



Original: English

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

Date: 29 April 2016

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

**Decision on the Defence request for leave to appeal the decision on the
confirmation of charges**

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

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Other

Pre-Trial Chamber II of the International Criminal Court hereby issues this decision on the “Defence Request for Leave to Appeal Issues in the Confirmation of Charges Decision” filed on 29 March 2016 ([ICC-02/04-01/15-423](#), the “Request”).

1. On 23 March 2016, the Chamber issued the “Decision on the confirmation of charges against Dominic Ongwen” (ICC-02/04-01/15-422-Conf and [-Red](#)), whereby it confirmed, in part, the charges brought against Dominic Ongwen and committed him for trial on the charges as confirmed (the “Confirmation Decision”).
2. On 29 March 2016, the Defence filed the Request, seeking leave to appeal the Confirmation Decision on five different issues.
3. The Chamber received the response to the Request from the legal representatives of a group of participating victims on 1 April 2016 ([ICC-02/04-01/15-424](#)) and, on 4 April 2016, the responses from the Prosecutor ([ICC-02/04-01/15-426](#)) and from the common legal representative of the otherwise unrepresented victims appointed by the Court ([ICC-02/04-01/15-425](#)). The Prosecutor and the legal representatives of both groups of victims submit that, as the Defence has failed to identify any appealable issue arising from the Confirmation Decision, the Request must be rejected in its entirety.

I. The applicable law

4. At the outset, the Chamber observes, as repeatedly held by Pre-Trial Chambers, that the drafters of the Statute intentionally excluded decisions on the confirmation of charges from the category of decisions which may be directly appealed before the Appeals Chamber.¹ A decision on the

¹ Pre-Trial Chamber I, *The Prosecutor v. Thomas Lubanga Dyilo*, “Decision on the Prosecution and Defence applications for leave to appeal the Decision on the confirmation of charges”, 23 May 2007, [ICC-01/04-01/06-915](#), para. 19; Pre-Trial Chamber II, *The Prosecutor v. Jean-Pierre*

confirmation of charges may therefore only be appealed if the specific requirements under article 82(1)(d) of the Statute are met. As has been stated by other chambers of this court, the remedy of article 82(1)(d) reflects a restrictive approach,² favouring “as a principle the deferral of appellate proceedings until final judgment, and limit interlocutory appeals to a few, strictly defined, exceptions”.³ In particular, the Chamber agrees with Pre-Trial Chamber I that “an interlocutory decision can only be appealed in exceptional

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’”, 18 September 2009, [ICC-01/05-01/08-532](#), para. 12; Pre-Trial Chamber I, *The Prosecutor v. Bahar Idriss Abu Garda*, “Decision on the ‘Prosecution’s Application for Leave to Appeal the ‘Decision on the Confirmation of Charges’”, 23 April 2010, [ICC-02/05-02/09-267](#), p. 5; Pre-Trial Chamber II, *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, “Decision on the Defences’ Applications for Leave to Appeal the Decision on the Confirmation Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute”, 9 March 2012, [ICC-01/09-01/11-399](#), para. 16; Pre-Trial Chamber II, *The 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”, 9 March 2012, [ICC-01/09-02/11-406](#), para. 25.

² See e.g. Pre-Trial Chamber II, *The Prosecutor v. Joseph Kony et al.*, “Decision on Prosecutor’s Application for Leave to Appeal Dated the 15th Day of March 2006 and to Suspend or Stay Consideration of Leave to Appeal Dated the 11th Day of May 2006”, 10 July 2006, [ICC-02/04-01/05-90](#), paras 19-21; Pre-Trial Chamber I, *The Prosecutor v. Bosco Ntaganda*, “Decision on the Prosecution and Defence applications for leave to appeal the Decision on the confirmation of charges”, 24 May 2007, [ICC-01/04-01/06-915](#), para. 20; Pre-Trial Chamber III, *The Prosecutor v. Jean-Pierre Bemba Gombo*, “Decision on the Prosecutor’s application for leave to appeal Pre-Trial Chamber III’s decision on disclosure”, 25 August 2008, [ICC-01/05-01/08-75](#), para. 6; Trial Chamber II, *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, “Decision on the Prosecutor’s Application for Leave to Appeal the Decision on Redactions Rendered on 10 February 2009”, 6 March 2009, [ICC-01/04-01/07-946-tENG](#), para. 11. Pre-Trial Chamber II, *The Prosecutor v. William Samoei Ruto et al.*, “Decision on the ‘Prosecution’s Application for Leave to Appeal the ‘Decision Setting the Regime for Evidence Disclosure and Other Related Matters’ (ICC-01/09-01/11-44)”, 2 May 2011, [ICC-01/09-01/11-74](#), para. 7; Pre-Trial Chamber II, *The 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”, 9 March 2012, [ICC-01/09-02/11-406](#), para. 20.

³ See Pre-Trial Chamber II, *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 Warrant of Arrest under Article 58”, 20 August 2005, [ICC-02/04-01/05-20](#), paras 19; Pre-Trial Chamber I, *The Prosecutor v. Thomas Lubanga Dyilo*, “Decision on the Prosecution and Defence applications for leave to appeal the Decision on the confirmation of charges”, 23 May 2007, [ICC-01/04-01/06-915](#), para. 20; Pre-Trial Chamber II, *The 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’”, 18 September 2009, [ICC-01/05-01/08-532](#), para. 12.

circumstances and to avoid irreparable prejudice to the appellant” and that “[g]reater emphasis should be placed on this principle with regard to a decision confirming charges, as any appeal against such a decision would significantly delay the start of the trial and thus the expeditious course of proceedings before the Court”.⁴ In this respect, the Chamber notes that in the practice of the Court until now, no leave has ever been granted to appeal decisions by which charges were confirmed.

5. Article 82(1)(d) of the Statute provides that either party may appeal:

A decision that involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial, and for which, in the opinion of the Pre-Trial or Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

6. According to established jurisprudence, an “issue” is an identifiable subject or topic requiring a decision for its resolution, as opposed to a hypothetical concern or an abstract legal question or a question over which there is a mere disagreement or conflicting opinion. An “issue” is constituted by a subject the resolution of which is “essential for the determination of matters arising in the judicial cause under examination”.⁵ It follows that any issues which, if decided otherwise, would have no impact on whether and what charges against Dominic Ongwen would be confirmed do not arise from the Confirmation Decision for the purposes of article 82(1)(d) of the Statute.⁶ At the same time, as previously observed, “arguing that any alleged error in the Chamber’s approach by definition constitutes an appealable issue simply

⁴ Pre-Trial Chamber I, *The Prosecutor v. Thomas Lubanga Dyilo*, “Decision on the Prosecution and Defence applications for leave to appeal the Decision on the confirmation of charges”, 23 May 2007, [ICC-01/04-01/06-915](#), paras 28-29.

⁵ Appeals Chamber, *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”, 13 July 2006, [ICC-01/04-168](#), para. 9.

⁶ See also Pre-Trial Chamber I, *The Prosecutor v. Laurent Gbagbo*, “Decision on the Defence request for leave to appeal the ‘Decision on the Confirmation of Charges against Laurent Gbagbo’”, 11 September 2014, [ICC-02/11-01/11-680](#), para. 11.

because in the absence of such error the charges would not have been confirmed, is not tenable”.⁷

7. In fact, the object and purpose of article 82(1)(d) of the Statute, which regulates interlocutory appeals, is to create a procedure by which appellate intervention on a certain issue can be anticipated to an intermediate stage of proceedings when it is determined that to have that issue decided only in the final appeal at the conclusion of the proceedings would mean to risk that large parts or the entire proceedings may be invalidated.⁸

8. Indeed, for leave to appeal to be granted, article 82(1)(d) of the Statute requires that the “issue” identified by the party would significantly affect either the fair and expeditious conduct of the proceedings or the outcome of the trial. In order to assess whether the issue would significantly affect one of these “elements of justice”, the Chamber “must ponder the implications of a given issue being wrongly decided” on the fairness and expeditiousness of the proceedings or the outcome of the trial, performing an “exercise [that] involves a forecast of the consequences of such an occurrence”.⁹

9. Finally, it is necessary that, in the opinion of the Chamber, an immediate resolution of the issue by the Appeals Chamber may materially advance the proceedings. As held by the Appeals Chamber, “the issue must be such that its immediate resolution by the Appeals Chamber will settle the matter posing

⁷ Pre-Trial Chamber II, *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, “Decision on the Defences’ Applications for Leave to Appeal the Decision on the Confirmation Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute”, 9 March 2012, [ICC-01/09-01/11-399](#), para. 16; Pre-Trial Chamber II, *The 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”, 9 March 2012, [ICC-01/09-02/11-406](#), para. 25.

⁸ See Pre-Trial Chamber II, *The Prosecutor v. Walter Osapiri Barasa*, “Decision on the ‘Defence request for leave to appeal decision ICC-01/09-01/13-35’”, 29 October 2015, [ICC-01/09-01/13-41](#), para. 7.

⁹ Appeals Chamber, *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”, 13 July 2006, [ICC-01/04-168](#), paras 10 and 13.

for decision through its authoritative determination, ridding thereby the judicial process of possible mistakes that might taint either the fairness of the proceedings or mar the outcome of the trial”.¹⁰ In this regard, “advancing the proceedings” has been identified by the Appeals Chamber as “[r]emoving doubts about the correctness of a decision or mapping a course of action along the right lines” and the term “immediate” has been defined as “underlin[ing] the importance of avoiding errors through the mechanism provided by subparagraph (d) by the prompt reference of the issue to the court of appeal”.¹¹

II. Analysis

First issue

10. The first issue identified by the Defence reads: “[w]hether the Chamber erred when it refused to exclude non-translated statements and transcripts [...] disclosed on 21 December 2015”. The Defence elaborates on this issue at paragraphs 12 to 19 of its Request.

11. With this issue, the Defence challenges paragraphs 22 to 23 of the Confirmation Decision, in which the Chamber rejected the Defence request to exclude seventeen witness statements and transcripts disclosed by the Prosecutor on 21 December 2015 without translation in Acholi.

12. The Defence argues that the first issue affects the fairness of the proceedings because allowing the Prosecutor to rely on evidence which has not been translated in Acholi violates “[t]he ability of the suspect to participate in the proceedings [...] as enshrined in Article 67(1)(f) and reinstated in Rule 76(3) of the Rules”. However, as correctly pointed out by the Prosecutor ([ICC-02/04-01/15-426](#), paras 4-5) and the legal representatives

¹⁰ *Ibid.*, para. 14.

¹¹ *Ibid.*, para. 18.

of both groups of participating victims ([ICC-02/04-01/15-424](#), paras 19-22; [ICC-02/04-01/15-425](#), para. 10), the argument that the non-translation of certain disclosed material *per se* violates the Statute and the Rules was considered and rejected by the former Single Judge in her decision of 27 February 2015, in which she delineated the legal framework for, and scope of, translation of evidence in Acholi ([ICC-02/04-01/15-203](#)). Therefore, in the part that the Defence argues that the first issue is an appealable issue as it is based on an incorrect understanding of the law in setting the scope of the required translations, it cannot be said that such issue arises from the Confirmation Decision.

13. Likewise, it is unpersuasive the argument that an appeal on this issue is necessary because without the intervention of the Appeals Chamber “[s]tatements submitted for trial might not get to Mr Ongwen in time to aid properly in his defence” ([Request](#), para. 17) and that “[f]ailure to have proper translations will undoubtedly cause delays in the trial” ([Request](#), para. 18). These statements reveal that the Defence argument as to the repercussions of this first issue in the proceedings is not related to the confirmation proceedings, but on the continuation of the present proceedings at trial. However, the question of whether and to what extent material disclosed by the Prosecutor needs to be translated into Acholi was not addressed in the Confirmation Decision, but, as recalled above, in the former Single Judge’s decision of 27 February 2015.

14. Importantly, the essential element for the positive determination that the first issue constitutes an appealable issue arising from the Confirmation Decision – namely how the Confirmation Decision would have been different had the Chamber acceded to the Defence request to exclude the concerned material – is missing from the Defence submissions. Indeed, as correctly observed by the legal representatives of a group of victims, “the Defence

Request does not show how this question impacted on the outcome of the decision” ([ICC-02/04-01/15-424](#), para. 22). In particular, with its first issue, the Defence does not identify a concrete issue arising from the Confirmation Decision that could have had an essential impact on the determination by the Chamber that there are substantial grounds to believe that Dominic Ongwen committed the crimes charged. It is in fact significant that, as recalled above, the Defence argues that the prejudice to its right exists only insofar as non-translated material would be further disclosed to it at trial.

15. Leave to appeal the Confirmation Decision with respect to the first issue is therefore rejected.

Second issue

16. The second issue identified by the Defence reads: “[w]hether the Chamber erred when it failed to consider evidence presented by the Defence as to the age of Dominic Ongwen”. The Defence elaborates on this issue at paragraphs 20 to 24 of its Request.

17. The Defence argues that “[a]t paragraph 150 of the Decision, the Chamber dismissed Defence submission on the age of Mr Ongwen as ‘entirely without legal basis, and the Chamber will not entertain it further’” ([Request](#), para. 20).

18. The Defence argument is incorrect. Paragraph 150 of the Confirmation Decision reads:

The Defence has raised several times an argument that circumstances exist that exclude Dominic Ongwen’s individual criminal responsibility for the crimes that he may otherwise have committed. One side of this argument is that Dominic Ongwen, who was abducted into the LRA in 1987 at a young age and made a child soldier, should benefit from the international legal protection as child soldier up to the moment of his leaving of the LRA in January 2015, almost 30 years after his abduction, and that such protection should include, as a matter of law, an exclusion of individual criminal responsibility for the crimes under the Statute that he may have committed (Transcript [T-22](#), p. 46;

[Defence Brief](#), paras 36-49). However, this argument is entirely without legal basis, and the Chamber will not entertain it further.

19. Contrary to the Defence argument in its Request, it is clear that the Chamber did not dismiss as “entirely without legal basis” the Defence submissions as to the age of Dominic Ongwen. As correctly observed by the Prosecutor ([ICC-02/04-01/15-426](#), para. 13) and by the legal representatives of a group of victims ([ICC-02/04-01/15-424](#), para. 24), what the Chamber considered without legal basis is the argument which was raised by the Defence that there exists, as a matter of law, a ground excluding individual criminal responsibility for any crime under a Statute that Dominic Ongwen may have committed until his leaving of the LRA in January 2015, as a result of the fact that he had been abducted and made a child soldier at a young age. Furthermore, at no point in the Confirmation Decision did the Chamber refuse to accept that Dominic Ongwen was indeed abducted at a young age and made a child soldier. Paragraph 150 of the Confirmation Decision acknowledges this fact. Whether at the time of his abduction Dominic Ongwen was 12 years old (as he originally told the Chamber during his first appearance) or 9 years old (as the Defence argued at the confirmation of charges hearing) was immaterial to any finding made by the Chamber in the Confirmation Decision, and is not a question the resolution of which is essential to whether the charges brought against Dominic Ongwen ought to be confirmed.

20. Accordingly, the second issue does not arise from the Confirmation Decision and leave to appeal with respect to this issue is rejected.

Third issue

21. The third issue identified by the Defence reads: “[w]hether the Chamber erred in the Decision by failing to issue a well-reasoned decision”. The Defence elaborates on this issue at paragraphs 25 to 35 of its Request.

22. The Defence argues that the Chamber's reasoning for its final determination under article 61(7) of the Statute is somehow deficient. The Chamber notes the arguments in the responses to the Request by the Prosecutor and the legal representatives of a group of victims that this issue does not arise from, and misrepresents the Confirmation Decision as "the Decision sets out with sufficient clarity the relevant factual conclusions and supporting evidence" ([ICC-02/04-01/15-426](#), para. 18) and that the Confirmation Decision "[i]dentifies the facts relevant to its reasoning, as well as the sources of evidence which support them" ([ICC-02/04-01/15-424](#), para. 30). At the same time, the Chamber considers that this issue, in the terms that it has been formulated by the Defence, would naturally arise from any decision of judicial institutions as the succumbing party may always argue that a judicial determination is not reasoned enough. In this sense, it cannot be said that the third issue, as phrased, does not arise from the Confirmation Decision on the ground that the decision is, in the view of the Chamber which rendered it, sufficiently reasoned.

23. The Chamber shall therefore determine whether the Defence sufficiently demonstrates that the issue as presented would, if left unresolved, have significant repercussions on the fair and expeditious conduct of the proceedings or the outcome of the trial and, as such, warrant an interlocutory appeal. The Chamber considers that this is not the case.

24. Indeed, the Defence argument appears to rest on a misunderstanding of the nature, purpose and structure of the Confirmation Decision and is predicated on a failure to appreciate the distinction between the Chamber's reasoning in the Confirmation Decision, on the one hand, and the disposition in such decision (*i.e.* the confirmed charges), on the other hand. In fact, the Defence claims that the alleged insufficiency of the Chamber's reasoning in the Confirmation Decision: (i) "significantly affects the fairness of the

proceedings because the Chamber did little to delineate the facts and circumstances of the case” ([Request](#), para. 32); (ii) “significantly affects the expeditious conduct of the proceedings because it deprives the Defence of proper guidelines for the facts and circumstances of the case, causing it to keep a broad base when investigating the case [and] inevitably requir[ing] the Defence to seek delays in the proceedings” ([Request](#), para. 33); and (iii) “significantly affects the outcome of the trial because it will cause the Defence to spend countless and needless time on broad issue [as] [f]ailure to define proper facts and circumstances [...] will cause issues in the future which will require litigious and needless litigation for the Trial Chamber” ([Request](#), para. 34). Likewise, the Defence argues that “[a]s the official court document for the charges, an overly vague document with almost no evidentiary citations will cause confusion and problems throughout the rest of the proceedings” ([Request](#), para. 35).

25. The Defence arguments are entirely predicated on the assumption that it is the reasoning of the Chamber in the Confirmation Decision that delineates the facts and circumstances of the charges and therefore constitutes the “official court document for the charges”. However, as observed by the Prosecutor ([ICC-02/04-01/15-426](#), para. 21) and by the legal representatives of a group of victims ([ICC-02/04-01/15-424](#), paras 31-32), this is incorrect. The facts and circumstances of the charges brought against Dominic Ongwen and confirmed by the Chamber are clearly stipulated in the operative part of the Confirmation Decision, which reproduces *verbatim* the charges presented by the Prosecutor in the document containing the charges of 21 December 2015 (with the limited modifications described at paragraph 158 of the Confirmation Decision), the formulation of which – in terms of their clarity and specificity – had not been challenged by the Defence.

26. The Chamber indeed recalls that it is only the charges as reproduced in the operative part of the Confirmation Decision which are binding to the proceedings in that they delineate the facts and circumstances setting the parameters of the charges for which Dominic Ongwen is committed to trial. No binding effect (whether on factual or legal matters) is instead attached to the reasoning provided in the Confirmation Decision by which the Chamber explains how it reached its final determination under article 61(7) of the Statute and which, as clarified at paragraph 19 of the Decision, was limited to what the Chamber considered “necessary and sufficient for its determination on the charges”.

27. Therefore, even assuming, *arguendo*, that the Chamber’s reasoning in the Confirmation Decision was somehow deficient as argued by the Defence, this would have no impact on the delineation of the facts and circumstances of the charges reproduced in the operative part of the Confirmation Decision. As the Defence argument that the third issue is an appealable issue exclusively rests on possible repercussions ensuing from an alleged lack of clarity as to the facts and circumstances of the case, and considering that this premise is manifestly incorrect, the Chamber concludes that leave to appeal the Confirmation Decision in relation to the third issue must be rejected.

Fourth issue

28. The fourth issue identified by the Defence reads: “[w]hether the Chamber erred when it decided that Article 25(3)(c) does not require a substantial contribution to the crime”. The Defence elaborates on this issue at paragraphs 36 to 39 of its Request.

29. The Defence contests the Chamber’s reference to previous determinations by other Pre-Trial Chambers in other cases. In the part of the Confirmation Decision challenged by the Defence, the Chamber held that “[i]t

is nowhere required, contrary to the Defence argument [...] that the assistance [within the meaning of article 25(3)(c)] be ‘substantial’ or anyhow qualified other than by the required specific intent to facilitate the commission of the crime (as opposed to a requirement of sharing the intent of the perpetrators)” ([Confirmation Decision](#), para. 43). While in that paragraph, the Chamber did refer to previous determinations by other Chambers concerning the interpretation of article 25(3)(c) of the Statute, it is clear that the Chamber, contrary to the Defence submission in its Request, did not uncritically adopt such previous determinations, but primarily relied on the fact that the provision at issue does not qualify the required assistance.

30. In any case, the Chamber recalls that the mode of liability under article 25(3)(c) of the Statute was confirmed for the crimes committed in the context of the attack on Pajule IDP camp on or about 10 October 2003 (notably, under charges 1 to 9) as a possible alternative to the mode of responsibility under article 25(3)(a) which, as observed at paragraphs 38 and 39 of the Confirmation Decision, requires that the person’s contribution be “essential”. Considering that the Chamber found that Dominic Ongwen’s “undertook action which was essential for the commission of crimes” under charges 1 to 9 ([Confirmation Decision](#), para. 70), it follows that Dominic Ongwen’s contribution to the commissions of these crimes would *a fortiori* qualify under any supposed threshold under article 25(3)(c) of the Statute. Therefore, the relevant charges would have been equally confirmed even had the Chamber found that, as a matter of law, article 25(3)(c) of the Statute requires a “substantial” contribution to the crimes as argued by the Defence. This legal aspect, which was addressed in the Confirmation Decision only as an answer to the Defence submissions raised on the point at the confirmation of charges hearing, is in fact not essential, in the factual circumstances of the present case, for the determination of the matter under consideration, namely the

confirmation of charges 1 to 9 also with respect to the mode of liability under article 25(3)(c) of the Statute.¹²

31. It is indeed significant that the Defence argument as to the need to have an interlocutory appeal on this issue at the present stage is not that charges 1 to 9 would not have been confirmed under article 25(3)(c) had the Chamber agreed with the Defence that the assistance under this article must be “substantial”, but that “[p]roper interpretation of a mode of liability for which Mr Ongwen is accused of performing is vital to both parties in the case to determine the proper course of its investigation and presentation of evidence ([Request](#), para. 37) and “[f]ailure to have a proper determination of the interpretation of Article 25(3)(c) will undoubtedly lead to delays in the proceedings” ([Request](#), para. 38). Similarly, the Defence argues that “[a]n immediate resolution of the Fourth Issue by the Appeals Chamber will materially advance the proceedings by providing a definitive answer to the construction of aiding and abetting under the Rome Statute, and would dispel any questions as to whether the Chamber should follow other Pre-Trial Chamber’s determinations or follow applicable principles and rules of international law” ([Request](#), para. 39). With respect to these submissions, the Chamber observes, as pointed out by the Prosecutor ([ICC-02/04-01/15-426](#), para. 27), that the Defence can raise at trial the matter of the proper interpretation of article 25(3)(c) of the Statute as the Trial Chamber is not legally bound to follow the Chamber’s interpretation in the Confirmation Decision, and that, in these circumstances, a ruling by the Appeals Chamber

¹² Similarly, albeit with respect to the issue of whether there exists a threshold for the contribution within the meaning of article 25(3)(d), see Pre-Trial Chamber II, *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, “Decision on the Defences’ Applications for Leave to Appeal the Decision on the Confirmation Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute”, 9 March 2012, [ICC-01/09-01/11-399](#), paras 52-54.

would be tantamount to providing an advisory opinion, which is something going “beyond and outside the scope of its authority”.¹³

32. For these reasons, leave to appeal the Confirmation Decision with respect to the fourth issue is rejected.

Fifth issue

33. Finally, the fifth issue identified by the Defence reads: “[w]hether the Chamber erred when it decided that forced marriage was not subsumed by the crime of sexual slavery”. The Defence elaborates on this issue at paragraphs 40 to 44 of its Request.

34. With this issue, the Defence challenges paragraphs 87 to 95 of the Confirmation Decision in which the Chamber found that the crime of forced marriage as an other inhumane act is not predominantly a sexual crime and that, as it differs from the crime of sexual slavery in terms of conduct, ensuing harm and protected interests, is not subsumed by the crime of sexual slavery. The fifth issue, under which the Defence challenges precisely this finding, therefore arises from the Confirmation Decision.

35. Nonetheless, the Chamber considers that this issue does not hold the potential to significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial.

36. First, the Chamber notes the Defence argument that a significant impact on the fairness result of the Chamber’s “judicial activism” as Dominic Ongwen is being charged with “crimes that are not even enshrined in the Statute” ([Request](#), para. 42). This is incorrect. Dominic Ongwen is charged

¹³ Appeals Chamber, *Situation in the Democratic Republic of the Congo*, “Decision on Victim Participation in the appeal of the Office of Public Counsel for the Defence against Pre-Trial Chamber I’s Decision of 7 December 2007 and in the appeals of the Prosecutor and the Office of Public Counsel for the Defence against Pre-Trial Chamber I’s Decision of 24 December 2007”, 30 June 2008, [ICC-01/04-503](#), para. 30.

with the crime of “other inhumane acts” which is a crime listed in the Statute at 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.

37. Second, the Defence claims a significant impact of expeditiousness of the proceedings which is also to avoid litigation on a matter of law that has already been adjudicated. This is because the Defence argues that the matter has already been dealt by Pre-Trial Chamber I in its decision on the confirmation of charges against Germain Katanga and Mathieu Ngudjolo Chui.¹⁴ This argument is also incorrect. Indeed, in the decision referred to by the Defence, Pre-Trial Chamber I was not confronted with the question of whether “forced marriage” could qualify as an other inhumane act under article 7 (as this crime was not even charged) or whether this conduct would be subsumed by sexual slavery. In that decision, at paragraph 431, Pre-Trial Chamber I merely described, as a matter of fact and not as a matter of law, that the crime of sexual slavery “also encompasses situations where women and girls are forced into ‘marriage’, domestic servitude or other forced labour involving compulsory sexual activity, including rape, by their captors”. As correctly observed by the Prosecutor ([ICC-02/04-01/15-426](#), para. 30) and by the legal representatives of a group of victims ([ICC-02/04-01/15-424](#), para. 37), this statement, which implies an interpretation of the scope of the crime of sexual slavery under article 7(1)(g) of the Statute, in no way can be construed as concluding that forced marriage – which, as noted, was not charged in that case – cannot constitute an “other inhumane act” under article 7(1)(k) separate and not subsumed by the crime of sexual slavery.

¹⁴ Pre-Trial Chamber I, *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui* “Decision on the confirmation of charges”, 30 September 2008, [ICC-01/04-01/07-717](#).

38. Finally, the Chamber recalls its holding at paragraphs 29 to 33 of the Confirmation Decision (for which no leave to appeal is sought in the Request) that 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 Chamber as part of its reasoning in the Confirmation Decision. Furthermore, the Chamber observes that in this particular case any need to anticipate an appellate intervention on this issue at this stage is even less warranted as the evidence underlying the charges of other inhumane act in the form of forced marriage has in large part already been obtained in the proceedings conducted under article 56 of the Statute. Therefore, also in this sense, no significant repercussion on the fair and expeditious conduct of the proceedings or the outcome of the trial would ensue from the Chamber's alleged error in determining that forced marriage was not subsumed by the crime of sexual slavery and confirming charges 50 and 61.

39. Leave to appeal the Confirmation Decision in relation to the fifth issue is therefore rejected.

III. Conclusion

40. In light of the above, the Chamber concludes that the Defence has failed to identify any appealable issue arising from the Confirmation Decision. The proceedings in the present case before this Chamber are therefore concluded. Accordingly, the Registrar, in accordance with rule 129 of the Rules, shall transmit the decision on the confirmation of charges and the record of the

proceedings of the Pre-Trial Chamber to the Presidency for constitution of a Trial Chamber under article 61(11) of the Statute and rule 130 of the Rules.

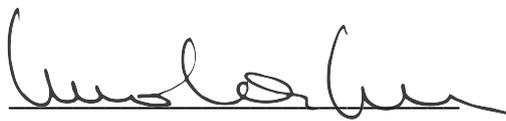
FOR THESE REASONS, THE CHAMBER

REJECTS the Defence application for leave to appeal the decision on the confirmation of charges; and

ORDERS the Registrar to transmit to the Presidency the decision on the confirmation of charges and the record of the proceedings of the Chamber.

Judge Perrin de Brichambaut will append in due course a partly dissenting opinion.

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



Judge Cuno Tarfusser
Presiding Judge

Judge Marc Perrin de Brichambaut



Judge Chang-ho Chung

Dated this 29 April 2016

At The Hague, The Netherlands