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PRE-TRIAL CHAMBER II

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

SITUATION IN UGANDA

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

Public Document

Common Legal Representative's response to the "*Defence Request for Leave to Appeal Issues in 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 592 victims authorised to participate in the present case¹ submits that the *“Defence Request for Leave to Appeal Issues in Confirmation of Charges Decision”* (the *“Defence Request”*) should be rejected in its entirety. The Request does not demonstrate that the issues identified by the Defence arise from the Impugned Decision and can be the subject of an interlocutory appeal, nor does it show how said issues would significantly affect the fair and expeditious conduct of the proceedings or the outcome of the trial. In particular, out of the five issues identified by the Defence, the first four fail to constitute proper appealable matters. The fifth issue does not fulfil the relevant criteria for lodging an interlocutory appeal.

II. Background

2. On 23 March 2016, Pre-Trial Chamber II (the *“Chamber”*) issued the *“Decision on the confirmation of charges against Dominic Ongwen”* (the *“Impugned Decision”*).²

3. On 29 March 2016, the Defence filed its Request.³ The Defence seeks leave to appeal the Impugned Decision on the following five *“issues”*:

- i) *The Chamber erred when it refused to exclude non-translated statements and transcripts (‘Statements’) disclosed on 21 December 2015 (‘First Issue’);*

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; and the *“Second decision on contested victims’ applications for participation and legal representation of victims”* (Pre-Trial Chamber II, Single Judge), No. ICC-02/04-01/15-369, 24 December 2015, pp. 20-22.

² See the *“Decision on the confirmation of charges against Dominic Ongwen”* (Pre-Trial Chamber II), No. ICC-02/04-01/15-422-Red, 23 March 2016.

³ See the *“Defence Request for Leave to Appeal Issues in Confirmation of Charges Decision”*, No. ICC-02/04-01/15-423, 29 March 2016.

- ii) *The Chamber erred when it failed to consider evidence presented by the Defence as to the age of Dominic Ongwen ('Second Issue');*
- iii) *The Chamber erred in the Decision by failing to issue a well-reasoned decision ('Third Issue');*
- iv) *The Chamber erred when it decided that Article 25(3)(c) does not require a substantial contribution to the crime ('Fourth Issue');* and
- v) *The Chamber erred when it decided that forced marriage was not subsumed by the crime of sexual slavery ('Fifth Issue').*⁴

III. Submissions

Legal standards for interlocutory appeals

4. Article 82(1)(d) of the Rome Statute sets out the criteria for granting a request for leave to appeal as follows:

- a) The decision shall involve an issue that would significantly affect:
 - i. the fair and expeditious conduct of proceedings; or
 - ii. the outcome of the trial; and
- b) For which, in the opinion of relevant Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.

5. For the purposes of the first prong of this test, the Appeals Chamber defined an “issue” as “an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion”.⁵ Moreover, the

⁴ *Idem*, para. 2.

⁵ See the “Judgement on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal”, (The Appeals Chamber), No. ICC-01/04-168 OA3, 13 July 2006, para. 9.

Appeals Chamber ruled that *“the Pre-Trial or Trial Chamber is vested with power to state, or more accurately still, to certify the existence of an appealable issue”*.⁶

6. Consequently, it must, first, be determined whether the alleged *“issues”* identified in the Defence Request are proper *“appealable issues”* within the meaning of article 82(l)(d) of the Rome Statute as interpreted by the relevant jurisprudence of the Court. The above mentioned definition *“requires the parties to articulate discrete issues for Appeals Chamber’s resolution and [...] it is generally insufficient to argue that the entirety of the Chamber’s reasoning is erroneous when requesting leave to appeal”*.⁷

7. Moreover, the issues for which leave to appeal is sought, must not be *“generic assertions”*;⁸ in other words, issues whose formulation is exceedingly broad or so general that it is essentially a challenge to the entirety of the Chamber's reasoning are not sufficiently discrete to qualify as appealable issues.⁹ Moreover, *“while an application for leave to appeal should not contain in detail the arguments which the party intends to raise before the Appeals Chamber, it must still identify clearly the appealable issue, including by way of indicating a specific factual and/or legal error. Only in this case can the*

⁶ *Idem*, para. 20.

⁷ See the “Decision on the joint defence request for leave to appeal the decision on witness preparation”, (Trial Chamber V), No. ICC-01/09-01/11-596, 11 February 2013, para. 11; the “Decision on Defence Request for Reconsideration of or Leave to Appeal/Decision on ‘Defence Request for Disclosure and Judicial Assistance’”, (Trial Chamber VII), No. ICC-01/05-01/13-1282, 22 September 2015, para. 10.

⁸ See the “Decision on Defence Request for Leave to Appeal Decision on the Request to strike two witnesses from the Prosecution’s Witness List”, (Trial Chamber VII), No. ICC-01/05-01/13-1307, 28 September 2015, para. 14.

⁹ See the “Decision on the ‘Defence Application for Leave to Appeal the ‘Decision on the defence request for a temporary stay of proceedings’”, (Trial Chamber IV), No. ICC-02/05-03/09-428, 13 December 2012, para. 28; the “Decision on the joint defence request for leave to appeal the decision on witness preparation”, *supra* note 7, para. 17; the “Decision on the Prosecutor's and Defence requests for leave to appeal the decision adjourning the hearing on the confirmation of charges”, (Pre-Trial Chamber I), No. ICC-02/11-01/11-464, 31 July 2013, para. 67 and the “Decision on Babala Defence request for leave to appeal ICC-01/05-01/13-800”, (Trial Chamber VII), No. ICC-01/05-01/13-877, 27 March 2015, para. 7.

*Chamber assess whether the issue, provided it was wrongly decided, may have implications on the fairness and expeditiousness of the proceedings or outcome of the trial”.*¹⁰

The first four purported “issues” fail to constitute proper appealable issues

8. In light of the clear text of article 82(1)(d) of the Rome Statute and the relevant jurisprudence of the Appeals Chamber, the Common Legal Representative submits that the first four purported “issues” raised in the Defence Request fail to constitute proper appealable issues.

The First “Issue” does not arise from the Impugned Decision

9. The Defence argues that the Chamber erred when it refused to exclude non-translated statements and transcripts disclosed on 21 December 2015.¹¹ However, by raising this issue, the Defence effectively challenges two previous rulings of the Pre-Trial Chamber issued prior to the Impugned Decision.

10. In particular, on 27 February 2015, the Single Judge dismissed the Defence’s request for Acholi translation of the documents disclosed by the Prosecution.¹² This decision governed the same subject matter that the Defence is raising as the first “issue” in its Request. No leave to appeal of this ruling was lodged by the Defence at the time. Similarly, the Defence also failed to timely raise the relevant matter in its two requests seeking the postponement of the confirmation of charges hearing. These procedural matters are recalled in the Impugned Decision.¹³

11. Furthermore, during the confirmation of the charges hearing, the Defence was not allowed to raise the same matter when the Presiding Judge ruled that the issue

¹⁰ See the “Decision on three applications for leave to appeal”, (Pre-Trial Chamber I), No. ICC-02/11-01/11-307, 21 October 2015, para. 70.

¹¹ See the Defence Request, paras. 2, 12-19.

¹² See the “Decision Setting the Regime for Evidence Disclosure and Other Related Matters, (Pre-Trial Chamber II, Single Judge), No. ICC-02/04-01/15-203, 27 February 2015, paras. 30-36.

¹³ See the Impugned Decision, para. 21.

related to the language of the statements provided in rule 76(3) of the Rules of Procedure and Evidence should have been raised prior to the commencement of the confirmation hearing pursuant to rule 122(3) of the Rules.¹⁴

12. Lastly, in the Impugned Decision, the Chamber further noted that no prejudice to the fairness of the proceedings is arising out of said decision due to the limited amount of material concerned within the broader scope of the evidence relied upon by the Prosecutor, the limited scope and purpose of the confirmation of charges hearing and the fact that Mr Ongwen is assisted by a Defence team with members, including counsel, fluent in English and Acholi.¹⁵

13. As held by the Appeals Chamber, a properly constituted appealable issue must first and foremost “arise” from the Impugned Decision.¹⁶ In other words, the issue identified by the party seeking appeal must “emanate” from the relevant decision itself.¹⁷ As shown *supra*, the rulings that the Defence presently challenges are extraneous to the Impugned Decision.

14. Indeed, the Defence simply reiterates its arguments already considered and rejected by the Chamber. According to the established jurisprudence of the Court, a request for leave to appeal repeating arguments already considered in previous decisions amounts to a mere disagreement with the relevant rulings¹⁸ and the fact

¹⁴ See ICC-02/04-01/15-T-23-Conf, page 23, line 1 to page 24, line 11. (Public redacted version of this transcript is not presently available. Nonetheless, this ruling was rendered in open session.)

¹⁵ See Impugned Decision, paras. 22-23.

¹⁶ See the “Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal”, *supra* note 5, para. 9.

¹⁷ See the “Decision on the ‘Defence Application for Leave to Appeal the ‘Decision on the defence request for a temporary stay of proceedings’”, *supra* note 9, para. 7; the “Decision on the Prosecutor's and Defence requests for leave to appeal the decision adjourning the hearing on the confirmation of charges”, *supra* note 9, para. 8; the “Decision on the ‘Requête de la Défense sollicitant l'autorisation d'interjeter appel de la Décision sur la confirmation des charges datée du 9 juin 2014’” (Pre-Trial Chamber II), No. ICC-01/04-02/06-322, 4 July 2014, para. 10; and the “Decision on the Defence Request for Leave to Appeal” (Pre-Trial Chamber II), No. ICC-01/04-02/06-207, 13 January 2014, para. 11.

¹⁸ See the “Decision on the ‘Request for Leave to Appeal against the ‘Decision on the Request for an order for the commencement of the pre-confirmation phase by the Defence of Saif Al-Islam Gaddafi’” (Pre-Trial Chamber I), No. ICC-01/11-01/11-490, 1 December 2013, para. 31 and the “Decision on

that the Defence is not satisfied with the dismissal of its submissions does not establish an appealable issue.¹⁹ Therefore, the first “*issue*” fails to constitute a proper appealable issue.

The Second “Issue” does not arise from the Impugned Decision

15. The Defence argues that the Chamber erred when it failed to consider evidence presented by the Defence as to the age of Mr Ongwen.²⁰ The Chamber did dismiss the Defence’s arguments in this regard as being “*entirely without legal basis*”²¹ since Mr Ongwen’s age has *no* legal significance *vis-à-vis* the charges brought against him. Moreover, the Defence itself does not dispute the fact that Mr Ongwen was an adult at the time of the commission of the crimes in question.

16. More importantly, the Appeals Chamber held that “[an appealable issue] *is constituted by a subject the resolution of which is essential for the determination of matters arising in the judicial cause under examination*”.²² Yet, the exact age of Mr Ongwen, regardless of how precise in years or in months it could possibly be determined, is not an essential subject requiring the intervention of the Appeals Chamber.

17. Even if, *arguendo*, the Appeals Chamber rules in favour of the Defence, a judicial finding in relation to this “*issue*” will have *no* impact on the resolution of the ultimate question which is “whether and what charges against the suspect should be confirmed or declined”. In the jurisprudence of the Court, such matters, having no impact on judicial proceedings and/or not materially affecting the impugned

Defence requests for leave to appeal the ‘Order setting the commencement date for trial’” (Trial Chamber I), No. ICC-02/11-01/15-117, 2 July 2015, para. 22.

¹⁹ See the “Decision on the Defence Request for Leave to Appeal”, *supra* note 17, para. 33.

²⁰ See the Defence Request, paras. 2 and 20-24.

²¹ See the Impugned Decision, para. 150.

²² See the “Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal”, *supra* note 5, para. 9.

decisions are regularly denied.²³ Thus, the second “*issue*” also fails to constitute a proper appealable issue.

The Third “Issue” does not arise from the Impugned Decision

18. The Defence argues that the Chamber erred by failing to issue a well-reasoned decision.²⁴ Forthrightly, this purported “*issue*” appears to be nothing more than an extremely generic assertion, which, as such, cannot be the basis for interlocutory appeals.²⁵ Indeed, the formulation of this “*issue*” challenges the entirety of the Chamber's reasoning of the Impugned Decision. As recalled *supra*, such “*issues*”, framed in an overly broad fashion, are not sufficiently discrete to qualify as appealable an issue.²⁶ The most explicit and brazen admission of this fact is found in paragraph 25 of the Defence Request which reads “[t]he *Third Issue not only arises from the Decision, the Third Issue is the Decision*”.²⁷

19. Moreover, the Defence further challenges multiple aspects of the Impugned Decision without successfully raising even a single properly constituted appealable issue.²⁸ Indeed, “[i]t is not the Chamber’s duty to decompose broadly formulated issues in order to identify potential issues for certification”.²⁹ A party seeking leave to appeal a decision must “*identify clearly the appealable issue, including by way of indicating a*

²³ See the “Decision on the Defence request for leave to appeal the ‘Decision on the Confirmation of Charges against Laurent Gbagbo’”, (Pre-Trial Chamber I), No. ICC-02/11-01/11-680, 11 September 2014, para. 11 and the “Decision on the Defence Applications for Leave to Appeal the Decision on the Confirmation of Charges”, (Pre-Trial Chamber II), No. ICC-01/09-02/11-406, March 2012, para. 43.

²⁴ See the Defence Request, paras. 2, 25-35.

²⁵ See the “Decision on Defence Request for Leave to Appeal Decision on the Request to strike two witnesses from the Prosecution’s Witness List”, *supra* note 8, para. 14.

²⁶ See the “Decision on the ‘Defence Application for Leave to Appeal the ‘Decision on the defence request for a temporary stay of proceedings’”, *supra* note 9, para. 27; the “Decision on the joint defence request for leave to appeal the decision on witness preparation”, *supra* note 7, para. 17; the “Decision on the Prosecutor’s and Defence requests for leave to appeal the decision adjourning the hearing on the confirmation of charges”, *supra* note 9, para. 67 and the “Decision on Babala Defence request for leave to appeal ICC-01/05-01/13-800”, *supra* note 9, para. 7.

²⁷ See Defence’s request, para. 25 (Emphases added.)

²⁸ *Idem*, paras. 28-31.

²⁹ See the “Decision on the Prosecutor’s and Defence requests for leave to appeal the decision adjourning the hearing on the confirmation of charges”, *supra* note 9, para. 70.

specific factual and/or legal error” and “[l]eave to appeal cannot be granted if the party seeking to appeal, instead of identifying appealable issues, seeks leave to litigate ex novo before the Appeals Chamber the entire decision”.³⁰ Therefore, the third “issue” also fails to constitute a proper appealable issue.

The Fourth “Issue” does not arise from the Impugned Decision

20. The Defence argues that the Chamber erred in deciding that article 25(3)(c) of the Rome Statute does not require a substantial contribution to the crime.³¹ The Defence’s contention simply repeats, in an extremely succinct manner, the same argument already considered and rejected in the Impugned Decision. Moreover, the Defence’s reference, made without proper citation, to the alleged qualification “essential”, as being contained in article 25(3)(a) of the Rome Statute, is extraneous to the matter since each mode of criminal liability is to be interpreted within its own unique legal framework.

21. The reasoning of the Defence indicates a mere disagreement with the relevant rulings.³² In this regard, when a party challenges the legal interpretation of certain provisions relied upon by a chamber in confirming the charges, expressing a simple difference of opinion regarding the question *sub judice* or with the legal reasoning provided by the Chamber, is not sufficient to establish that the decision is somehow vitiated.³³ As held by the Appeals Chamber, “*mere disagreement*” or “*conflict of opinion*” do not constitute an “*appealable issue*” within the meaning of article 82(1)(d)

³⁰ See the “Decision on three applications for leave to appeal”, *supra* note 10, para. 70. (Emphasis added).

³¹ See the Defence Request, paras. 2 and 36-39.

³² See the “Decision on the ‘Request for Leave to Appeal against the ‘Decision on the Request for an order for the commencement of the pre-confirmation phase by the Defence of Saif Al-Islam Gaddafi’” *supra* note 18, para. 31 and the “Decision on Defence requests for leave to appeal the ‘Order setting the commencement date for trial’”, *supra* note 18, para. 22.

³³ See the “Decision on the ‘Requête de la Défense sollicitant l’autorisation d’interjeter appel de la Décision sur la confirmation des charges datée du 9 juin 2014’”, *supra* note 17, para. 33.

of the Rome Statute.³⁴ Since this purported “*issue*”, along with three previous “*issues*” fail to properly constitute appealable issues, there is no need to delve into the remaining requirements of article 82(1)(d) of the Rome Statute.

The Fifth Issue does arise from the Impugned Decision

22. The Defence argues that the Chamber erred when it decided that the crime of forced marriage was not subsumed by the crime of sexual slavery.³⁵ The Chamber did indeed find, for the first time in the history of the Court, that forced marriage is a form of “*other inhumane acts*” of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health, within the meaning of article 7(1)(k) of the Rome Statute. Therefore, the Common Legal Representative acknowledges that this issue does arise from the Impugned Decision and constitutes an appealable issue.

The Fifth Issue does not fulfil remaining criteria for granting leave to appeal

23. However, the Common Legal Representative posits that this issue would not significantly affect the fair and expeditiousness conduct of proceedings or the outcome of the trial; and an immediate resolution by the Appeals Chamber of this issue would not materially advance the proceedings.

24. As held by the Appeals Chamber, not every issue may constitute the subject of an appeal since “*it must be one apt to ‘significantly affect’, i.e. in a material way, either a) ‘the fair and expeditious conduct of the proceedings’ or b) ‘the outcome of the trial’*”.³⁶ It should be stressed that the Chamber did not create a new crime of forced marriage *per se*. The Chamber simply recognized the fact that forced marriage constitutes one

³⁴ See the “Judgement on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal”, *supra* note 5, para. 9.

³⁵ See the Defence Request, paras. 2 and 40-44.

³⁶ See the “Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal”, *supra* note 5, para. 10.

of the “forms” of various ways to commit the crime of “other inhumane acts” provided for in article 7(1)(k) of the Rome Statute.³⁷ This interpretation is not legally binding upon the Trial Chamber which may reach a wholly different conclusion based on comprehensive and in-depth assessment of evidence and analysis of the law, applicable to the trial phase. Thus, this issue would not significantly or materially affect the fair and expeditious conduct of the proceedings or the outcome of the trial.

25. Moreover, an immediate resolution of this issue by the Appeals Chamber would not materially advance the proceedings. Since the matter at hand may be re-litigated before a Trial Chamber, “immediate” or “the prompt reference of the issue to the court of appeal”³⁸ is not required at this stage of the proceedings. *Arguendo*, even if the Appeals Chamber rules in favour of the Defence, the resolution of the issue would not materially advance or “move forward”³⁹ the proceedings since the rendering of the decision on the confirmation of the charges brings end to pre-trial proceedings and, as mentioned *supra*, the Defence may re-litigate the issue before a Trial Chamber.

FOR THE FOREGOING REASONS, the Common Legal Representative respectfully requests the Pre-Trial Chamber to dismiss the Defence Request.



Paolina Massidda
Principal Counsel

Dated this 4th day of April 2016

At Kampala, Uganda

³⁷ See Impugned Decision, paras. 87-95.

³⁸ See the “Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal”, *supra* note 5, para. 18.

³⁹ *Idem*, para. 15.