule 134(3) of the Rules

³⁹ Peter Lewis, 'Trial Procedure', in *The International Criminal Court - Elements of Crimes and Rules of Procedure and Evidence* (Roy S. Lee et al., eds, Transnational Publishers, 2001) ('Lee RPE'), p. 543.

⁴⁰ The ICTY/ICTR rules on preliminary motions do include a statutory deadline, but do not explicitly prohibit such issues to be raised again after the trial commencement. Rule 72(A) of the ICTY Rules (IT/32/Rev.50) and Rule 72(A) of the ICTR Rules (version of 13 May 2015).

⁴¹ Defects Series Part I, [ICC-02/04-01/15-1430](#), paras 34-35, *citing to* ICTY, Appeals Chamber, *The Prosecutor v. Zoran Kupreškić et al.*, Appeal Judgement, 23 October 2001, [IT-95-16-A](#), paras 114, 124, 246 (on defective indictments generally); ICTR, Trial Chamber, *The Prosecutor v. Andre Ntagerura et al.*, Judgement and Sentence, 25 February 2004, [ICTR-99-46-T](#), paras 28-39, ICTR, Trial Chamber, *The Prosecutor v. Protais Zigiranyirazo*, Decision on the Defence Request for Extension of Time to File Preliminary Motions under Rule 72(G) of the Rules of Procedure and Evidence, 17 December 2003, [ICTR-2001-73-I](#) (in the context of an extension of time to file a preliminary motion); ICTR, Trial Chamber, *The Prosecutor v. Ferdinand Nahimana*, Decision on Preliminary Motion Filed by the Defence Based on Defects in the Form of the Indictment, 24 November 1997, [ICTR-96-11-T](#) (a ruling on a preliminary motion).

⁴² ICTR, Appeals Chamber, *The Prosecutor v. Tharcisse Muvunyi*, Judgement, 29 August 2008, [ICTR-2000-55A-A](#), para. 123 (if a challenge to the form of the indictment is untimely, it then falls to the defence to demonstrate that the preparation of its defence was prejudiced by the lack of information); ICTR, Appeals Chamber, *The Prosecutor v. Théoneste Bagosora et al.*, Decision on Aloys Ntabakuze's Interlocutory Appeal on Questions of Law Raised by the 29 June 2006 TCI Decision on Motion for Exclusion of Evidence, 18 September 2006, [ICTR-98-41-AR73](#), para. 42-47 (motion challenging indictment after commencement of trial is untimely - and thus requires the defence to show material impairment occurred – unless consideration of the late challenge is justified by factors such as a reasonable explanation for the timing); ICTY, Appeals Chamber, *The Prosecutor v. Enver Hadžihasanović & Amir Kubura*, Decision on Joint Defence Interlocutory Appeal of Trial Chamber Decision on Rule 98 *Bis* Motions for Acquittal, 11 March 2005, [IT-01-47-AR73.3](#), para. 9-11.

⁴³ Lee RPE, p. 544.

(governing motions on issues which ‘arise during the course of trial’) is also misguided.⁴⁴

23. The Chamber considers that challenges to the sufficiency of the confirmation decision fall within both the letter and intended purpose of this rule. The Chamber considers that Rule 134(2)’s purpose is to ensure procedural economy and enable trial chambers to focus on the evidence at trial. It also serves as a safeguard against strategic efforts to undermine the conduct of proceedings, which cannot be tolerated.

3. *Whether leave should be granted*

24. Rule 134(2) does not entirely foreclose late challenges, as the rule allows the trial chamber to consider them after granting leave. But the Defence cannot raise such challenges over two years after the commencement of trial without some reasonable explanation for doing so. The Defence does not squarely seek leave to file the Defects Series, and no explanation is provided why it waited until now to advance its objections. Further, its arguments why it should still be allowed to raise these matters now⁴⁵ are entirely unpersuasive.
25. The Defence argues that ‘that fairness to the accused is the determinative criterion in whether this motion should be entertained by the Trial Chamber, and that procedural rules, if any, should be subordinated to the fairness criterion.’⁴⁶ The Chamber must always act in fairness to the accused, but disagrees that the Defence’s argument logically follows. Were the Defence to be correct, it could subvert all procedural requirements by the mere invocation of

⁴⁴ Defects Series Part I, [ICC-02/04-01/15-1430](#), para. 1; Defects Series Part II, [ICC-02/04-01/15-1431](#), para. 1; Defects Series Part III, [ICC-02/04-01/15-1432](#), para. 1; Defects Series Part IV, [ICC-02/04-01/15-1433](#), para. 1. Rule 134(3) of the Rules provides 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’.

⁴⁵ See Defects Series Part I, [ICC-02/04-01/15-1430](#), paras. 33-39 (setting out timeliness arguments without formally seeking leave).

⁴⁶ Defects Series Part I, [ICC-02/04-01/15-1430](#), para. 36.

the fair trial rights of the accused without any further explanation. Rule 134(2) of the Rules is designed specifically to avoid such tactics, and the Appeals Chamber has previously ruled in the stay of proceedings context that motions raising fundamental matters of fairness can still be dismissible as untimely.⁴⁷

26. At the commencement of trial, the Defence did not raise any concrete objections to the charges and did not object to the trial proceeding. Upon being asked if they had any Rule 134(2) objections, Defence counsel said as follows:

May it please your Honours. We've carefully listened to the decision today and want just to say that in the course of the proceedings we expect that specificity be given to aspects of some of the charges which may -- with regard to venue, northern Uganda, within a period of five years, is so huge. So we hope that in relation to the question of specificity as the proceedings proceed, in order to have appropriate notice of some of the charges, we will raise this as the occasion arises in the course of the trial.⁴⁸

27. The Defence relies on these remarks,⁴⁹ but this statement cannot be reasonably construed as raising concrete objections such as those in the Defect Series. The Defence cannot use its remarks at the trial commencement to reserve a right to raise defects on the content of the charges at its leisure without the express permission of the Chamber. At the very latest, the Defence was able to identify all alleged defects from when it received the Confirmation Decision in March 2016. The Defence elected to remain silent before this Chamber on all these matters until now, without any valid explanation as to why this delay occurred.
28. The Defence argues that it 'requires details of the evidence upon which the Prosecution relied, and the [Pre-Trial Chamber] confirmed to mount a defence

⁴⁷ Appeals Chamber, *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, 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", 12 July 2010, [ICC-01/04-01/07-2259](#), OA 10 (with dissent at [ICC-01/04-01/07-2297](#)) (majority upholds Trial Chamber motion to dismiss – on timeliness alone – a defence request for a finding of abuse of process on grounds that the accused's fundamental human rights were violated by domestic authorities prior to surrender).

⁴⁸ Trial Commencement, [ICC-02/04-01/15-T-26-ENG](#), p. 21 line 22 to p. 22 line 4.

⁴⁹ Defects Series Part I, [ICC-02/04-01/15-1430](#), paras 38-39.

and to investigate thoroughly'.⁵⁰ To make such an argument after a point when all Prosecution evidence has been presented is simply untenable. The Defence has all the materials on which the Prosecution relies, and conducted an extensive defence throughout the Prosecution's evidence presentation. The Defence has had the opportunity to raise the potentially prejudicial effect of every item of evidence submitted during trial, and such arguments will be considered during deliberations.⁵¹ They also have been afforded an opportunity to question every witness who appeared, and they have done so. The Chamber sees nothing in the conduct of the proceedings to date to suggest that the Defence is somehow unfairly burdened by the formulation of the charges, and has also made clear to the Defence that there is no apparent reason from the evidence presented thus far to trigger a 'no case to answer' procedure.⁵²

29. The Chamber confirms that no evidence will be used against the accused in a manner which would exceed the scope of the charges or could not have been reasonably anticipated. To do so would be incompatible with the Chamber's obligation to ensure the fair and expeditious conduct of the proceedings.⁵³ But for the Defence to insinuate that it is suffering prejudice because insufficient reasoning or evidence underlies the charges is nothing more than an argument to reconsider rulings made against it long ago.⁵⁴

⁵⁰ Defects Series Part I, [ICC-02/04-01/15-1430](#), para. 52.

⁵¹ Initial Directions on the Conduct of the Proceedings, 13 July 2016, [ICC-02/04-01/15-497](#), para. 24.

⁵² NCTA Leave Decision, [ICC-02/04-01/15-1309](#).

⁵³ Article 64(2) of the Statute.

⁵⁴ NCTA Leave Decision, [ICC-02/04-01/15-1309](#), para. 9; Acholi Charges Decision, [ICC-02/04-01/15-1147](#), para. 19; Pre-Trial Chamber II, Decision on the Defence request for leave to appeal the decision on the confirmation of charges, 29 April 2016, [ICC-02/04-01/15-428](#), paras 24-27. *In general, see also* European Court of Human Rights, Commission (Plenary), *X. v. Belgium*, Decision on the admissibility of the application, 9 May 1977, app. no. 7628/76, p. 5 (p. 173 in original); European Court of Human Rights, Commission (Plenary), *Giacinto Collozza and Pedro Rubinat v. Italy*, Report of the Commission, 5 May 1983, app no. 9024/80 and 9317/81, para. 114 (in considering whether an arrested person is sufficiently informed of the accusation against them under Article 6(3)(a) of the European Convention of Human Rights, the information need not necessarily mention the evidence on which the charge is based).

4. Conclusion

30. For these reasons, the Chamber considers that Rule 134(2) of the Rules required the Defence to seek leave to raise the challenges on the formulation of the charges in the Defects Series. The Chamber is not persuaded by the Defence's limited arguments on timeliness or that its references to the dictates of fairness justify granting such leave.

B. Jurisdictional challenges

31. Across the Defects Series, the Defence makes two further arguments which are distinct from the formulation of the charges as such. They are also not standard questions of the interpretation of the applicable law, which the Chamber has indicated will be set out in its judgment.⁵⁵ Rather, the Defence raises threshold questions as to the possibility of charging one mode of liability and one charged crime:

- (i) Whether indirect co-perpetration is an *ultra vires* mode of liability under Article 25 of the Statute.⁵⁶
- (ii) Whether forced marriage can be charged under Article 7(1)(k) of the Statute.⁵⁷

32. The Chamber notes the Prosecution's submissions that the Defence raises jurisdictional challenges that fall under Article 19 of the Statute.⁵⁸

33. The Chamber also notes that the Appeals Chamber describes jurisdictional challenges as those 'which would, if successful, eliminate the legal basis for a

⁵⁵ NCTA Leave Decision, [ICC-02/04-01/15-1309](#), para. 10.

⁵⁶ Defects Series Part II, [ICC-02/04-01/15-1431](#), paras 23-31, *responded to in* Second Prosecution Response, [ICC-02/04-01/15-1463](#), paras 99-102.

⁵⁷ Defects Series Part IV, [ICC-02/04-01/15-1433](#), paras 39-53, *responded to in* Second Prosecution Response, [ICC-02/04-01/15-1463](#), paras 93-98; LRV Response, [ICC-02/04-01/15-1464-Corr](#), paras 60-62.

⁵⁸ Second Prosecution Response, [ICC-02/04-01/15-1463](#), paras 89-102.

charge on the facts as alleged by the Prosecutor [...].⁵⁹ This is precisely what occurs here – both Defence challenges call for exclusively legal determinations without any factual or evidentiary determinations. The Defence itself uses the phrase ‘jurisdictionally defective’ in its framing of both challenges.⁶⁰

34. Article 19(4) of the Statute requires jurisdictional challenges to take place prior to or at the commencement of trial in the absence of exceptional circumstances.⁶¹ For similar reasons to those set out in the prior sub-section, the Defence is manifestly too late to file a jurisdictional challenge and fails to justify any exceptional circumstances for raising such arguments at this time.
35. Accordingly, the Chamber also dismisses these two jurisdictional arguments for being untimely. This ruling precludes the Defence from future challenges to the existence of indirect co-perpetration or forced marriage at the ICC. This said, the Defence may still raise legal arguments about indirect co-perpetration or forced marriage in the context of stating its interpretation of the existing law.⁶² Such arguments are best reserved for final briefs and closing statements because, as has been previously decided, the Chamber sees no justification for determining the applicable law in this case prior to its judgment.⁶³

⁵⁹ Appeals Chamber, *The Prosecutor v. Bosco Ntaganda*, Judgment on the appeal of Mr Bosco Ntaganda against the “Decision on the Defence’s challenge to the jurisdiction of the Court in respect of Counts 6 and 9”, 22 March 2016, [ICC-01/04-02/06-1225](#), OA 2, para. 39.

⁶⁰ Defects Series Part II, [ICC-02/04-01/15-1431](#), p. 7 (‘[t]he confirmation of indirect co-perpetration as a mode of liability is jurisdictionally defective’); Defects Series Part IV, [ICC-02/04-01/15-1433](#), p. 10 (‘[t]he confirmation of the crime of forced marriage is jurisdictionally defective’).

⁶¹ Article 19(4) provides, in relevant part: ‘[t]he admissibility of a case or the jurisdiction of the Court may be challenged only once by any person or State referred to in paragraph 2. The challenge shall take place prior to or at the commencement of the trial. In exceptional circumstances, the Court may grant leave for a challenge to be brought more than once or at a time later than the commencement of the trial’.

⁶² For a further example of such a legal argument, see Defects Series Part III, [ICC-02/04-01/15-1432](#), paras 31-36 (on the legal threshold for contributions under Article 25(3)(d) of the Statute).

⁶³ NCTA Leave Decision, [ICC-02/04-01/15-1309](#), para. 10.


C. Findings

36. The Chamber finds that motions challenging the formulation of the charges must be brought in a timely manner after they arise.⁶⁴ Rule 134(2) of the Rules requires that motions alleging defects in the confirmation decision may not, as a general rule, be brought after the commencement of trial. The Defence files its challenges on the formulation of the charges after the commencement of trial, the Prosecution's evidence presentation and part of the Defence's evidence presentation. It does so without sufficient justification for the timing of its motions. As such, the Chamber dismisses these arguments *in limine*.
37. For similar reasons, the Chamber finds that the Defence's jurisdictional arguments on indirect co-perpetration and forced marriage are untimely and no exceptional circumstances justify their consideration at this point during the trial. They must also be dismissed *in limine*. The Chamber will decide upon the proper legal interpretation of the charged crimes and modes of liability in the applicable law of its judgment.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

DISMISSES the relief sought in the Defects Series.

Done in both English and French, the English version being authoritative.


 Judge Bertram Schmitt, Presiding Judge


 Judge Péter Kovács


 Judge Raul C. Pangalangan

Dated 7 March 2019
 At The Hague, The Netherlands

⁶⁴ Rules 122(3)-(4) and 134(2) of the Rules.