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No. ICC-02/04-01/15 OA4

Date: 17 July 2019

THE APPEALS CHAMBER

Before: Judge Luz del Carmen Ibáñez Carranza, Presiding
Judge Chile Eboe-Osuji
Judge Howard Morrison
Judge Piotr Hofmański
Judge Solomy Balungi Bossa

SITUATION IN UGANDA

IN THE CASE OF THE PROSECUTOR v. DOMINIC ONGWEN

Public

Judgment

on the appeal of Mr Dominic Ongwen against Trial Chamber IX's 'Decision on Defence Motions Alleging Defects in the Confirmation Decision'

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

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The Appeals Chamber of the International Criminal Court,

In the appeal of Dominic Ongwen against the decision of Trial Chamber IX entitled ‘Decision on Defence Motions Alleging Defects in the Confirmation Decision’ of 7 March 2019 (ICC-02/04-01/15-1476),

After deliberation,

Unanimously,

Delivers the following

JUDGMENT

1. The ‘Decision on Defence Motions Alleging Defects in the Confirmation Decision’ is confirmed.
2. The Prosecutor’s and the Common Legal Representative of Victims’ requests for leave to file a response to Mr Ongwen’s Further Submissions under regulation 28 of the Regulations of the Court are rejected.

REASONS

I. KEY FINDINGS

1. The purpose of rule 134 of the Rules is to safeguard the nature of the judicial process as an orderly succession of procedural acts provided by law that ensure the proper administration of justice.
2. Expeditiousness forms an integral part of a fair trial; procedural rules that require parties to raise certain issues at a given point in time are not necessarily incompatible with the rights of the accused.

II. INTRODUCTION

3. Mr Dominic Ongwen (‘Mr Ongwen’) is currently standing trial before Trial Chamber IX (‘Trial Chamber’) on charges of war crimes and crimes against humanity. In the present appeal, the Appeals Chamber is called upon to determine whether the Trial Chamber in the ‘Decision on Defence Motions Alleging Defects in the Confirmation Decision’ of 7 March 2019 (‘Impugned Decision’),¹ correctly interpreted rule 134 of the Rules, and if so, whether it properly exercised its discretion thereunder when dismissing *in limine* Mr Ongwen’s motions alleging defects in the decision on the confirmation of charges (‘Confirmation Decision’)² raised by Mr Ongwen over three years after that decision was issued (‘Defects Series’).

4. Mr Ongwen raises four grounds of appeal. Under the first ground of appeal,³ Mr Ongwen essentially argues that the Trial Chamber incorrectly exercised its discretion, in the decision granting leave to appeal, by mischaracterising the issues in the Impugned Decision.⁴ Under the second and fourth grounds of appeal,⁵ Mr Ongwen is in essence challenging the Trial Chamber’s interpretation of the applicable law, in particular rule 134 of the Rules, arguing that the Trial Chamber erred when it found that the alleged defects in the Confirmation Decision fell under rule 134(2) of the Rules rather than under rule 134(3) of the Rules. Under the third ground of appeal,⁶ which is raised in the alternative, Mr Ongwen essentially argues that the Trial Chamber incorrectly exercised its discretion by refusing to grant leave under rule 134(2) and decide on the merits of the Defects Series.

5. For the reasons that will be elaborated in this judgment, the Appeals Chamber finds that the Trial Chamber did not err in its interpretation of rule 134 of the Rules and in holding that rule 134(2) rather than rule 134(3) of the Rules is applicable to the present case. Furthermore, in light of the particular circumstances of the case, the

¹ Trial Chamber IX, *The Prosecutor v. Dominic Ongwen*, [Decision on Defence Motions Alleging Defects in the Confirmation Decision](#), 7 March 2019, ICC-02/04-01/15-1476.

² Pre-Trial Chamber II, *The Prosecutor v. Dominic Ongwen*, [Decision on the confirmation of charges against Dominic Ongwen](#), 23 March 2016, ICC-02/04-01/15-422-Red.

³ [Defence’s appeal against the ‘Decision on Defence Motions Alleging Defects in the Confirmation Decision’](#), 11 April 2019, ICC-02/04-01/15-1496 (‘Appeal Brief’), paras 10-15.

⁴ Trial Chamber IX, *The Prosecutor v. Dominic Ongwen*, [Decision on Defence Request for Leave to Appeal a Decision on Motions Alleging Defects in the Confirmation Decision](#), 1 April 2019, ICC-02/04-01/15-1493 (‘Decision on Leave to Appeal’), para. 13.

⁵ [Appeal Brief](#), paras 16-24, 36-42.

⁶ [Appeal Brief](#), paras 25-35.

Appeals Chamber finds that the Trial Chamber did not exercise its discretion improperly when dismissing *in limine* Mr Ongwen's motions alleging defects in the Confirmation Decision. In light of the foregoing, the Appeals Chamber rejects the appeal lodged by Mr Ongwen and confirms the Impugned Decision.

6. This judgment shall first provide an overview of the case, before addressing a preliminary matter, namely the requests by the Prosecutor and the group of victims represented by the Common Legal Representative of Victims ('CLR') for leave to file a response to Mr Ongwen's further submissions. It will thereafter set out the standard of review that will guide the analysis, the issues arising from the four grounds of appeal, and the legal framework relevant to the determination of the issues arising in the grounds of appeal.

7. It will then enter into an analysis of the grounds of appeal, which will be structured as follows: (1) the first ground of appeal concerning the Trial Chamber's alleged error in its characterisation of the issues stemming from the Impugned Decision; and (2) the second, third and fourth grounds of appeal concerning the Trial Chamber's interpretation of the applicable law and the manner in which it exercised its discretion when dismissing *in limine* the motions alleging defects in the Confirmation Decision. In light of the interconnection between the latter three grounds of appeal and the overlap of Mr Ongwen's arguments, the Appeals Chamber will address them together, starting with the second and fourth grounds of appeal, and subsequently addressing the third ground of appeal.

III. OVERVIEW OF THE CASE

A. Background Information

8. On 16 December 2003, the Government of Uganda referred the situation in Uganda to the Prosecutor of the Court.⁷ The Prosecutor proceeded with an investigation.⁸ On 8 July 2005, Pre-Trial Chamber II ('Pre-Trial Chamber') issued warrants of arrest against Joseph Kony,⁹ Vincent Otti,¹⁰ Raska Lukwiya,¹¹ Okot

⁷ Presidency, [Decision Assigning the Situation in Uganda to the Pre-Trial Chamber II](#), 5 July 20014, ICC-02/04-01/15-1 ('Decision Assigning the Uganda Situation').

⁸ [Decision Assigning the Uganda Situation](#), p. 4.

⁹ Pre-Trial Chamber II, *Situation in Uganda*, [Warrant of arrest for Joseph Kony issued on 8th July 2005 as amended on 27th September 2005](#), 27 September 2005, ICC-02/04-01/05-53.

Odhiambo¹² and Dominic Ongwen.¹³ On 16 January 2015, Mr Ongwen was surrendered to the Court by the Central African Republic and made his first appearance before the Pre-Trial Chamber on 26 January 2015.¹⁴

9. On 21 December 2015, the Prosecutor filed the document containing the charges, presenting charges of crimes against humanity and war crimes committed on the territory of the Uganda between 1 July 2002 and 31 December 2005.¹⁵

10. The confirmation of charges hearing took place between 21 and 27 January 2016.¹⁶ On 23 March 2016, the Pre-Trial Chamber confirmed the charges against Mr Ongwen.¹⁷ The Pre-Trial Chamber confirmed 70 counts, including crimes against humanity and war crimes.¹⁸

11. The trial against Mr Ongwen commenced on 6 December 2016.¹⁹ On 13 April 2018, the Prosecutor completed her presentation of evidence.²⁰ On 1 October 2018, Mr Ongwen commenced with his presentation of evidence, which is ongoing.²¹

B. Procedural History

1. Proceedings before the Pre-Trial Chamber

12. On 21 December 2015, the Prosecutor filed the document containing the charges, including the Acholi translation thereof.²² This was the first point in time

¹⁰ Pre-Trial Chamber II, *Situation in Uganda*, [Warrant of arrest for Vincent Otti](#), 8 July 2005, ICC-02/04-01/05-54.

¹¹ Pre-Trial Chamber II, *Situation in Uganda*, [Warrant of arrest for Raska Lukwiya](#), 8 July 2005, ICC-02/04-01/05-55.

¹² Pre-Trial Chamber II, *Situation in Uganda*, [Warrant of arrest for Okot Odhiambo](#), 8 July 2005, ICC-02/04-01/05-56.

¹³ Pre-Trial Chamber II, *Situation in Uganda*, [Warrant of Arrest for Dominic Ongwen](#), 8 July 2005, ICC-02/04-01/15-6.

¹⁴ [Transcript of hearing](#), 26 January 2015, ICC-02/04-01/15-T-4-ENG.

¹⁵ [Annex A to \[Prosecution's submission of the document containing the charges, the pre-confirmation brief, and the list of evidence\]](#), 22 December 2015, ICC-02/04-01/15-375-AnxA-Red.

¹⁶ [Transcript of hearing](#), 21 January 2016, ICC-02/04-01/15-T-20-Red; [Transcript of hearing](#), 22 January 2016, ICC-02/04-01/15-T-21-Red-ENG; [Transcript of hearing](#), 25 January 2016, ICC-02/04-01/15-T-22-ENG; [Transcript of hearing](#), 26 January 2016, ICC-02/04-01/15-T-23-Red-ENG; [Transcript of hearing](#), 27 January 2016, ICC-02/04-01/15-T-24-ENG.

¹⁷ [Confirmation Decision](#).

¹⁸ [Confirmation Decision](#).

¹⁹ [Transcript of hearing](#), 6 December 2016, ICC-02/04-01/15-T-26-ENG.

²⁰ [Notice of the Prosecution's completion of evidence presentation](#), 13 April 2018, ICC-02/04-01/15-1225.

²¹ [Transcript of hearing](#), 1 October 2018, ICC-02/04-01/15-T-180-Red-ENG.

after which Mr Ongwen could have raised any specific objections that he may have had in relation to the formulation of the charges.

13. On 23 March 2016, the Pre-Trial Chamber confirmed the charges against Mr Ongwen.²³ In particular, the Pre-Trial Chamber confirmed the following charges: crimes against humanity of murder (counts 2, 12, 25, 38), torture (counts 4, 16, 29, 42, 51, 62), other inhumane acts (counts 7, 18, 31, 44), enslavement (counts 8, 20, 33, 46, 57, 68), persecution (counts 10, 23, 36, 49), attempted murder (counts 14, 27, 40); forced marriage (counts 50, 61), rape (counts 53, 64), sexual slavery (counts 55, 66) and forced pregnancy (count 58).²⁴ The Pre-Trial Chamber also confirmed the following charges of war crimes: attacks against the civilian population as such, (counts 1, 11, 24, 37); murder (counts 3, 13, 26, 39), torture (counts 5, 17, 30, 43, 52, 63), cruel treatment (counts 6, 19, 32, 45), pillaging (counts 9, 21, 34, 47), attempted murder (counts 15, 28, 41); outrages upon personal dignity (counts 22, 60), destruction of property (counts 35, 48), rape (counts 54, 65), sexual slavery (counts 56, 67), forced pregnancy (count 59), conscription of children under the age of 15 into an armed group as a war crime (count 69) and use of children under the age of 15 to participate actively in hostilities (count 70).²⁵

14. With respect to the modes of liability, the Pre-Trial Chamber confirmed seven different modes of liability alternatively, including direct perpetration (article 25(3)(a) of the Statute), indirect co-perpetration (article 25(3)(a), or (c), ordering (article 25(b)), command responsibility (article 28(a)), and common purpose liability (article 25(3)(d)(i)).

15. In his brief for the confirmation of charges hearing, Mr Ongwen challenged the existence, under the Statute, of the mode of liability of ‘indirect co-perpetration’, relied upon by the Prosecutor for charges 1 to 23 and 61 to 70²⁶ and raised a jurisdictional challenge related to charges of forced marriage, arguing that forced marriage is not recognised as a crime in the Statute, that it does not amount to a

²² [Annex B to ‘Prosecution’s submission of the document containing the charges, the pre-confirmation brief, and the list of evidence’](#), 21 December 2015, ICC-02/04-01/15-375-AnxB-Red.

²³ [Confirmation Decision](#).

²⁴ [Confirmation Decision](#), pp. 71-104.

²⁵ [Confirmation Decision](#), pp. 71-104.

²⁶ [Confirmation Decision](#), para. 37.

category of other inhumane acts and that it is subsumed in the crime of sexual slavery.²⁷ In the Confirmation Decision, the Pre-Trial Chamber rejected the challenges.²⁸ The Pre-Trial Chamber subsequently rejected Mr Ongwen's request for leave to appeal the Confirmation Decision.²⁹ Therefore, the jurisdictional challenges advanced by Mr Ongwen were addressed and decided by the Pre-Trial Chamber in the Confirmation Decision.

2. *Proceedings before the Trial Chamber*

16. On 2 May 2016, the Presidency constituted Trial Chamber IX and referred to it the case of *The Prosecutor v. Mr Dominic Ongwen*.³⁰ In the course of the preparation of the case, the Trial Chamber set a deadline of 28 October 2016 for the parties to file any motions which required resolution prior to the commencement of the trial.³¹ This was the second moment at which Mr Ongwen could have raised any issues or objections in relation to the formulation of the charges.

17. The trial against Mr Ongwen commenced on 6 December 2016.³² During the hearing on that day, the Court Officer read extracts of the confirmed charges,³³ and the Trial Chamber rendered an oral decision stating that it was 'satisfied that Mr Ongwen understands the nature of the charges'.³⁴ In support of its decision, the Trial Chamber noted that (i) Mr Ongwen had 'confirmed to Pre-Trial Chamber II that he had read and understood the charges as set out in the document containing the charges at the confirmation hearing'; (ii) the charges alleged by the Prosecutor were essentially confirmed and thus not different from what Mr Ongwen 'said he understood'; (iii) the Confirmation Decision had been fully translated into Acholi; (iv)

²⁷ [Defence Brief for the Confirmation of Charges Hearing, filed on 18 January 2016](#), 3 March 2016, ICC-02/04-01/15-404-Red2, para. 128. See also Transcript of hearing, 26 January 2016, ICC-02/04-01/15-T-23-Red-ENG, p. 14, lines 5-22.

²⁸ [Confirmation Decision](#), paras 41, 88, 91-92.

²⁹ [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 ('Decision on Request for Leave to Appeal Confirmation Decision').

³⁰ [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.

³¹ [Decision Setting the Commencement Date of the Trial](#), 30 May 2016, ICC-02/04-01/15-449 ('Decision on the Commencement of Trial').

³² [Transcript of hearing](#), 6 December 2016, ICC-02/04-01/15-T-26-ENG.

³³ [Transcript of hearing](#), 6 December 2016, ICC-02/04-01/15-T-26-ENG, p. 8, line 14 to p. 16, line 9. See also [Initial Directions on the Conduct of the Proceedings](#), 13 July 2016, ICC-02/04-01/15-497, para. 6.

³⁴ [Transcript of hearing](#), 6 December 2016, ICC-02/04-01/15-T-26-ENG, p. 17, line 25 to p. 18, line 1.

‘Mr Ongwen has been fully informed of the incriminating conduct since the confirmation of charges decision set out the facts of the case with precision, together with their legal characterisation’; (v) counsel for Mr Ongwen ‘gave no indication that Mr Ongwen was having difficulty understanding the nature of the charges’; and (vi) ‘Mr Ongwen’s remarks that the LRA is not him and that the LRA committed these acts demonstrate an understanding of the confirmed charges’.³⁵

18. Subsequently, the Trial Chamber, noting rule 134(2) of the Rules, enquired with the parties whether they had ‘any remaining objections or observations concerning the conduct of the proceedings which have arisen since the confirmation hearing’, and reminded the parties that ‘in accordance with Rule 134(2), no such objection or observation may be raised or made again during the trial proceedings without the leave of the Chamber’.³⁶ In response, counsel for Mr Ongwen indicated the following:

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.³⁷

This was the third time that Mr Ongwen had an opportunity to raise any issues that he may have had as regards the formulation of the charges.

19. On 27 October 2017 and on 10 January 2018, Mr Ongwen submitted that the untimely translation of the Confirmation Decision, including the separate opinion attached to the decision, violated his rights stipulated in article 67 of the Statute, in particular those under article 67(1)(a) and (f).³⁸ Similarly, in a motion filed on 11

³⁵ [Transcript of hearing](#), 6 December 2016, ICC-02/04-01/15-T-26-ENG, p. 18, line 1 to p. 19, line 24.

³⁶ [Transcript of hearing](#), 6 December 2016, ICC-02/04-01/15-T-26-ENG, p. 21, lines 13-18.

³⁷ [Transcript of hearing](#), 6 December 2016, ICC-02/04-01/15-T-26-ENG, p. 21, line 22 to p. 22, line 4.

³⁸ [Public Redacted Version of “Defence Observations on the Preliminary Directions for any LRV or Defence Evidence Presentation and Request for Guidance on Procedure for No-case-to-answer Motion”, filed on 27 October 2017](#), 8 November 2017, ICC-02/04-01/15-1029-Red, para. 34: ‘The Defence has so far identified a few legal and factual issues that have arisen and likely to arise in the Prosecution theory of the case. For instance, Mr Ongwen has asserted that he has not been given appropriate and reasonable notice of the crimes with which he has been charged. Indeed, while Mr Ongwen has been explained the charges and been provided with many sections of the confirmation of charges in Acholi, a final draft has yet to be provided’, [Addendum to ‘Defence Request for Findings on](#)

December 2017, Mr Ongwen submitted that he ‘was not provided notice with a sufficient degree of specificity’, maintaining that instead the Prosecutor had provided ‘a smörgåsbord of charges and modes of liability’,³⁹ with the idea that the Chamber would make a final determination of charges based on the evidence.⁴⁰

20. On 13 December 2017, a complete translation of the Confirmation Decision into Acholi was registered on the record.⁴¹ This was the fourth moment after which Mr Ongwen had a concrete opportunity to raise any specific issues related to the formulation of the charges that would have required resolution by the Trial Chamber.

21. In its decision rendered on 24 January 2018 in response to the challenges of 27 October 2017 and 10 January 2018, the Trial Chamber found that it was ‘plainly untimely’ for Mr Ongwen to raise the lack of an Acholi translation as a ‘trial-halting’ issue 13 months after the commencement of trial, noting in addition that Mr Ongwen had not sought leave to raise such objection under rule 134 of the Rules.⁴² In the same decision, the Trial Chamber considered that in any event there was no reason to revisit its decision of 6 December 2016 that Mr Ongwen sufficiently understood the charges, noting that ‘an important distinction must be made between the operative part of the Confirmation Decision and its reasoning’, clarifying that ‘the content of “the charges” appears only in the operative part’.⁴³

22. On 13 April 2018, the Prosecutor completed her presentation of evidence.⁴⁴

[Fair Trial Violations and Remedy, Pursuant to Articles 67 and 64 of the Rome Statute’ \(ICC-02/04-01/15-1127\) filed 8 January 2018](#), 10 January 2018, ICC-02/04-01/15-1229, para. 10: ‘Furthermore, a late and incomplete translation cannot cure the harm and prejudice of the fair trial violations of Article 67(a) and (f) – the lack of notice and lack of translation of the charging instrument including the Separate Opinion – which have existed since the inception of the case, in the pre-trial and trial phases and which continue to violate Mr Ongwen’s Article 67 rights.’

³⁹ [Defence Observations on Fair Trial and Request for Orders on Prosecution Resources and Additional Defence Resources](#), 11 December 2017, ICC-02/04-01/15-1098 (‘Mr Ongwen’s Observations on Fair Trial’), para. 33.

⁴⁰ [Mr Ongwen’s Observations on Fair Trial](#), para. 33.

⁴¹ Acholi Translation of Decision on the confirmation of charges against Dominic Ongwen, 13 December 2017, ICC-02/04-01/15-422-Conf-tACH.

⁴² [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 (‘Decision on Acholi Translation’), para. 18.

⁴³ [Decision on Acholi Translation](#), para. 19.

⁴⁴ [Notice of the Prosecution’s completion of evidence presentation](#), 13 April 2018, ICC-02/04-01/15-1225.

23. On 5 July 2018, Mr Ongwen filed a request for leave to file a ‘no case to answer’ motion submitting, *inter alia*, that the Confirmation Decision ‘is deficient because it does not explicitly define some of the charges and modes of liability and the supporting evidence of each charge is not identified’.⁴⁵ In its decision rendered on 18 July 2018, the Trial Chamber emphasised ‘the significant distinction between being informed of the charges and the confirmation decision’s reasoning’.⁴⁶ It held that arguments advanced by Mr Ongwen concerning ‘evidentiary references and legal definitions fail to appreciate this distinction’.⁴⁷ The Trial Chamber was equally unpersuaded by Mr Ongwen’s arguments concerning the burdens caused by the number of charges and modes of liability in the case.⁴⁸ In this regard, it did not consider the number of charges and modes of liability ‘to be of much significance’, given that ‘it is more the factual scope of a case - rather than the number of legal characterisations within it - that drives the time and resources needed during trial’.⁴⁹

24. The trial resumed on 18 September 2018 with the opening statement given by the Defence for Mr Ongwen.⁵⁰

25. On 1 October 2018, Mr Ongwen commenced his presentation of evidence, which is currently ongoing.⁵¹

26. On 1 February 2019, Mr Ongwen filed the Defects Series alleging that the Confirmation Decision suffers various defects and requesting that the Trial Chamber dismiss the charges and modes of liability which are ‘facially deficient and violate [his] fundamental fair trial right of notice’.⁵² In particular, Mr Ongwen submitted that

⁴⁵ [Defence Request for Leave to File a No Case to Answer Motion and Application for Judgment of Acquittal](#), 5 July 2018, ICC-02/04-01/15-1300, para. 23.

⁴⁶ [Decision on Defence Request for Leave to File a No Case to Answer Motion](#), 18 July 2018, ICC-02/04-01/15-1309 (‘Decision on Request for Leave to File a No Case to Answer Motion’), para. 9.

⁴⁷ [Decision on Request for Leave to File a No Case to Answer Motion](#), para. 9.

⁴⁸ [Decision on Request for Leave to File a No Case to Answer Motion](#), para. 14.

⁴⁹ [Decision on Request for Leave to File a No Case to Answer Motion](#), para. 14.

⁵⁰ [Transcript of hearing](#), 18 September 2018, ICC-02/04-01/15-T-179-Red-ENG.

⁵¹ [Transcript of hearing](#), 1 October 2018, ICC-02/04-01/15-T-180-Red-ENG.

⁵² [Defence Motion on Defects in the Confirmation of Charges Decision: Defects in Notice and Violations of Fair Trial](#), 1 February 2019, 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](#), 1 February 2019, 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 \(ii\)](#), 1 February 2019, ICC-02/04-01/15-1432 (‘Defects Series Part III’); [Defence Motion on Defects in the](#)

(i) the Confirmation Decision fails to identify the *mens rea* elements for the modes of liability provided in article 25(3)(a) and (b) of the Statute;⁵³ (ii) the confirmation of indirect co-perpetration as a mode of liability is jurisdictionally defective and the pleading of indirect co-perpetration is defective;⁵⁴ (iii) the confirmation of indirect co-perpetration is *ultra vires*, since it is not a theory within the statutory language of article 25(3)(a);⁵⁵ (iv) the pleading of command responsibility under article 28(a) is defective;⁵⁶ (v) the pleading of common purpose liability under article 25(3)(d)(i) or (ii) is defective;⁵⁷ (vi) the pleading of the crime of persecution is ‘facially deficient’;⁵⁸ (vii) the pleading of the crime of enslavement is defective;⁵⁹ (viii) the pleading of conscription and use of children under the age of 15 is deficient;⁶⁰ (ix) the confirmation of the crime of forced marriage is jurisdictionally defective.⁶¹

27. On 5 February 2019, the Prosecutor sought a ruling for the Defects Series to be dismissed, *in limine*, submitting, *inter alia*, that these motions: (i) were manifestly out of time and (ii) repeated arguments that have already been dismissed.⁶² On 25 February 2019, the Prosecutor filed the remainder of her response,⁶³ and CLRV and Legal Representatives of Victims (‘LRV’) filed their responses.⁶⁴ All responding participants sought to dismiss the Defects Series.

[Confirmation of Charges Decision: Defects in the Charged Crimes](#), 1 February 2019, ICC-02/04-01/15-1433 (‘Defects Series Part IV’).

⁵³ [Defects Series Part II](#), para. 8.

⁵⁴ [Defects Series Part II](#), para. 23-27.

⁵⁵ [Defects Series Part II](#), para. 28-31.

⁵⁶ [Defects Series Part III](#), paras 10, 12.

⁵⁷ [Defects Series Part III](#), paras 31, 53.

⁵⁸ [Defects Series Part IV](#), para. 33.

⁵⁹ [Defects Series Part IV](#), para. 60.

⁶⁰ [Defects Series Part IV](#), para. 70.

⁶¹ [Defects Series Part IV](#), para. 53.

⁶² [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.

⁶³ [Prosecution Response to the “Defence Motion on Defects in the Confirmation of Charges Decision: Defects in Notice and Violations of Fair Trial” dated 1 February 2019](#), 25 February 2019, ICC-02/04-01/15-1463.

⁶⁴ [Victims’ Response to “Defence Motion on Defects in the Confirmation of Charges Decision” \(Parts I – IV\)](#), 25 February 2019, ICC-02/04-01/15-1464-Corr; [CLR V Response to the Defence’s Four Requests on Defects in the Confirmation of Charges Decision](#), 25 February 2019, ICC-02/04-01/15-1461.

28. On 7 March 2019, the Trial Chamber dismissed the Defects Series *in limine*⁶⁵ finding that the challenges to the formulation of the charges were untimely without any sufficient justification for the timing of its motions.⁶⁶ It also found that the arguments challenging the jurisdiction on indirect co-perpetration and forced marriage were untimely and that there were no exceptional circumstances warranting their consideration at that point during trial.⁶⁷

29. On 14 March 2019, Mr Ongwen requested leave to appeal the Impugned Decision on two issues:⁶⁸

i) '[W]hether the [Impugned] Decision, based on procedural grounds under rules 122(4) and 134(2), implements the Trial Chamber's responsibility under Article 64(2) to "ensure that a trial is fair [...] and is conducted with the full respect for the right of the accused" consistent with Article 67(1)' ('First Issue'); and

ii) '[W]hether the [Impugned] Decision's finding, at paragraph 37, that jurisdictional arguments on forced marriage are untimely, is accurate' ('Second Issue').⁶⁹

30. On 1 April 2019, the Trial Chamber granted leave to appeal the First Issue and rejected leave to appeal the Second Issue.⁷⁰

3. *Proceedings before the Appeals Chamber*

31. On 11 April 2019, Mr Ongwen filed the Appeal Brief.⁷¹

32. On 23 April 2019, the Prosecutor ('Prosecutor's Response')⁷² and the CLRV ('CLR V Response')⁷³ filed their responses.

⁶⁵ [Impugned Decision](#), para. 36.

⁶⁶ [Impugned Decision](#), paras 14, 24-30 and 36.

⁶⁷ [Impugned Decision](#), paras 34-35 and 37.

⁶⁸ [Defence Request for Leave to Appeal "Decision on Defence Motions Alleging Defects in the Confirmation Decision" \(ICC-02/04-01/15-1476\), notified 7 March 2019](#), 14 March 2019, ICC-02/04-01/15-1480 ('Request for Leave to Appeal').

⁶⁹ [Request for Leave to Appeal](#), para. 3.

⁷⁰ [Decision on Leave to Appeal](#).

⁷¹ [Appeal Brief](#).

⁷² [Prosecutor's Response to "Defence's Appeal against the 'Decision on Defence Motion Alleging Defect in the Confirmation Decision'"](#), 23 April 2019, ICC-02/04-01/15-1502.

⁷³ [CLR V's Response to "Defence's Appeal against the 'Decision on Defence Motion Alleging Defect in the Confirmation Decision'"](#), 23 April 2019, ICC-02/04-01/15-1503.

33. On 24 May 2019, the Appeals Chamber invited the parties and participants to file additional observations on four discrete questions.⁷⁴

34. The Prosecutor⁷⁵ and the LRV⁷⁶ filed their further submissions on 31 May 2019. Mr Ongwen⁷⁷ and the CLRV⁷⁸ filed their further submissions on 3 June 2019.

IV. PRELIMINARY ISSUE – REQUESTS UNDER REGULATION 28 TO FILE A RESPONSE TO MR ONGWEN’S FURTHER SUBMISSIONS

A. Submissions by the Parties and Participants

35. On 6 June 2019, the Prosecutor filed a request for leave to respond to Mr Ongwen’s Further Submissions under regulation 28 of the Regulations of the Court.⁷⁹ In her request, the Prosecutor recalls that in her response to the Appeals Chamber’s order filed on 31 May 2019 she could not provide a detailed response to questions 1 and 2, given that she was not aware of what Mr Ongwen’s submissions would be.⁸⁰

36. Having reviewed Mr Ongwen’s Further Submissions, the Prosecutor seeks leave to respond to the following three issues. First, Mr Ongwen’s submissions on alleged defects in the modes of liability, which the Prosecutor contends are irrelevant and do not respond to question 1 because they identify matters that did not arise during the

⁷⁴ [Order for Further Submissions](#), 24 May 2019, ICC-02/04-01/15-1524 (OA4) (‘Order for Further Submissions’): ‘1. Which are the specific issues that, in the view of Mr Dominic Ongwen, arose during the course of the trial warranting the application of rule 134(3) of the Rules? 2. Why did Mr Dominic Ongwen raise concrete alleged defects in the confirmation of charges decision three years after it was issued? 3. What type of issues, objections or observations can be raised prior to or during trial under rule 134 of the Rules? In this regard, are ‘observations concerning the conduct of the proceedings’ limited to procedural aspects or can substantive aspects be raised as well? 4. The Appeals Chamber notes that Mr Dominic Ongwen raises arguments concerning the possible violation of his fundamental rights as a result of the Impugned Decision, referring, inter alia, to his right under article 67(1)(a) of the Statute. Are there any additional submissions that the parties and participants intend to raise in this regard?’.

⁷⁵ [Prosecution’s Submission in response to “Order for Further Submissions” \(ICC-02/04-01/15-1524\)](#), 31 May 2019, ICC-02/04-01/15-1532 (‘Prosecutor’s Further Submissions’).

⁷⁶ [Victims’ submissions in response to the Order for Further Submissions](#), 31 May 2019, ICC-02/04-01/15-1531 (‘LRV’s Further Submissions’).

⁷⁷ [Defence’s Further Submissions](#), 31 May 2019, ICC-02/04-01/15-1536 (‘Mr Ongwen’s Further Submissions’).

⁷⁸ [CLRV’s Further Submissions Pursuant to the Appeals Chamber’s Order](#), 3 June 2019, ICC-02/04-01/15-1537 (‘CLRV’s Further Submissions’).

⁷⁹ [Prosecution’s request for leave under regulation 28 to file a response to Defence’s Further Submissions \(ICC-02/04-01/15-1536-Corr\)](#), 6 June 2019, ICC-02/04-01/15-1539 (‘Prosecutor’s Request to File Further Submissions’).

⁸⁰ [Prosecutor’s Request to File Further Submissions](#), para. 2.

course of the trial.⁸¹ Second, arguments made in response to question 1 that Mr Ongwen did not place before the Trial Chamber, fall outside the scope of the appeal or concern issues that are the subject of separate litigation before the Trial Chamber⁸² – in particular the Prosecutor contends that the following have been the subject of litigation before the Trial Chamber: (i) the alleged Prosecution disclosure failures; (ii) the alleged dispute over the questioning of witnesses on events that occurred outside the temporal scope of the charges; and (iii) the prejudice from alleged failure to fully translate the Confirmation Decision into the Acholi language.⁸³ Third, arguments made in response to question 2 that Mr Ongwen did not place before the Trial Chamber, fall outside the scope of the appeal or concern issues that are the subject of separate litigation before the Trial Chamber – in particular the Prosecutor contends that: (i) the alleged inability to object in a timely manner to the Confirmation Decision due to inequality of resources between the defence and the prosecution, and Mr Ongwen’s mental health conditions and disability are new matters; and (ii) the allegedly prejudicial evidentiary regime adopted by the Trial Chamber has been the subject of litigation before the Trial Chamber.⁸⁴

37. The Prosecutor seeks leave to file a response pursuant to regulation 28 and, should leave not be granted, she requests that the Appeals Chamber dismiss Mr Ongwen’s Further Submissions (‘Prosecutor’s Alternative Request’).⁸⁵

38. On 10 June 2019, after reviewing Mr Ongwen’s Further Submissions, the CLRV filed a request seeking leave to respond thereto.⁸⁶ In her request, the CLRV notes that Mr Ongwen ‘placed new arguments which not only fall outside of the scope of the present appeal but were also already the subject of separate litigations before the Trial Chamber’.⁸⁷ In particular, the CLRV seeks leave to respond to three arguments raised by Mr Ongwen: ‘1) the alleged prejudice stemming from the alleged failure to fully translate the Confirmation Decision in the Acholi language; 2) the

⁸¹ [Prosecutor’s Request to File Further Submissions](#), para. 5.

⁸² [Prosecutor’s Request to File Further Submissions](#), para. 6.

⁸³ [Prosecutor’s Request to File Further Submissions](#), para. 6.

⁸⁴ [Prosecutor’s Request to File Further Submissions](#), para. 7.

⁸⁵ [Prosecutor’s Request to File Further Submissions](#), para. 8.

⁸⁶ [CLRV’s Request to respond to the Defence’s Further Submissions Pursuant to the Appeals Chamber’s Order No. 1524](#), 10 June 2019, ICC-02/04-01/15-1541 (‘CLRV Request to File Further Submissions’).

⁸⁷ [CLRV Request to File Further Submissions](#), para. 7.

alleged inability to object timeously to the Confirmation Decision due to the Accused's mental health conditions and disability; and 3) the alleged prejudicial Trial Chamber evidentiary regime'.⁸⁸

B. Determination by the Appeals Chamber

39. Regulation 28 of the Regulations of the Court ('Questions by a Chamber') provides

1. A Chamber may order the participants to clarify or to provide additional details on any document within a time limit specified by the Chamber.
2. A Chamber may order the participants to address specific issues in their written or oral submissions within a time limit specified by the Chamber.
3. These provisions are without prejudice to the inherent powers of the Chamber.

40. The Appeals Chamber considers that in the circumstances of the present case, further submissions are not necessary for the proper determination of the appeal. In this regard, it is noted that the issues to which the Prosecutor and the CLRV seek leave to respond concern matters that are, in principle, of limited relevance to the resolution of the discrete questions before the Appeals Chamber in the appeal, namely whether the Trial Chamber correctly interpreted rule 134 and if it exercised its discretion thereunder properly in the Impugned Decision.

41. Furthermore, the information that the Prosecutor and the Victims intend to provide to the Appeals Chamber is already available in the record, e.g. decisions rendered by the Trial Chamber on the matters raised by Mr Ongwen in his further submissions.

42. In these circumstances, the Appeals Chamber considers that further submissions would not assist it in the determination of the appeal. Rather, they would delay the proceedings thereby failing to comply properly with the object of article 82(1)(d) of the Statute to 'materially advance the proceedings'.

43. In light of the foregoing considerations, the requests by the Prosecutor and the CLRV to file a response to Mr Ongwen's Further Submissions under regulation 28 of

⁸⁸ [CLR V Request to File Further Submissions](#), para. 8.

the Regulations of the Court are rejected. The Appeals Chamber will address the Prosecutor's Alternative Request below, when discussing the third ground of appeal.

V. MERITS

A. Standard of Review

44. In the present case, the Appeals Chamber must address whether the Trial Chamber correctly interpreted the applicable law and, if so, whether it exercised its discretion properly when dismissing the Defects Series *in limine*. Therefore, the Appeals Chamber must determine whether the Trial Chamber erred in law and/or whether it failed to exercise its discretion judiciously.

45. With respect to errors of law, the Appeals Chamber has previously found that it:

[W]ill not defer to the Trial Chamber's interpretation of the law. Rather, it will arrive at its own conclusions as to the appropriate law and determine whether or not the Trial Chamber misinterpreted the law. If the Trial Chamber committed such an error, the Appeals Chamber will only intervene if the error materially affected the Impugned Decision.

A judgment is 'materially affected by an error of law' if the Trial Chamber 'would have rendered a judgment that is substantially different from the decision that was affected by the error, if it had not made the error'. [Footnotes omitted].⁸⁹

46. With respect to discretionary decisions, the Appeals Chamber has set out the following applicable standard of review:

The Appeals Chamber recalls that it will not interfere with the Chamber's exercise of discretion merely because the Appeals Chamber, if it had the power,

⁸⁹ *The Prosecutor v. Jean-Pierre Bemba Gombo*, [Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's "Judgment pursuant to Article 74 of the Statute"](#), 8 June 2018, ICC-01/05-01/08-3636-Red (A) ('*Bemba A Appeal Judgment*'), para. 36; *The Prosecutor v. Uhuru Muigai Kenyatta*, [Judgment on the Prosecutor's appeal against Trial Chamber V\(B\)'s "Decision on Prosecution's application for a finding of non-compliance under Article 87\(7\) of the Statute"](#), 19 August 2015, ICC-01/09-02/11-1032 (OA5) ('*Kenyatta OA5 Judgment*'), para. 23. *See also The Prosecutor v. Thomas Lubanga Dyilo*, [Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction](#), 1 December 2014, ICC-01/04-01/06-3121-Conf (A5) with a public redacted version, ICC-01/04-01/06-3121-Red (A5) ('*Lubanga A5 Judgment*'), para. 18; *The Prosecutor v. Simone Gbagbo*, [Judgment on the appeal of Côte d'Ivoire against the decision of Pre-Trial Chamber I of 11 December 2014 entitled "Decision on Côte d'Ivoire's challenge to the admissibility of the case against Simone Gbagbo"](#), 27 May 2015, ICC-02/11-01/12-75-Conf (OA) with a public redacted version, ICC-02/11-01/12-75-Red (OA) ('*S. Gbagbo Admissibility OA Judgment*'), para. 40.

might have made a different ruling.⁹⁰ The Appeals Chamber will only disturb the exercise of a Chamber's discretion where it is shown that an error of law, fact or procedure was made.⁹¹ In this context, the Appeals Chamber has held that it will interfere with a discretionary decision only under limited conditions and has referred to standards of other courts to further elaborate that it will correct an exercise of discretion in the following broad circumstances, namely where (i) it is based upon an erroneous interpretation of the law; (ii) it is based upon a patently incorrect conclusion of fact; or (iii) the decision amounts to an abuse of discretion.⁹² Furthermore, once it is established that the discretion was erroneously exercised, the Appeals Chamber has to be satisfied that the improper exercise of discretion materially affected the impugned decision.⁹³

With respect to an exercise of discretion based upon an alleged erroneous interpretation of the law, the Appeals Chamber will not defer to the relevant Chamber's legal interpretation, but will arrive at its own conclusions as to the appropriate law and determine whether or not the first instance Chamber misinterpreted the law.⁹⁴

47. With regard to an exercise of discretion based upon an incorrect conclusion of fact, the Appeals Chamber applies a standard of reasonableness in appeals pursuant to article 82 of the Statute, thereby according a margin of deference to the chamber's findings.⁹⁵ The Appeals Chamber will not interfere with the factual findings of a first instance chamber unless it is shown that the chamber committed a clear error, namely, misappreciated the facts, took into account irrelevant facts or failed to take into

⁹⁰ [Kenya OA5 Judgment](#), para. 22. See also *The Prosecutor v. Joseph Kony et al.*, [Judgment on the appeal of the Defence against the "Decision on the admissibility of the case under article 19 \(1\) of the Statute" of 10 March 2009](#), 16 September 2009, ICC-02/04-01/05-408 (OA3) ('Kony et al. OA3 Judgment'), para. 79; *The Prosecutor v. Thomas Lubanga Dyilo*, [Judgment on the appeals of the Prosecutor and Mr Thomas Lubanga Dyilo against the "Decision on Sentence pursuant to Article 76 of the Statute"](#), 1 December 2014, ICC-01/04-01/06-3122 (A4 A6), para. 41; [Ngudjolo Appeal Judgment](#)'), para. 21.

⁹¹ [Kenya OA5 Judgment](#), para. 22. See also [Kony et al. OA3 Judgment](#), para. 80; *The Prosecutor v. Abdallah Banda Abakaer Nourain*, [Judgment on the appeal of Mr Abdallah Banda Abakaer Nourain against Trial Chamber IV's issuance of a warrant of arrest](#), 3 March 2015, ICC-02/05-03/09-632-Red (OA5) ('Banda OA5 Judgment'), para. 30; *The Prosecutor v. Dominic Ongwen*, [Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber II entitled "Decision Setting the Regime for Evidence Disclosure and Other Related Matters"](#), 17 June 2015, ICC-02/04-01/15-251 (OA3) ('Ongwen OA3 Judgment'), para. 35.

⁹² [Kenya OA5 Judgment](#), para. 22. See also [Kony et al. OA3 Judgment](#), paras 80-81; [Banda OA5 Judgment](#), para. 30; [Ongwen OA3 Judgment](#), para. 35.

⁹³ [Kenya OA5 Judgment](#), para. 22. See also [Kony et al. OA3 Judgment](#), para. 80; [Banda OA5 Judgment](#), para. 30; [Ongwen OA3 Judgment](#), para. 35.

⁹⁴ [Kenya OA5 Judgment](#), para. 23. See also *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, [Judgment on the appeal of the Prosecutor against the decision of Trial Chamber IV of 12 September 2011 entitled "Reasons for the Order on translation of witness statement \(ICC-02/05-03/09-199\) and additional instructions on translation"](#), 17 February 2012, ICC-02/05-03/09-295, para. 20; [Lubanga A5 Judgment](#), para. 18; [S. Gbagbo Admissibility OA Judgment](#), para. 40.

⁹⁵ [Kenya OA5 Judgment](#), para. 24. See also [Lubanga A5 Judgment](#), paras 24, 27; [S. Gbagbo Admissibility OA Judgment](#), para. 39.

account relevant facts.⁹⁶ Regarding the misappreciation of facts, the Appeals Chamber will not disturb a pre-trial or trial chamber's evaluation of the facts just because the Appeals Chamber might have come to a different conclusion.⁹⁷ It will interfere only where it cannot discern how the chamber's conclusion could have reasonably been reached from the evidence before it.⁹⁸

48. The analysis and determination of the issues arising from the four grounds of appeal will be guided by the standard of review set out above.

B. Questions Arising From the Four Grounds of Appeal

1. First Ground of Appeal

49. Under the first ground of appeal, Mr Ongwen essentially argues that the Trial Chamber incorrectly exercised its discretion by mischaracterising the issues in the Decision on Leave to Appeal. Mr Ongwen's arguments primarily question the Trial Chamber's finding in the Decision on Leave to Appeal that 'the First Issue [for which leave was granted] does not [...] require an assessment of whether notice in accordance with Article 67(1)(a) of the Statute has been properly provided'.⁹⁹

50. In light of the arguments advanced by Mr Ongwen, the following questions must be addressed:

- i. Is Mr Ongwen challenging the Impugned Decision or the Decision on Leave to Appeal?
- ii. Did the Trial Chamber rule on the merits of Mr Ongwen's arguments concerning whether notice in accordance with

⁹⁶ [Kenya OA5 Judgment](#), para. 24. See also *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, [Judgment In the Appeal by Mathieu Ngudjolo Chui of 27 March 2008 against the Decision of Pre-Trial Chamber I on the Application of the Appellant for Interim Release](#), 9 June 2008, ICC-01/04-01/07-572 (OA4), para. 25; [Ngudjolo Appeal Judgment](#), para. 22; [S. Gbagbo Admissibility OA Judgment](#), para. 38.

⁹⁷ [Kenya OA5 Judgment](#), para. 24. See also *The Prosecutor v. Callixte Mbarushimana*, [Judgment on the appeal of Mr Callixte Mbarushimana against the decision of Pre-Trial Chamber I of 19 May 2011 entitled "Decision on the 'Defence Request for Interim Release'"](#), 14 July 2011, ICC-01/04-01/10-283 (OA) ('*Mbarushimana* OA Judgment'), para. 17; [Ngudjolo Appeal Judgment](#), para. 22; [S. Gbagbo Admissibility OA Judgment](#), para. 38.

⁹⁸ [Kenya OA5 Judgment](#), para. 24. See also [Mbarushimana OA Judgment](#), para. 17; [Ngudjolo Appeal Judgment](#), para. 22; [S. Gbagbo Admissibility OA Judgment](#), para. 38.

⁹⁹ [Appeal Brief](#), paras 10-15.

article 67(1)(a) of the Statute was provided? If not, does the question of whether notice in accordance with article 67(1)(a) arise from the Impugned Decision?

2. *Second and Fourth Grounds of Appeal*

51. Under the second and fourth grounds of appeal, Mr Ongwen is in essence challenging the Trial Chamber's interpretation of the applicable law, in particular rule 134 of the Rules. He argues that the Trial Chamber erred when it found that the Defects Series fell under rule 134(2) of the Rules. In his view, the Trial Chamber should have applied rule 134(3) instead. He argues, in particular, that the Trial Chamber's interpretation of the Rules was too restrictive and did not properly take into account that the accused person's right to notice was at stake.¹⁰⁰

52. In light of the arguments advanced by Mr Ongwen, the following questions must be addressed:

- i. How should rule 134 of the Rules be interpreted in light of its wording, purpose and context? In this regard, what is the relationship between rule 134 and rule 122(3) and (4); and what is the relationship between the different subparagraphs of rule 134?
- ii. How should rule 134 be interpreted in a manner consistent with internationally recognised human rights as per article 21(3) of the Statute?
- iii. Did the Trial Chamber correctly interpret rule 134, and in finding that rule 134(2) rather than 134(3) was applicable to the present case?

3. *Third Ground of Appeal*

53. Under the third ground of appeal, which is raised in the alternative, Mr Ongwen essentially argues that the Trial Chamber incorrectly exercised its discretion by

¹⁰⁰ [Appeal Brief](#), paras 16-24, 36-42.

refusing to grant leave under rule 134(2) of the Rules and rule on the merits of the Defects Series.¹⁰¹

54. In light of the arguments advanced by Mr Ongwen, the following questions must be addressed:

Did the Trial Chamber err in its exercise of discretion or should it have granted leave under rule 134(2) of the Rules?

1. Did Mr Ongwen advance any reasonable justification for raising challenges to the Confirmation Decision after over three years of the rendering of that decision and after the Prosecutor completed her presentation of evidence?
2. Did Mr Ongwen raise similar challenges before and if so, were these ruled upon by the Pre-Trial and/or the Trial Chamber?
3. Has Mr Ongwen's right to a fair trial been violated as a result of the Trial Chamber's decision to dismiss the Defects Series *in limine*?

C. Relevant Legal Framework

55. In the context of this appeal, the Appeals Chamber is called upon to review the interpretation and application of the relevant legal provisions made by the Trial Chamber. Notably, the Appeals Chamber must determine whether in the circumstances of this case, the Trial Chamber properly balanced the rights of the accused *vis-à-vis* the duty of the Trial Chamber to ensure the expeditious conduct of the proceedings.

56. Mr Ongwen submits that the Impugned Decision violated some fundamental human rights, including the right to be informed in detail of the nature, cause and content of the charge under article 67(1)(a) of the Statute and the right to have adequate time and facilities for the preparation of a defence under article 67(1)(b) of the Statute. In particular, Mr Ongwen takes issue with the Trial Chamber's finding

¹⁰¹ [Appeal Brief](#), paras 25-35.

that if the argument that ‘procedural rules, if any, should be subordinated to the fairness criterion’ were correct, ‘it could subvert all procedural requirements by the mere invocation of the fair trial rights of the accused’.¹⁰²

57. Having regard to the sources and order of precedence set out in article 21 of the Statute, the following legal provisions are relevant in resolving the issues arising from the four grounds of appeal and the outcome of the appeal: article 19(4) of the Statute stating that ‘[t]he admissibility of a case or the jurisdiction of the Court may be challenged only once by any person or State’ and such challenge ‘shall take place prior to or at the commencement of the trial’;¹⁰³ article 21(3) of the Statute;¹⁰⁴ article 64(2) of the Statute obligating the Trial Chamber to ‘ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused and due regard for the protection of victims and witnesses’; article 67(1) of the Statute providing 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 [...] minimum guarantees, in full equality’;¹⁰⁵ and article 82(1)(d) of the Statute stating that ‘[e]ither party may appeal any of the following decisions in accordance with the Rules of Procedure and Evidence: [...] (d)

¹⁰² [Appeal Brief](#), para. 25.

¹⁰³ ‘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. Challenges to the admissibility of a case, at the commencement of a trial, or subsequently with the leave of the Court, may be based only on article 17, paragraph 1 (c)’.

¹⁰⁴ ‘The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.’

¹⁰⁵ Those minimum guarantees are: ‘(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; (c) To be tried without undue delay; (d) Subject to article 63, paragraph 2, to be present at the trial, to conduct the defence in person or through legal assistance of the accused’s choosing, to be informed, if the accused does not have legal assistance, of this right and to have legal assistance assigned by the Court in any case where the interests of justice so require, and without payment if the accused lacks sufficient means to pay for it; (e) To examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her. The accused shall also be entitled to raise defences and to present other evidence admissible under this Statute; (f) To have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness, if any of the proceedings or documents presented to the Court are not in a language which the accused fully understands and speaks; (g) Not to be compelled to testify or to confess guilt and to remain silent, without such silence being a consideration in the determination of guilt or innocence; (h) To make an unsworn oral or written statement in his or her defence; and (i) Not to have imposed on him or her any reversal of the burden of proof or any onus of rebuttal.’

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’; rules 122(3) and (4) of the Rules;¹⁰⁶ and rule 134 of the Rules providing:

1. Prior to 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 any issue concerning the conduct of the proceedings. Any request from the Prosecutor or the defence shall be in writing and, unless the request is for an ex parte procedure, served on the other party. For all requests other than those submitted for an ex parte procedure, the other party shall have the opportunity to file a response.

2. 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.

3. After 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.

58. In addition, the following provisions from International Human Rights Law are of relevance: article 14(3) of the International Covenant on Civil and Political Rights stating that ‘[i]n the determination of any criminal charge against him, everyone shall be entitled to [...] minimum guarantees, in full equality’;¹⁰⁷ article 6 of the European

¹⁰⁶ ‘3. Before hearing the matter on the merits, the Presiding Judge of the Pre-Trial Chamber shall ask the Prosecutor and the person 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. 4. At no subsequent point may the objections and observations made under sub-rule 3 be raised or made again in the confirmation or trial proceedings.’

¹⁰⁷ Those guarantees are as follows: ‘(a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him; (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing; (c) To be tried without undue delay; (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it; (e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; (f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court; (g) Not to be compelled to testify against himself or to confess guilt.’

Convention on Human Rights;¹⁰⁸ article 8(1) of the American Convention on Human Rights;¹⁰⁹ and article 7 of the African Charter on Human and Peoples' Rights.¹¹⁰

D. First Ground of Appeal – Mr Ongwen's Challenge to the Trial Chamber's Characterisation of the Issue for Which Leave to Appeal Was Granted

1. Submissions of the Parties and Participants

(a) Submissions of Mr Ongwen

59. Mr Ongwen submits that the Trial Chamber 'erred in law by refusing to rule on the contents of the Defects Series, which concern jurisdictional errors and the violations of fair trial, in particular the error of whether notice under Article 67(1)(a) of the Statute has been provided'.¹¹¹ According to Mr Ongwen, '[i]n granting the leave to appeal, the Trial Chamber reframed the Defence position on the issue of

¹⁰⁸ '1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. [...] 3. Everyone charged with a criminal offence has the following minimum rights: a. to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him; b. to have adequate time and facilities for the preparation of his defence; c. to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require; d. to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; e. to have the free assistance of an interpreter if he cannot understand or speak the language used in court.'

¹⁰⁹ '1. Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature. 2. Every person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law. During the proceedings, every person is entitled, with full equality, to the following minimum guarantees: a. the right of the accused to be assisted without charge by a translator or interpreter, if he does not understand or does not speak the language of the tribunal or court; b. prior notification in detail to the accused of the charges against him; c. adequate time and means for the preparation of his defense; d. the right of the accused to defend himself personally or to be assisted by legal counsel of his own choosing, and to communicate freely and privately with his counsel; e. the inalienable right to be assisted by counsel provided by the state, paid or not as the domestic law provides, if the accused does not defend himself personally or engage his own counsel within the time period established by law; f. the right of the defense to examine witnesses present in the court and to obtain the appearance, as witnesses, of experts or other persons who may throw light on the facts; g. the right not to be compelled to be a witness against himself or to plead guilty; and h. the right to appeal the judgment to a higher court.'

¹¹⁰ '1. Every individual shall have the right to have his cause heard. This comprises: 1. The right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force; 2. The right to be presumed innocent until proved guilty by a competent court or tribunal; 3. The right to defence, including the right to be defended by counsel of his choice; 4. The right to be tried within a reasonable time by an impartial court or tribunal [...].'

¹¹¹ [Appeal Brief](#), para. 10.

notice in order to reach its conclusion that “the First Issue does not therefore require an assessment of whether notice in accordance with Article 67(1)(a) of the Statute has been provided properly”¹¹².

60. In that regard, Mr Ongwen emphasises the importance of ‘the issue of whether notice under Article 67(1)(a) of the Statute has been properly provided, because [he] has the right to know in detail the charges and modes of liability against him, should he choose to defend himself during the trial’.¹¹³

61. Mr Ongwen avers that the Trial Chamber incorrectly exercised its discretion by mischaracterizing the issue at stake as well as his arguments on the matter of notice, which amounts to an error of law that materially affects the Impugned Decision.¹¹⁴ He submits that the Trial Chamber’s error materially affects the Impugned Decision because it limits him in raising arguments about the lack of notice in the appellate brief.¹¹⁵ In addition, he alleges that the Trial Chamber is incorrectly defining for the Appeals Chamber the parameters of its judgment.¹¹⁶

62. Mr Ongwen contends that as a result, the Trial Chamber’s leave was not properly granted in respect to the formulation of the issue as the Trial Chamber concluded that it does not require an assessment of notice.¹¹⁷ Mr Ongwen submits that the Appeals Chamber has discretion to determine whether leave was properly granted and whether it respects the true nature of an impugned decision.¹¹⁸

63. Thus, Mr Ongwen requests that the Appeals Chamber remand the issue to the Trial Chamber for a determination on each of the remedies sought in the Defects Series, including the violation of the fair trial right to notice.¹¹⁹

(b) Submissions of the Prosecutor

64. The Prosecutor submits that the Trial Chamber did not err in its characterisation of the issue for appeal, maintaining that Mr Ongwen’s first ground of appeal

¹¹² [Appeal Brief](#), para. 11.

¹¹³ [Appeal Brief](#), para. 12.

¹¹⁴ [Appeal Brief](#), para. 14.

¹¹⁵ [Appeal Brief](#), para. 14.

¹¹⁶ [Appeal Brief](#), para. 15.

¹¹⁷ [Appeal Brief](#), para. 15.

¹¹⁸ [Appeal Brief](#), para. 15.

¹¹⁹ [Appeal Brief](#), para. 15.

challenges the Decision on Leave to Appeal and not the Impugned Decision.¹²⁰ Therefore, the Prosecutor avers that Mr Ongwen's first ground of appeal should be rejected on this basis alone.¹²¹

65. In addition, the Prosecutor contends that the prerogative rests upon the Trial Chamber to 'state or more accurately certify the existence of an appealable issue' in the Impugned Decision because:¹²² (a) article 82(1)(d) 'does not confer a right to appeal interlocutory [...] decisions of either the Pre Trial or Trial Chamber';¹²³ (b) 'a right to appeal arises only if the Pre-Trial or Trial Chamber is of the opinion that such decisions must receive the immediate attention of the Appeals Chamber';¹²⁴ and (c) 'it is for the Pre-Trial or Trial Chamber to determine not only whether a decision may be appealed, but also to what extent'.¹²⁵

(c) Observations of the Victims

66. The CLRV asserts that the issue raised by Mr Ongwen is not a ground of appeal *per se* against the Impugned Decision.¹²⁶ She submits that the Trial Chamber has discretion to reformulate issues when deciding on requests for leave to appeal, and that this has been ignored by Mr Ongwen.¹²⁷ Accordingly, the CLRV submits that the first ground of appeal should be dismissed *in limine*.¹²⁸

2. Determination by the Appeals Chamber

67. The Appeals Chamber notes that Mr Ongwen's first ground of appeal relates to how the Trial Chamber granted leave to appeal the Impugned Decision. It is therefore opportune to recall the issues in relation to which Mr Ongwen sought leave to appeal. They were formulated as follows:¹²⁹

- i) '[W]hether the [Impugned] Decision, based on procedural grounds under rules 122(4) and 134(2), implements the Trial Chamber's responsibility under

¹²⁰ [Prosecutor's Response](#), para. 10.

¹²¹ [Prosecutor's Response](#), para. 10.

¹²² [Prosecutor's Response](#), para. 11.

¹²³ [Prosecutor's Response](#), para. 11.

¹²⁴ [Prosecutor's Response](#), para. 11.

¹²⁵ [Prosecutor's Response](#), para. 11.

¹²⁶ [CLRV Response](#), para. 10.

¹²⁷ [CLRV Response](#), para. 11.

¹²⁸ [CLRV Response](#), para. 12.

¹²⁹ [Request for Leave to Appeal](#).

Article 64(2) to “ensure that a trial is fair [...] and is conducted with the full respect for the right of the accused” consistent with Article 67(1)”; and

ii) ‘[W]hether the [Impugned] Decision’s finding, at paragraph 37, that jurisdictional arguments on forced marriage are untimely, is accurate’.¹³⁰

68. In the Decision on Leave to Appeal and by reference to arguments made by Mr Ongwen, the Trial Chamber clarified that the issue for which leave to appeal was granted ‘is not about whether notice has been properly provided, but whether a rejection of the Initial Requests on procedural grounds alone is possible’.¹³¹ On this basis, the Trial Chamber concluded that the issue for which leave to appeal was granted ‘does not therefore require an assessment of whether notice in accordance with Article 67(1)(a) of the Statute has been provided properly’.¹³²

69. On appeal, Mr Ongwen argues that in reframing the issue of notice in the Decision on Leave to Appeal, the Trial Chamber ‘effectively excised the fundamental fair trial matter of notice from the appellate issue granted’.¹³³ The Appeals Chamber recalls that ‘the right of the accused person to be informed of the charges is firmly grounded in the Statute’¹³⁴ and it has already highlighted ‘the strong link between the right to be informed in detail of the nature, cause and content of the charges and the right to *prepare* one’s defence’.¹³⁵ While the Appeals Chamber therefore emphasises the crucial importance of the right to notice as part of the guarantee of fair trial, it considers that the arguments raised by Mr Ongwen seem to be based on a misunderstanding of the Impugned Decision. In that decision, the Trial Chamber dismissed the Defects Series, which had alleged defects in the Confirmation Decision and raised matters relating to notice, *in limine* for untimeliness. Therefore, the Trial Chamber did not consider, in the Impugned Decision, whether Mr Ongwen had received sufficient notice of the charges. For this reason, the Trial Chamber did not err when it stated that the issue of notice did not arise from the Impugned Decision.

¹³⁰ [Request for Leave to Appeal](#), para. 3.

¹³¹ [Decision on Leave to Appeal](#), para. 13.

¹³² [Decision on Leave to Appeal](#), para. 13.

¹³³ [Appeal Brief](#), para. 11.

¹³⁴ [Lubanga A5 Judgment](#), para. 118.

¹³⁵ [Lubanga A5 Judgment](#), para. 129.

70. Furthermore, the Appeals Chamber notes that, contrary to the assertion of Mr Ongwen,¹³⁶ an alleged error in the Decision on Leave to Appeal cannot have a material impact on the Impugned Decision because the former was rendered after the latter. Notwithstanding the above, the Appeals Chamber notes that, regardless of the Decision on Leave to Appeal, Mr Ongwen raises arguments concerning whether notice in accordance with article 67(1)(a) of the Statute was provided, in relation to the other grounds of appeal. These will be discussed, to the extent necessary, below.

71. In light of the above reasons, the Appeals Chamber dismisses the first ground of appeal *in limine*.

E. Second, Third and Fourth Grounds of Appeal – Alleged Errors in the Interpretation of the Applicable Legal Framework and in the Exercise of Discretion by the Trial Chamber

72. The Appeals Chamber deems it appropriate to deal with the second, third and fourth grounds of appeal together as they are concerned with the interpretation of the applicable law and whether the Trial Chamber erred in its discretion by dismissing Mr Ongwen's challenges to the Confirmation Decision *in limine*. In this regard, it is noted that some of the arguments advanced by Mr Ongwen in the second, third and fourth grounds of appeal overlap to a large extent.

1. Relevant Parts of the Impugned Decision

73. Having considered the Defects Series filed by Mr Ongwen, the Trial Chamber examined the appropriateness of reviewing these arguments at this point during trial.

74. The Trial Chamber dismissed *in limine* the Defects Series, because: (i) noting the requirements of rule 134(2) of the Rules, the arguments of Mr Ongwen were untimely;¹³⁷ and (ii) no reasonable explanation was provided by Mr Ongwen as to why he had not raised such challenges before and had done so only over two years after the commencement of the trial.¹³⁸ It held further that the arguments presented by

¹³⁶ [Appeal Brief](#), para. 14.

¹³⁷ [Impugned Decision](#), para. 12.

¹³⁸ [Impugned Decision](#), para. 24.

Mr Ongwen concerning why he should still be allowed to raise these matters now were ‘entirely unpersuasive’.¹³⁹

75. In relation to rule 134(2) of the Rules, the Trial Chamber considered that its purpose is to ensure procedural economy and enable trial chambers to focus on the evidence at trial, and that it also serves as a safeguard against strategic efforts to undermine the conduct of proceedings, which, it stated, ‘cannot be tolerated’.¹⁴⁰ By reference to the drafting history of this provision, the Trial Chamber made plain that rule 134(2) was designed to ensure that proceedings between the confirmation hearing and commencement of trial are settled before the trial commences.¹⁴¹

76. The Trial Chamber considered that rules 122(4) and 134(2) of the Rules have a complementary relationship with each other, and that, in combination, these rules set out the general framework on the timing of objections arising from the beginning of the proceedings through the commencement of trial.¹⁴²

77. The Trial Chamber also ruled that Mr Ongwen’s reliance on rule 134(3), which governs issues raised during the course of the trial, was ‘misguided’, given that the Confirmation Decision falls within the period between the confirmation hearing and the commencement of trial.¹⁴³

78. In regards to the issue of fairness raised by Mr Ongwen, the Trial Chamber found that, following the commencement of trial, he ‘elected to remain silent before this chamber on all these matters until now’ without providing any explanation for this delay.¹⁴⁴ Moreover, the Trial Chamber considered that Mr Ongwen had taken the opportunity to raise potentially prejudicial effects of every item of evidence submitted during trial and question every witness that appeared.¹⁴⁵ Ergo, the Trial Chamber concluded that it saw nothing to suggest that Mr Ongwen had been unfairly burdened by the formulation of charges to the extent that a ‘no case to answer’ procedure could

¹³⁹ [Impugned Decision](#), para. 24.

¹⁴⁰ [Impugned Decision](#), para. 23.

¹⁴¹ [Impugned Decision](#), para. 22.

¹⁴² [Impugned Decision](#), para. 16.

¹⁴³ [Impugned Decision](#), para. 22.

¹⁴⁴ [Impugned Decision](#), para. 27.

¹⁴⁵ [Impugned Decision](#), para. 28.

have been reasonably triggered.¹⁴⁶ In light of this, the Trial Chamber found such objection to be ‘nothing more than an argument to reconsider rulings made [...] long ago’.¹⁴⁷

79. Furthermore, the Trial Chamber equally dismissed the jurisdictional challenges advanced by Mr Ongwen on indirect co-perpetration and forced marriage,¹⁴⁸ considering these motions to be: (i) untimely because article 19(4) of the Statute requires jurisdictional challenges to be raised prior to or at the commencement of trial in the absence of exceptional circumstances;¹⁴⁹ and (ii) the Defence failed to justify any exceptional circumstances for raising such arguments at this time.¹⁵⁰

2. *Submissions of the Parties and Participants*

(a) **Second ground of appeal - The Trial Chamber’s interpretation of Rule 134 of the Rules is restrictive; the interpretation and the Impugned Decision violate the requirements of fair and expeditious trial (articles 21(3) and 64(2) of the Statute), and the rights of the accused (article 67(1) of the Statute)**

(i) *Submissions of Mr Ongwen*

80. Mr Ongwen contends that the Trial Chamber misinterpreted the general purpose of rule 134 of the Rules as a whole, which, according to Mr Ongwen is directed towards dealing with matters that may arise throughout the trial proceedings.¹⁵¹ In that regard, Mr Ongwen submits that the real purpose behind rule 134 is to ensure that trial chambers stay within the confines of the requirements of a fair and expeditious trial under articles 21(3) and 64(2) of the Statute, respecting thereby the rights of the accused under article 67(1) of the Statute, particularly when there is a need to rule on matters that arose ‘during the course of trial’.¹⁵²

81. According to Mr Ongwen, ‘[s]ince not all trial objections can be foreseen at the commencement of trial, nor their contexts and implications be known, Rule 134 of the

¹⁴⁶ [Impugned Decision](#), para. 28.

¹⁴⁷ [Impugned Decision](#), para. 29.

¹⁴⁸ [Impugned Decision](#), para. 35.

¹⁴⁹ [Impugned Decision](#), para. 35.

¹⁵⁰ [Impugned Decision](#), para. 34.

¹⁵¹ [Appeal Brief](#), para. 18.

¹⁵² [Appeal Brief](#), para. 19.

Rules provides the opportunity for the parties to raise such issues that are relevant to the proceedings and requires the Trial Chamber to rule on them'.¹⁵³

82. Mr Ongwen further argues that '[u]nder Rule 134 of the Rules, nothing prohibits the parties from raising issues after the start of the trial'.¹⁵⁴ He submits that rule 134(3) of the Rules allows trial chambers to address the continuing effects of motions linked to the trial proceedings after the commencement of the trial.¹⁵⁵

83. According to Mr Ongwen, rule 134(3) of the Rules is in place to safeguard the right to a fair trial during the conduct of the proceedings¹⁵⁶ and, it would not be logical to assume that all potential issues would be foreseeable before the commencement of the trial proceedings.¹⁵⁷ He asserts that some 'issues only become evident once the proceedings unfold and develop'.¹⁵⁸

84. Based on the above considerations, Mr Ongwen concludes that 'the Trial Chamber erred in its restrictive interpretation of Rule 134 of the Rules as a whole and by not relying on Rule 134(3) of the Rules'.¹⁵⁹ In his view, this caused a violation of his rights to a fair trial, including the right to notice under article 67(1)(a) of the Statute,¹⁶⁰ because he was not able to know in detail of the nature, cause and content of the confirmed charges and modes of liability.¹⁶¹

(ii) Submissions of the Prosecutor

85. The Prosecutor submits that the Trial Chamber correctly interpreted rule 134(2) of the Rules.¹⁶² She argues that the Trial Chamber correctly held that Mr Ongwen was required to raise any potential defects in the Confirmation Decision prior to the commencement of the trial and that rule 134(2) 'precluded parties from raising such challenges for the first time during trial when they had a reasonable opportunity to do

¹⁵³ [Appeal Brief](#), para. 20.

¹⁵⁴ [Appeal Brief](#), para. 21.

¹⁵⁵ [Appeal Brief](#), para. 21.

¹⁵⁶ [Appeal Brief](#), para. 22.

¹⁵⁷ [Appeal Brief](#), para. 22.

¹⁵⁸ [Appeal Brief](#), para. 22.

¹⁵⁹ [Appeal Brief](#), para. 24.

¹⁶⁰ [Appeal Brief](#), para. 24.

¹⁶¹ [Appeal Brief](#), para. 24.

¹⁶² [Prosecutor's Response](#), para. 15.

so earlier.’¹⁶³ The Prosecutor contends that albeit that rule 134(2) of the Rules does not entirely foreclose late challenges, ‘the Trial Chamber retains discretion to grant a party leave to file a late challenge.’¹⁶⁴

86. Moreover, she argues that the Trial Chamber was correct in concluding that rule 134(3) was inapplicable to Mr Ongwen’s situation, as it only governs motions filed on issues that ‘arise during the course of the trial.’¹⁶⁵ The Prosecutor argues that the defects alleged by Mr Ongwen do not concern matters that were unforeseeable prior to the commencement of the trial proceedings, nor can it be maintained that they arose during the course of the trial.¹⁶⁶

87. She argues that there is nothing in rule 134 that confers an obligation upon the Trial Chamber to entertain the objections on the merits raised by the parties after the commencement of the trial.¹⁶⁷ She maintains that under the clear wording of rule 134, the Trial Chamber ‘is granted a margin of discretion’ to balance all competing values to decide whether to grant motions on their merits or to dismiss them *in limine*.¹⁶⁸

88. Furthermore, the Prosecutor contends that even assuming that the Trial Chamber could have relied on rule 134(3), Mr Ongwen’s appeal should nevertheless be rejected because: (i) Mr Ongwen ‘does not show he could not have foreseen his extensive notice objections’;¹⁶⁹ and (ii) in regards to motions filed after the commencement of the trial proceedings, rule 134(3) confers upon the Trial Chamber ‘a margin of discretion’ as its terms state that a trial chamber ‘may rule’ (*in lieu* of shall rule) on issues arising during the course of the trial.¹⁷⁰

89. Therefore, she argues, the Trial Chamber may dismiss any motion *in limine*, including for untimeliness to ensure procedural economy and promote the expeditious conduct of proceedings.¹⁷¹ The Prosecutor affirms that the dismissal *in limine* for untimeliness finds additional support in the drafting history of rule 134, submitting

¹⁶³ [Prosecutor’s Response](#), para. 15.

¹⁶⁴ [Prosecutor’s Response](#), para. 15.

¹⁶⁵ [Prosecutor’s Response](#), para. 15.

¹⁶⁶ [Prosecutor’s Response](#), para. 16.

¹⁶⁷ [Prosecutor’s Response](#), paras 19.

¹⁶⁸ [Prosecutor’s Response](#), para. 19.

¹⁶⁹ [Prosecutor’s Response](#), para. 24.

¹⁷⁰ [Prosecutor’s Response](#), para. 25.

¹⁷¹ [Prosecutor’s Response](#), para. 25.

that ‘the rule’s principle object and purpose was to address trial delays as those experienced at the *ad hoc* Tribunals due to endless procedural challenges’.¹⁷² Finally, the Prosecutor submits that ‘since belated objections are an exception to the general rule that objections must be raised in a timely manner, they must be subjected to a stricter scrutiny’.¹⁷³ For these reasons, the Prosecutor maintains that Mr Ongwen’s second ground of appeal should be rejected.¹⁷⁴

(iii) Observations of the Victims

90. The CLRV asserts that the Trial Chamber interpreted rule 134 of the Rules in a correct manner.¹⁷⁵ According to the CLRV, the interpretation by the Trial Chamber of rule 134(2) and 134(3) of the Rules complies with the rules of judicial interpretation, by construing the provision in good faith and in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.¹⁷⁶

91. The CLRV alleges that, on the contrary, the interpretation proposed by Mr Ongwen would give a different meaning to the provision, which was not intended by the drafters and would obfuscate the intention to guarantee the expeditious conduct of the proceedings.¹⁷⁷ She adds that the choice of words used in rule 134 of the Rules shows that the drafters intended to restrict the ability of the parties to raise objections at three specific stages, which are (i) prior to the commencement of the trial, (ii) at the commencement of the trial, and (iii) after the commencement of the trial.¹⁷⁸ The CLRV contends that the approach of Mr Ongwen would make these explicit restrictions meaningless.¹⁷⁹ For these reasons, she submits that the second ground of appeal should be dismissed.¹⁸⁰

¹⁷² [Prosecutor’s Response](#), para. 27

¹⁷³ [Prosecutor’s Response](#), para. 27.

¹⁷⁴ [Prosecutor’s Response](#), para. 28.

¹⁷⁵ [CLR V Response](#), para. 17.

¹⁷⁶ [CLR V Response](#), para. 17.

¹⁷⁷ [CLR V Response](#), para. 18.

¹⁷⁸ [CLR V Response](#), para. 19.

¹⁷⁹ [CLR V Response](#), para. 19.

¹⁸⁰ [CLR V Response](#), para. 19.

(b) Third ground of appeal - In the alternative, should the Appeals Chamber find that the Trial Chamber correctly relied on rule 134(2) of the Rules, then it incorrectly exercised its article 64(2) discretion by refusing to rule on the merits of the Defects Series

(i) Submissions of Mr Ongwen

92. Under this ground of appeal, Mr Ongwen challenges the Trial Chamber's finding that if the argument that 'procedural rules, if any, should be subordinated to the fairness criterion' were correct, 'it could subvert all procedural requirements by the mere invocation of the fair trial rights of the accused'.¹⁸¹ Mr Ongwen submits that the Trial Chamber's finding that at the commencement of trial he did not raise any concrete objections to the charges and did not object to the trial proceedings 'is simply not true'.¹⁸² To support his argument, he refers to several filings and transcripts in the case.¹⁸³ Mr Ongwen submits that the issue of notice in relation to the charged crimes and modes of liability is fundamental to the consideration of a fair trial in this case.¹⁸⁴ He contends that in concluding that procedural factors should take precedence over his right to a fair trial, the Trial Chamber left 'potential fair trial violations unaddressed'.¹⁸⁵

93. Mr Ongwen submits that the Trial Chamber erred in law and this error materially affected the Impugned Decision because he is 'not informed in detail of charges and modes of liability for which he is being tried'.¹⁸⁶ He finally contends that if the Trial Chamber rules on the proper legal interpretation of the alleged crimes and modes of liability in its article 74 judgment, his right to prepare and present his defence will be moot.¹⁸⁷

(ii) Submissions of the Prosecutor

94. The Prosecutor submits that the Trial Chamber properly exercised its rule 134(2) discretion in refusing to rule on the merits of Mr Ongwen's objections and

¹⁸¹ [Appeal Brief](#), para. 25.

¹⁸² [Appeal Brief](#), para. 29.

¹⁸³ [Appeal Brief](#), para. 29.

¹⁸⁴ [Appeal Brief](#), para. 30.

¹⁸⁵ [Appeal Brief](#), para. 32.

¹⁸⁶ [Appeal Brief](#), para. 34.

¹⁸⁷ [Appeal Brief](#), para. 35.

correctly ruled on the applicable law and its purpose when considering the impact of untimeliness *vis-à-vis* the conduct of the proceedings.¹⁸⁸

95. The Prosecutor holds that the fact that ‘a Chamber must always act in fairness to the accused does not mean that an accused person can subvert the Court’s carefully crafted regime by simply invoking “fairness”’.¹⁸⁹ Therefore, ‘[a] Chamber does not [...] necessarily err merely because it dismisses raising matters of fairness for being untimely.’¹⁹⁰

96. The Prosecutor holds further that Mr Ongwen failed to show that the Trial Chamber erred in its discretion because: (i) he did not raise any concrete objection to the charges before or at the commencement of the trial despite being specifically asked whether he had any objections; (ii) he only raised the alleged defects almost three years after the Confirmation Decision was issued; (iii) he failed to provide an explanation as to why he waited so long to advance the objections to the Confirmation Decision; (iv) his arguments on why the notice objections should be allowed are ‘unpersuasive’ as they focus on the erroneous claim that procedural rules must always be subordinated to fairness; and (v) he suffered no prejudice in the conduct of the proceedings.¹⁹¹

97. In conclusion, the Prosecutor argues that Mr Ongwen fails to show that the Trial Chamber erred in the exercise of its discretion and thus requests that the third ground of appeal be dismissed.¹⁹²

(iii) Observations of the Victims

98. The CLRV submits that the Trial Chamber correctly considered the purpose of rule 134(2), which is to ensure procedural economy and enable trial chambers to focus on the evidence at trial and that this is in accordance with previous jurisprudence of

¹⁸⁸ [Prosecutor’s Response](#), para. 30.

¹⁸⁹ [Prosecutor’s Response](#), para. 31.

¹⁹⁰ [Prosecutor’s Response](#), para. 32.

¹⁹¹ [Prosecutor’s Response](#), para. 35.

¹⁹² [Prosecutor’s Response](#), para. 39.

the Appeals Chamber, in which it was indicated that the Trial Chamber should give high importance to the expeditiousness of the proceedings.¹⁹³

99. The CLRV asserts that the Trial Chamber judiciously assessed the specific facts and circumstances in order to determine whether to grant leave pursuant to rule 134(2) of the Rules.¹⁹⁴ She notes that among these facts and circumstances, the Trial Chamber found that: (i) Mr Ongwen had filed the initial request out of time – two years after the commencement of the trial; (ii) there was lack of explanation on Mr Ongwen’s part as to why he waited all that time; (iii) he did not raise concrete objections at the beginning of the trial, even when he was in possession of the material relied upon by the Prosecutor; (iv) he had the opportunity to raise any issue related to a prejudicial effect of any item of evidence submitted during trial; and (v) he had opportunity to question every witness who appeared before the Chamber.¹⁹⁵

100. The CLRV adds that nothing shows that the Trial Chamber misappreciated the facts and circumstances of the initial request, that it took into account irrelevant facts or failed to take into account relevant facts or that the Trial Chamber’s exercise of discretion in dismissing the initial request was based on an erroneous legal interpretation or on an incorrect conclusion of fact or was so unfair and unreasonable to constitute an abuse of discretion.¹⁹⁶ She concludes that the third ground of appeal should be dismissed.¹⁹⁷

(c) Fourth ground of appeal - The purpose of the procedural rules concerning the conduct of proceedings cannot be antithetical to the core principles of the Statute, including the fair trial rights of the accused

(i) Submissions of Mr Ongwen

101. Mr Ongwen submits that article 21(3) of the Statute establishes that the Court must interpret and apply the applicable law in accordance with international human rights.¹⁹⁸ He contends that the Trial Chamber relied on a restrictive interpretation of procedural rules 122(4) and 134 of the Rules to support its view of the untimeliness of

¹⁹³ [CLR V Response](#), para. 23.

¹⁹⁴ [CLR V Response](#), para. 24.

¹⁹⁵ [CLR V Response](#), para. 24.

¹⁹⁶ [CLR V Response](#), para. 25.

¹⁹⁷ [CLR V Response](#), para. 25.

¹⁹⁸ [Appeal Brief](#), para. 38.

the Defects Series and that this view is antithetical to the core principles of the Statute.¹⁹⁹ According to Mr Ongwen, when the Trial Chamber decided based on article 64(2) of the Statute, it failed to guarantee that the law was interpreted and applied in line with internationally recognised human rights, which includes the fair trial rights under articles 67(1)(a) and (e) of the Statute.²⁰⁰ According to Mr Ongwen, this amounted to an error of law, which materially affects the Impugned Decision.²⁰¹ Mr Ongwen adds that a trial without undue delay is a right that has to be guaranteed to the accused but that it must not be prioritised at the expense of other rights of the accused.²⁰²

(ii) Submissions of the Prosecutor

102. The Prosecutor submits that Mr Ongwen's suggestion that the Trial Chamber was required to consider his objections under article 21(3) is 'incorrect'.²⁰³ Moreover, the Prosecutor avers that the decision reached by the Trial Chamber is 'consistent with the internationally recognised human rights'.²⁰⁴ She notes that in the absence of any alleged defects being raised by Mr Ongwen since the issuance of the Confirmation Decision, the Chamber afforded him a 'further' opportunity to do so under rule 134 at the commencement of the trial.²⁰⁵ She contends that Mr Ongwen did not do so but instead 'belatedly raised the objections more than two years after the commencement of the trial'.²⁰⁶ Thus, she argues that Mr Ongwen fails to show that he was denied the opportunity to exercise his rights.²⁰⁷

103. Furthermore, the Prosecutor submits that Mr Ongwen does not demonstrate that the Trial Chamber afforded undue weight to procedural economy and the expeditious conduct of the proceedings 'at the expense of other rights of the accused'.²⁰⁸ She contends that the Trial Chamber considered all the relevant factors before it and properly exercised its discretion when dismissing Mr Ongwen's belated notice

¹⁹⁹ [Appeal Brief](#), para. 39.

²⁰⁰ [Appeal Brief](#), para. 41.

²⁰¹ [Appeal Brief](#), para. 41.

²⁰² [Appeal Brief](#), para. 42.

²⁰³ [Prosecutor's Response](#), para. 41.

²⁰⁴ [Prosecutor's Response](#), para. 41.

²⁰⁵ [Prosecutor's Response](#), para. 41.

²⁰⁶ [Prosecutor's Response](#), para. 41.

²⁰⁷ [Prosecutor's Response](#), para. 44.

²⁰⁸ [Prosecutor's Response](#), para. 45.

objections.²⁰⁹ In addition, the Prosecutor asserts that a trial that is unduly delayed would infringe the rights of the accused, pursuant to article 67(1)(c), to be tried without undue delay.²¹⁰ On these bases, the Prosecutor requests that Mr Ongwen's fourth ground of appeal be rejected.²¹¹

(iii) Observations of the Victims

104. The CLRV submits that the fourth ground of appeal is framed in an overly broad manner that does not show any specific legal, factual or procedural error in the Impugned Decision.²¹² She avers that it is not the Appeals Chamber's duty to identify the exact matter subject to appellate review by decomposing a ground of appeal which has been broadly formulated.²¹³ The CLRV alleges that the main finding in the Impugned Decision was that the initial request was out of time and that with this ground of appeal Mr Ongwen is trying to widen the scope of the appellate review, going beyond the specific issue of timeliness.²¹⁴ The CLRV concludes that this ground of appeal should be dismissed.²¹⁵

(d) Further submissions by the parties and participants on the questions posed by the Appeals Chamber

105. The four questions posed by the Appeals Chamber were as follows:

- ‘1. Which are the specific issues that, in the view of Mr Dominic Ongwen, arose during the course of the trial warranting the application of rule 134(3) of the Rules?
2. Why did Mr Dominic Ongwen raise concrete alleged defects in the confirmation of charges decision three years after it was issued?
3. What type of issues, objections or observations can be raised prior to or during trial under rule 134 of the Rules? In this regard, are ‘observations concerning the conduct of the proceedings’ limited to procedural aspects or can substantive aspects be raised as well?
4. The Appeals Chamber notes that Mr Dominic Ongwen raises arguments concerning the possible violation of his fundamental rights as a result of the Impugned Decision, referring, inter alia, to his right under article 67(1)(a) of the

²⁰⁹ [Prosecutor's Response](#), para. 45.

²¹⁰ [Prosecutor's Response](#), para. 43.

²¹¹ [Prosecutor's Response](#), para. 46.

²¹² [CLRV Response](#), para. 27.

²¹³ [CLRV Response](#), para. 27.

²¹⁴ [CLRV Response](#), para. 28.

²¹⁵ [CLRV Response](#), para. 29.

Statute. Are there any additional submissions that the parties and participants intend to raise in this regard?’²¹⁶

(i) *Submissions of Mr Ongwen*

106. In relation to the first question, Mr Ongwen maintains that the key issue that has permeated the whole trial is the violation of the right to notice under article 67(1)(a) of the Statute.²¹⁷ He maintains further that the lack of specificity of the charges in the Confirmation Decision undermines his right under article 67(1)(e) of the Statute to examine or have examined witnesses against him, raise defences and present evidence.²¹⁸

107. Firstly, Mr Ongwen states that the pleading of modes of liability in the Confirmation Decision is defective.²¹⁹ Secondly, Mr Ongwen states that issues relating to the Prosecutor’s disclosure obligations have prejudiced his ability to form a strategy,²²⁰ impacting on his ability to prepare a defence and his right to a fair trial.²²¹ Thirdly, Mr Ongwen states that the questioning of witnesses on uncharged events and matters that occurred outside of the relevant time frame is a source of prejudice as he has received no notice of such contextual elements or their scope and that the prejudice is amplified by the deficiencies in the charges.²²² Finally, Mr Ongwen submits that the failure to provide him with an Acholi translation of the Confirmation Decision before he entered his plea violates article 67(1)(a) of the Statute.²²³

108. In relation to the second question, Mr Ongwen argues that the lack of notice was first raised on 29 March 2016 in his application for leave to appeal issues in the Confirmation Decision.²²⁴ As the trial proceeded, he continued to raise objections concerning lack of notice in the Confirmation Decision.²²⁵ Mr Ongwen argues that in raising concrete defects he was hampered by: i) the fact that he did not have the benefit of an Acholi translation of the Confirmation Decision; ii) the large number of

²¹⁶ [Order for Further Submissions](#).

²¹⁷ [Mr Ongwen’s Further Submissions](#), para. 3.

²¹⁸ [Mr Ongwen’s Further Submissions](#), para. 4.

²¹⁹ [Mr Ongwen’s Further Submissions](#), para. 7.

²²⁰ [Mr Ongwen’s Further Submissions](#), paras 8-10.

²²¹ [Mr Ongwen’s Further Submissions](#), para. 11.

²²² [Mr Ongwen’s Further Submissions](#), paras 12-13.

²²³ [Mr Ongwen’s Further Submissions](#), para. 16.

²²⁴ [Mr Ongwen’s Further Submissions](#), paras 20-21, referring to the ‘[Defence Request for Leave to Appeal Issues in Confirmation of Charges Decision](#)’, 29 March 2019, ICC-02/04-01/15-423, pp. 9-12.

²²⁵ [Mr Ongwen’s Further Submissions](#), para. 22, referring to [Impugned Decision](#), para. 27.

charges; iii) unequal resources as compared with the Prosecution; iv) the Trial Chamber's evidentiary regime, whereby all evidence is automatically admitted; and v) his vulnerable mental health and disability (which have entailed the use of significant litigation resources).²²⁶ He argues that 'the combination of the abovementioned factors exhausted the limited personnel and financial resources and forced the Defence to make difficult decisions as to its priorities'.²²⁷ Mr Ongwen submits that even if the concrete defects were not raised at an earlier point, his fair trial rights do not disappear.²²⁸

109. In relation to the third question, Mr Ongwen contends that any issue, objection or observation that relates or impacts on the trial proceeding can be raised pursuant to rule 134 of the Rules prior to or during trial, 'especially if it may have a significant impact on the outcome of the case'.²²⁹ Mr Ongwen argues that rule 134 of the Rules is a procedural tool that gives standing for parties to raise both substantive and procedural observations, maintaining that there is a false dichotomy between procedural and substantive aspects of criminal proceedings, which cannot be strictly bifurcated and procedural issues are often based on underlying substantive issues.²³⁰ The 'conduct of the proceedings' is a general phrase that includes not just the logistics of the proceedings but also the fairness of the trial process.²³¹

110. In relation to the last question, Mr Ongwen maintains that a breach of article 67(1)(a) of the Statute is a violation of human rights, which could lead to violations of other international fair trial rights; 'the requirement to have specifically formulated charged crimes and modes of liability is an important guarantee against wrongful convictions and ensures that trials are fair'.²³²

²²⁶ [Mr Ongwen's Further Submissions](#), paras 21, 23-27.

²²⁷ [Mr Ongwen's Further Submissions](#), para. 27.

²²⁸ [Mr Ongwen's Further Submissions](#), para. 28.

²²⁹ [Mr Ongwen's Further Submissions](#), para. 29.

²³⁰ [Mr Ongwen's Further Submissions](#), paras 33-34.

²³¹ [Mr Ongwen's Further Submissions](#), para. 34.

²³² [Mr Ongwen's Further Submissions](#), para. 38.

(ii) *Submissions of the Prosecutor*

111. In relation to the first and second questions posed by the Appeals Chamber, the Prosecutor argues that they are primarily addressed to Mr Ongwen.²³³ However, she submits that given the corrective nature of appellate review, the Appeals Chamber should not overturn the Impugned Decision based on facts that Mr Ongwen did not place before the Trial Chamber while being in a position to do so.²³⁴

112. With respect to the third question, the Prosecutor avers that the challenges advanced by Mr Ongwen could properly be dealt with by reference to rule 134 of the Rules given that those issues concern the conduct of the proceedings which have arisen since the confirmation hearing.²³⁵ However, the Prosecutor affirms, the Trial Chamber did not err in dismissing them *in limine* in the absence of a timely request.²³⁶

113. The Prosecutor further contends that, in light of the requirement of article 19(4) of the Statute, the Trial Chamber did not err in dismissing *in limine* Mr Ongwen's belated arguments challenging the Court's subject-matter jurisdiction over the mode of liability of indirect co-perpetration and the crime against humanity of forced marriage.²³⁷

114. The Prosecutor submits that it would exceed the scope of this appeal and it would be unnecessary for the Appeals Chamber to definitely rule on the general scope of rule 134 because it is sufficient to determine that belated challenges to the formulation of charges and the Court's subject matter jurisdiction can properly be dismissed *in limine* by a Trial Chamber under rule 134 and/or article 19, read in conjunction with rules 133 and 58(2).²³⁸

115. By reference to previous jurisprudence of the Appeals Chamber, the Prosecutor argues that a violation of an accused's fair trial rights cannot be established by the dismissal *in limine* of an accused's belated objections, as long as it can be established

²³³ [Prosecutor's Further Submissions](#), para. 17.

²³⁴ [Prosecutor's Further Submissions](#), para. 20.

²³⁵ [Prosecutor's Further Submissions](#), para. 6.

²³⁶ [Prosecutor's Further Submissions](#), para. 6.

²³⁷ [Prosecutor's Further Submissions](#), para. 7.

²³⁸ [Prosecutor's Further Submissions](#), para. 9.

that the accused was afforded an opportunity to raise them.²³⁹ She maintains that in the case at hand, Mr Ongwen was afforded such opportunity.²⁴⁰

116. With regards to the fourth and last question, the Prosecutor maintains that: i) by dismissing the Defects Series *in limine*, the Trial Chamber properly concluded that Mr Ongwen would not suffer prejudice;²⁴¹ and ii) Mr Ongwen's objections to alleged defects in the Confirmation Decision are without basis because they conflate charges with the evidence underlying those charges – the Confirmation Decision provided adequate notification of the material allegations underpinning the crimes and the modes of liability alleged against him.²⁴²

(iii) Observations of the Victims

117. With respect to the first question, the LRV argue that Mr Ongwen has not to date expressly identified how any of the issues raised can be said to have arisen during the course of the trial.²⁴³ In the view of the LRV, the list of instances provided in paragraph 29 of the Appeal Brief does not provide details of the nature of the defects and proves that the matter in question arose long ago.²⁴⁴

118. In relation to the second question, the LRV maintain that Mr Ongwen has never explained the delay in filing the alleged defects in the Confirmation Decision.²⁴⁵

119. In relation to the third question, the LRV submit that only procedural matters can be raised under rule 134 and since the matters raised by Mr Ongwen in the Defects Series are procedural in nature, they are governed by rule 134.²⁴⁶ The LRV contend that rule 134(3) of the Rules is intended to address issues of the same nature which would have been covered by rule 134(1) and (2) of the Rules but which were not able to be identified before the start of the trial.²⁴⁷

²³⁹ [Prosecutor's Further Submissions](#), para. 15.

²⁴⁰ [Prosecutor's Further Submissions](#), para. 15.

²⁴¹ [Prosecutor's Further Submissions](#), para. 22.

²⁴² [Prosecutor's Further Submissions](#), para. 23.

²⁴³ [LRV's Further Submissions](#), para. 11.

²⁴⁴ [LRV's Further Submissions](#), paras 14, 16.

²⁴⁵ [LRV's Further Submissions](#), paras 17-18.

²⁴⁶ [LRV's Further Submissions](#), paras 20, 23-24.

²⁴⁷ [LRV's Further Submissions](#), para. 22.

120. The CLRV argues that that there is nothing in the definitive texts of rule 134 that indicate that the drafters of the Rules intended to limit potential observations or objections made concerning the conduct of the proceedings to procedural aspects of the trial only.²⁴⁸ In the CLRV's view, rule 134 could cover any issue concerning substantive aspects of the trial as well.²⁴⁹

121. The CLRV contends that the Trial Chamber did not err in ruling that sub-rule 134(2) of the Rules is specifically designed to ensure that issues occurring between the confirmation hearing and the commencement of the trial are settled before the trial commences.²⁵⁰ Thus, the CLRV asserts that 'challenges to the sufficiency of the confirmation decision falls within both the letter and intended purpose of the said provision.'²⁵¹

122. In relation to the fourth and last question, the LRV contend that on a more precise analysis, the arguments advanced by Mr Ongwen are about the right to access the Court.²⁵² By reference to jurisprudence of the European Court of Human Rights ('ECtHR'), it is maintained that it is not a violation of Mr Ongwen's rights for the Rules of Procedure and Evidence to establish time limits or for a chamber to enforce them.²⁵³ The LRV note that the strict enforcement of time limits can only be considered a violation of the right of the defence to access a court where a reasonable justification has been provided for the failure to comply with the time limits.²⁵⁴ Given that, in the LRV's view, Mr Ongwen does not provide any explanation as to why he failed to file the Defects Series in a timely manner, the Trial Chamber's enforcement of rule 134(2) cannot constitute a violation of his rights.²⁵⁵

123. The LRV contend that the aim pursued by the time limit in rule 134(2) is fundamental to a fair trial because it ensures that the rules of the trial do not change mid-way through and in the particular case of concerns regarding the charges, the time limit of this rule ensures that the Prosecutor has an opportunity to rectify defects

²⁴⁸ [CLRV's Further Submissions](#), para. 6.

²⁴⁹ [CLRV's Further Submissions](#), para. 6.

²⁵⁰ [CLRV's Further Submissions](#), para. 9.

²⁵¹ [CLRV's Further Submissions](#), para. 9.

²⁵² [LRV's Further Submissions](#), para. 34.

²⁵³ [LRV's Further Submissions](#), paras 36-38.

²⁵⁴ [LRV's Further Submissions](#), paras 40-42.

²⁵⁵ [LRV's Further Submissions](#), para. 43.

in the charges before the commencement of trial.²⁵⁶ The LRV submit that allowing Mr Ongwen to bring a challenge almost three years after the Confirmation Decision could potentially lead to the dismissal of charges or to the restart of the trial and this would be ‘grossly unfair to the victims’.²⁵⁷

3. *Determination by the Appeals Chamber*

(a) **Second and Fourth Grounds of Appeal**

124. Under the second and fourth grounds of appeal, Mr Ongwen is in essence challenging the Trial Chamber’s interpretation of the applicable law, in particular rule 134 of the Rules. As noted above, the Appeals Chamber shall address these two grounds together. It shall first address the function and purpose of rule 134 of the Rules, including its interplay with rule 122(3) and (4). It will then turn to the question of whether the Trial Chamber’s interpretation is compatible with the requirements of a fair trial. Finally, the Appeals Chamber will determine whether the Trial Chamber was correct when it found that the challenges raised in the Defects Series fell under rule 134(2), as opposed to rule 134(3) of the Rules.

(i) *The function and purpose of rule 134 of the Rules*

125. Rule 134 of the Rules, which is entitled ‘Motions relating to the trial proceedings’, stipulates the procedure and conditions under which issues may be raised at different stages of the proceedings before the trial chamber. It provides as follows:

1. Prior to 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 any issue concerning the conduct of the proceedings. Any request from the Prosecutor or the defence shall be in writing and, unless the request is for an *ex parte* procedure, served on the other party. For all requests other than those submitted for an *ex parte* procedure, the other party shall have the opportunity to file a response.

2. 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

²⁵⁶ [LRV's Further Submissions](#), para. 45.

²⁵⁷ [LRV's Further Submissions](#), para. 46.

subsequent occasion in the trial proceedings, without leave of the Trial Chamber in this proceeding.

3. After 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.

126. Thus, rule 134(1) of the Rules allows trial chambers, *prior* to the commencement of the trial, to rule on issues concerning the conduct of the proceedings raised by the parties to the proceedings or on its own motion and sets out the procedure relevant thereto.

127. Rule 134(2) of the Rules governs objections by the parties concerning the conduct of the proceedings following the confirmation hearing. It thus relates to issues arising between the confirmation hearing and the start of the trial. The trial chamber is required to give the parties the opportunity to raise any such objections at the commencement of the trial. Importantly for the purposes of the present appeal, such objections cannot subsequently be raised or made again during the trial proceedings proper without leave of the trial chamber. The trial chamber enjoys discretion as to whether to grant such leave.

128. Finally, rule 134(3) governs objections to the proceedings which arise during the course of the trial, thus applying to issues which arise after the start of the trial until its completion.

129. Related to rule 134(2) and (3) is rule 122(3) and (4) of the Rules. Whilst rule 122(3)²⁵⁸ foresees challenges brought by the parties concerning an issue related to the proper conduct of the proceedings prior to the confirmation of charges hearing (requiring the pre-trial chamber to enquire as to whether there are any objections or observations to be made), rule 122(4),²⁵⁹ in similar fashion to rule 134(2), forecloses the possibility of a party raising objections or repeating observations concerning an issue related to the pre-confirmation proceedings at a subsequent stage.

²⁵⁸ Sub-rule 3 of rule 122 provides: ‘Before hearing the matter on the merits, the Presiding Judge of the Pre-Trial Chamber shall ask the Prosecutor and the person 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’.

²⁵⁹ Sub-rule 4 of rule 122 provides: ‘At no subsequent point may the objections and observations made under subrule 3 be raised or made again in the confirmation or trial proceedings’.

130. In sum, rule 122(3) and (4) as well as rule 134 of the Rules provide that parties must raise objections as a case moves through each anticipated stage of the pre-trial and eventually trial proceedings: objections concerning an issue related to the conduct of the proceedings prior to the confirmation hearing must be raised at that hearing; objections concerning an issue related to the conduct of the proceedings from the confirmation hearing to the beginning of the trial must be raised at the beginning of the trial. In principle, issues which arose prior to the confirmation hearing may no longer be raised before the trial chamber, nor may issues that arose between confirmation of the charges and the commencement of the trial be raised after the trial has begun.²⁶⁰ In hearing challenges pursuant to rule 134 of the Rules, the trial chamber has discretion as to how to dispose of them, including by dismissing such challenges for being out of time without examining the merits thereof. Accordingly, the Trial Chamber in the instant case was correct in determining that ‘Rule 134(2) would [...] apply to all such challenges not already time-barred by Rule 122(4) of the Rules’.²⁶¹

131. In the view of the Appeals Chamber, the purpose of rules 134 and 122 of the Rules is to safeguard the nature of the judicial process as an orderly succession of procedural acts provided by law that ensure the proper administration of justice, including the expeditious conduct of the proceedings.²⁶² This reading is supported by

²⁶⁰ See also Gilbert Bitti, ‘Article 64 Functions and Powers of the Trial Chamber’, in Otto Triffterer and Kai Ambos (ed.), *Commentary on the Rome Statute of the International Criminal Court - Observers’ Notes, Article by Article* (2016), p. 1599; Christopher Staker, Franziska Eckelmanns, ‘Article 81’ in Otto Triffterer and Kai Ambos (Ed.), *Treatise on International Criminal Law* (2016) 3rd Edn, OUP, pp. 99, 363, 506.

²⁶¹ [Impugned Decision](#), para. 19.

²⁶² See also ECtHR, *Miragall Escolano and Others v. Spain*, Judgment, 25 January 2000, applications nos. 38366/97, 38688/97, 40777/98, 40843/98, 41015/98, 41400/98, 41446/98, 41484/98, 41487/98 and 41509/98, para. 33: ‘The Court further considers that the rules governing the formal steps to be taken and the time-limits to be complied with in lodging an appeal are aimed at ensuring a proper administration of justice and compliance, in particular, with the principle of legal certainty. Litigants should expect those rules to be applied’; IACtHR, *Mémoli v. Argentina*. Judgment, 22 August 2013. Series C no. 265, paras 31-32 ‘procedural norms should be applied based on a standard of reasonableness; otherwise, there would be an imbalance between the parties and the attainment of justice would be adversely affected. As the Court has indicated, the essential factor in the international jurisdiction is to ensure the necessary conditions to guarantee that the procedural rights of the parties are not weakened or unequal, and to achieve the objectives for which the different procedures have been designed [...] This Court considers that the standard of reasonableness, based on which the procedural norms should be applied (*supra* para. 31), means that a time frame such as the one proposed by the State would have to be established clearly in the norms that regulate the proceedings’.

the drafting history of rule 134 which, as noted by the Trial Chamber,²⁶³ came into being following concerns ‘that proceedings at the ICTR and ICTY were being delayed by endless procedural challenges’.²⁶⁴

132. Nevertheless, Mr Ongwen is correct in stating that it would be ‘illogical to assume that all potential issues would be foreseeable prior to the commencement of the trial proceedings’ and that ‘[c]ertain issues only become evident once the proceedings unfold and develop’.²⁶⁵ Rule 134(2) and (3) thus expressly provides for this, allowing belated challenges to be made with leave of the trial chamber, and for further challenges to be made in the course of the trial. Accordingly, rule 134 requires the parties to the proceedings to raise issues at the time that they arise, whilst recognising that ‘events may occur during the trial which call into question earlier decisions’ and therefore allowing challenges to be made at a later occasion.²⁶⁶

(ii) *Is the Trial Chamber’s application of rule 134 of the Rules compatible with the requirements of a fair and expeditious trial and the rights of the accused?*

133. Mr Ongwen argues that the Trial Chamber’s purportedly ‘restrictive’ interpretation of rules 122(4) and 134 of the Rules is antithetical to the core principles of the Statute, in particular article 21(3), which obliges the Court to interpret and apply its applicable law in accordance with international human rights.²⁶⁷ Mr Ongwen refers in particular to his international fair trial rights.²⁶⁸

134. The Appeals Chamber notes that in the realm of international human rights law, fair trial requires observance of the fundamental rights of the accused.²⁶⁹ As explained by the UN Human Rights Committee, ‘fair trial is a key element of human rights

²⁶³ [Impugned Decision](#), para. 21.

²⁶⁴ Peter Lewis, ‘Trial Procedure’ in R.S. Lee (ed.) *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (2001), p. 543.

²⁶⁵ [Appeal Brief](#), para. 22.

²⁶⁶ Peter Lewis, ‘Confirmation Hearing to Trial’, in Horst Fischer et al. (Eds.) *International and National Prosecution of Crimes Under International Law*, Berliner Wissenschafts-Verlag, Second Edition, 2004, p. 230.

²⁶⁷ [Appeal Brief](#), paras 24, 39-41.

²⁶⁸ [Mr Ongwen’s Further Submissions](#), para. 38.

²⁶⁹ IACtHR, *Yvon Neptune v. Haiti*, Judgment, 6 May 2008, Series C no. 180, para. 79: ‘[a]rticle 8 of the Convention, which refers to the right to a fair trial, establishes the guidelines of the so-called “due process,” which consist *inter alia* in the right of every person to be heard, with due guarantees and within a reasonable time, by a competent, independent and impartial judge or court, previously established by law, in the substantiation of any accusation of a criminal nature made against him’.

protection and serves as a procedural means to safeguard the rule of law'.²⁷⁰ As noted by the IACHR, due process of law is intrinsically linked to the notion of justice which is reflected in, *inter alia*, the holding of a fair trial.²⁷¹ Indeed, the requirement of a fair trial 'establishes the standards of due process of law, which consists of a series of requirements that must be observed by the procedural instances, so that every person may defend his rights adequately when faced with any type of act of the State that may affect them'.²⁷²

135. Procedural rules that require parties to raise certain issues at a given point in time are not necessarily incompatible with a 'fair and expeditious trial' and the rights of the accused, as alleged in this case by Mr Ongwen. In this regard, the Appeals Chamber recalls that 'a party to a proceeding who claims to have an enforceable right must exercise due diligence in asserting such a right' in order for the relevant chamber 'to take account of the interests of the other parties to and participants in the proceedings and of the statutory injunction for fairness and expeditiousness'.²⁷³

136. With respect to the duty to ensure the expeditious conduct of the proceedings as per articles 64(2) and 67(1)(c) of the Statute, the Appeals Chamber has pointed out that, because an expeditious trial is beneficial to victims and witnesses, and unreasonable delay may also diminish public interest and public support for, and cooperation with the Court, '[e]xpeditiousness is [...] an independent and important value in the Statute to ensure the proper administration of justice, and is therefore

²⁷⁰ United Nations, Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, 23 August 2007, U.N. Doc. CCPR/C/GC/32.

²⁷¹ IACtHR, Case of *Ruano Torres et al. v. El Salvador*, Merits, Reparations and Costs Judgment, 5 October 2015, Series C no. 303, para. 151 (available only in Spanish): '[e]l debido proceso se encuentra, a su vez, íntimamente ligado con la noción de justicia²⁰⁸, que se refleja en [...] ii) el desarrollo de un juicio justo'. See also IACtHR *Genie Lacayo v. Nicaragua*, Judgment, 29 January 1997, Series C no. 30, para. 74, and IACtHR, *Baena Ricardo et al. v. Panama*, 2 February 2001, Serie C no. 72, para. 137.

²⁷² IACtHR, *Barbani Duarte et al. v. Uruguay*, Judgment, 13 October 2011, Series C no. 234, para. 116. See also IACtHR, *Velez Loo v. Panama*, Judgment, 23 November 2010, Serie C no. 218, para. 142; IACtHR, *Chocron Chocron v. Venezuela*, Judgment, 1 July 2011, Series C no. 227, para. 115.

²⁷³ *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 OA10 ('*Katanga and Ngudjolo OA10 Judgment*') para. 54.

more than just a component of the fair trial rights of the accused'.²⁷⁴ Expediency forms an integral part of a fair trial.

137. As the Appeals Chamber has stated in the *Lubanga* case, 'the overall role ascribed to the Trial Chamber in article 64 (2) of the Statute [is] to guarantee that the trial is fair and expeditious, and that the rights of the accused are fully respected.'²⁷⁵ The 'object of article 64(2) is to ensure that the trial is managed properly and expeditiously whilst giving full respect to the rights of the accused'.²⁷⁶ It is on the basis of this rationale that '[u]nder article 64(2) of the Statute, the Trial Chamber has the power to regulate the conduct of the parties and participants so as to ensure, among other considerations, that such conduct does not cause undue delay to the proceedings'.²⁷⁷ The Appeals Chamber has also previously found that 'delays in proceedings are inimical to the proper administration of justice'.²⁷⁸

138. As regards specifically rule 134(2) of the Rules and its compatibility with human rights norms, the Appeals Chamber is further assisted by the jurisprudence of the ECtHR in cases related to the rejection of petitions by domestic courts based on time limits. The ECtHR has mostly considered whether a disproportionate burden was placed on an applicant which would upset the right balance between, on the one hand, the legitimate concern of ensuring the respect of the formal conditions for seising the court and, on the other hand, the right of access to a court; it has considered whether there was a particularly rigorous application of a procedural rule, which infringed the applicant's right of access to a court.²⁷⁹ According to the jurisprudence of the ECtHR, in applying procedural rules, a court must avoid both an excess of formalism that would undermine the fairness of the proceedings and excessive flexibility which

²⁷⁴ [Katanga and Ngudjolo OAI0 Judgment](#), para. 47.

²⁷⁵ [Judgment on the appeal of the Prosecutor against the decision of Trial Chamber I entitled "Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54\(3\)\(e\) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008"](#), 21 October 2008, ICC-01/04-01/06-1486, para. 46, referred to in footnote 21 of the [Appeal Brief](#).

²⁷⁶ [Katanga and Ngudjolo OAI0 Judgment](#), para. 53 and footnote 101 relative to the drafting history of this provision.

²⁷⁷ [Katanga and Ngudjolo OAI0 Judgment](#), para. 53.

²⁷⁸ [Katanga and Ngudjolo OAI0 Judgment](#), para. 45.

²⁷⁹ See e.g. ECtHR, *Walchli v. France*, Judgment, 26 October 2007, application no. 35787/03, para. 36; ECtHR, *Evaggelou v. Greece*, Judgment, 20 June 2011, application no. 44078/07, para. 24; ECtHR, *Labergère v. France*, Judgment, 26 December 2006, application no. 16846/02, para. 23; ECtHR, *Davran v. Turkey*, Judgment, 3 February 2010, application no. 18342/03, para. 47.

would lead to the undermining of such rules.²⁸⁰ It has found that procedural rules should serve the purposes of legal certainty and the proper administration of justice and must not constitute a barrier preventing the litigant from having his dispute settled by the competent court.²⁸¹

139. In the instant case, the observance of prescribed time limits in search of expeditiousness in the trial proceedings ‘does not lead to unfairness *vis-à-vis* the accused person’.²⁸² The Appeals Chamber recalls that rule 134(2) provides for flexibility and does not outright deny a party the opportunity to raise an objection only because it could have been raised earlier. As set out above, and as noted by the Prosecutor, ‘rule 134(2) does not entirely foreclose late challenges – the Trial Chamber retains discretion to grant a party leave to file a late challenge’.²⁸³ ‘Only in circumstances where the accused person could not reasonably be expected to raise the matter’ at the prescribed stage will he or she be permitted to raise it at a subsequent stage, thereby striking a fair balance ‘between the rights of the accused person and the requirement of expeditiousness’.²⁸⁴ This is in line with object of article 64(2) of the Statute, which is to ensure that the trial is managed properly and expeditiously, whilst giving full respect to the rights of the accused.

140. In sum, the Trial Chamber’s interpretation of rule 134 was compatible with the requirements of a fair and expeditious trial and Mr Ongwen’s rights as an accused person.

(iii) *Did the challenges made in the Defects Series fall under rule 134(2) of the Rules?*

²⁸⁰ ECtHR, *Walchli v. France*, Judgment, 26 October 2007, application no. 35787/03, para. 29; ECtHR, *Evaggelou v. Greece*, Judgment, 20 June 2011, application no. 44078/07, para. 19.

²⁸¹ ECtHR, *Evaggelou v. Greece*, Judgment, 20 June 2011, application no. 44078/07, para. 19. Similarly, the IACtHR has established that ‘procedural norms should be applied based on a standard of reasonableness; otherwise, there would be an imbalance between the parties and the attainment of justice would be adversely affected’. As correctly noted by this regional court, ‘the essential factor in the international jurisdiction is to ensure the necessary conditions to guarantee that the procedural rights of the parties are not weakened or unequal, and to achieve the objectives for which the different procedures have been designed’ (IACtHR., *Mémoli v. Argentina*, Judgment, 22 August 2013, Series C no. 265, para. 31).

²⁸² [Katanga and Ngudjolo OAI0 Judgment](#), para. 48.

²⁸³ [Prosecutor’s Response](#), para. 15.

²⁸⁴ [Katanga and Ngudjolo OAI0 Judgment](#), para. 48.

141. Having thus clarified the interpretation of rule 134(2) and (3) of the Rules and its broader procedural context and its compatibility with the requirement of a fair trial, the Appeals Chamber shall now turn to Mr Ongwen's argument that, contrary to the Trial Chamber's finding, the objections contained in the Defects Series should have been addressed under rule 134(3) and not rule 134(2) of the Rules. For the reasons that follow, the Appeals Chamber is not persuaded by Mr Ongwen's argument.

142. The Appeals Chamber notes the manner in which the Defence formulated its specific challenges in the Defects Series and that they were directed against the charges contained in the Confirmation Decision. These challenges concerned alleged deficiencies in how the Prosecutor had presented the charges, alleged lack of notice of the charges and alleged jurisdictional defects therein. Importantly, the prayer for relief in the Defects Series requests that the Trial Chamber dismiss charges and modes of liability.²⁸⁵ Thus, the challenges in the Defects Series were directed against purported errors and flaws in the charges, as set out in the Confirmation Decision. The Appeals Chamber thus finds that the Trial Chamber was correct in finding that the issues raised by Mr Ongwen in the Defects Series concern the Confirmation Decision and would thus have fallen to be determined in the period prior to the commencement of the trial. They therefore were within the ambit of rule 134(2), rather than rule 134(3) of the Rules.

143. In sum, the Appeals Chamber rejects the second and fourth grounds of appeal.

(b) Third Ground of Appeal

144. The third ground of appeal concerns the question of whether the Trial Chamber properly exercised its discretion in deciding not to grant Mr Ongwen leave to make his submissions, dismissing the Defects Series *in limine* for untimeliness. The challenges advanced by Mr Ongwen in the Defects Series contained two types of challenges. First, he raises challenges to the formulation of the charges in the Confirmation Decision.²⁸⁶ Second, he challenges the subject-matter jurisdiction of the

²⁸⁵ [Defects Series Part I](#), para. 59.; [Defects Series Part II](#), para. 79; [Defects Series Part III](#), para. 64.; [Defects Series Part IV](#), para. 71.

²⁸⁶ [Defects Series Part II](#), paras 23, 28; [Defects Series Part III](#), paras 10, 12, 31, 53; [Defects Series Part IV](#), paras 11, 24, 35, 57-58, 62-68.

Court.²⁸⁷ The Appeals Chamber will address the correctness or otherwise of the Trial Chamber's exercise of discretion for each of these aspects in turn.

(i) *Challenges to the Formulation of the Charges in the Confirmation Decision*

145. For the reasons that follow, the Appeals Chamber finds that in the case at hand, the Trial Chamber did not abuse its discretion or act arbitrarily, unreasonably or unfairly when, based on the particular circumstances of the case and within the boundaries of the law, it dismissed the Defects Series *in limine* as regards the challenges concerning the formulation of the charges in the Confirmation Decision. To the contrary, the Appeals Chamber finds that the Trial Chamber acted in a manner consistent with its duty under article 64(2) of the Statute to ensure the fair and expeditious conduct of the proceedings.

146. The Appeals Chamber notes that the Trial Chamber found that 'no explanation is provided why [Mr Ongwen] waited until now to advance [his] objections'.²⁸⁸ The Appeals Chamber considers that this finding was reasonable. Mr Ongwen did not advance any reasonable justification for raising challenges to the Confirmation Decision before the Trial Chamber more than three years after that decision was issued and after the Prosecutor presented her case at trial. The Appeals Chamber notes that Mr Ongwen's arguments both before the Trial and the Appeals Chamber are primarily focused on the importance of his right to be informed in detail of the nature, cause and content of the charge under article 67(1)(a) of the Statute.

147. The Appeals Chamber considers that, whether motions that could have been presented prior to the commencement of trial may nonetheless be presented at a later stage always depends on the facts and circumstances of the case and due regard must be given to fairness to the other parties and participants and the statutory requirement of expeditiousness.²⁸⁹

²⁸⁷ [Defects Series Part II](#), para. 23; [Defects Series Part IV](#), paras 36-38, 52.

²⁸⁸ [Impugned Decision](#), para. 24.

²⁸⁹ [Katanga and Ngudjolo OAI0 Judgment](#), para. 49.

148. As noted above,²⁹⁰ there were at least four points in time at which Mr Ongwen could have been expected to raise any objections he may have had in relation to the formulation of the charges in this case. The first point in time was after he had received, on 21 December 2015, the Acholi translation of the document containing the charges.²⁹¹ The Appeals Chamber notes that at that stage Mr Ongwen did not raise any of the specific challenges advanced in the Defects Series.

149. The second point in time was after the Trial Chamber had rendered a decision setting 28 October 2016 as the deadline to file any motions that required resolution prior to the commencement of the trial.²⁹² Here again, Mr Ongwen did not avail himself of the opportunity to advance any of the specific challenges concerning the formulation of the charges included in the Defects Series.

150. The third point in time was the commencement of the trial when, pursuant to rule 134(2) of the Rules, the Presiding Judge asked Mr Ongwen whether he had any objections.²⁹³ Mr Ongwen did not raise any concrete objections to the charges. Counsel for Mr Ongwen only expressed his ‘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’.²⁹⁴

151. The fourth point in time at which Mr Ongwen could have been expected to raise objections concerning the formulation of the charges was as of 13 December 2017, when a complete translation of the Confirmation Decision in Acholi was registered on the record.²⁹⁵ Mr Ongwen did not present any objections to the charges at this point in time either.

152. The Appeals Chamber recalls that the duty to act in a diligent and expeditious manner applies to all those involved in the proceedings, including the accused

²⁹⁰ See *supra* paras 12, 16, 18, 20.

²⁹¹ [Annex B to ‘Prosecution’s submission of the document containing the charges, the pre-confirmation brief, and the list of evidence’](#), 21 December 2015, ICC-02/04-01/15-375-AnxB-Red.

²⁹² [Decision on the Commencement of Trial](#).

²⁹³ [Transcript of 6 December 2016](#), ICC-02/04-01/15-T-26-ENG, p. 21, lines 13-18.

²⁹⁴ [Transcript of 6 December 2016](#), ICC-02/04-01/15-T-26-EN, p. 22, lines 1-4.

²⁹⁵ ‘Acholi Translation of Decision on the confirmation of charges against Dominic Ongwen’, ICC-02/04-01/15-422-Conf-tACH.

person.²⁹⁶ In this case, even though he could have raised much earlier specific and concrete objections concerning the charges as confirmed by the Pre-Trial Chamber, Mr Ongwen waited until February 2019 to file the Defects Series which set out for the first time those specific challenges.

153. Therefore, the Appeals Chamber finds that the Trial Chamber was correct when it determined that no concrete objection or challenges were made at the commencement of the trial, such as those raised in the Defects Series, despite the fact that Mr Ongwen had ample opportunity to do so. The Trial Chamber was also reasonable in determining that Mr Ongwen did not advance any reasonable justification for raising challenges to the Confirmation Decision before the Trial Chamber more than three years after that decision was issued and after the Prosecutor presented her case at trial.

154. The Appeals Chamber notes that, in Mr Ongwen's Further Submissions, he raises several new factual arguments before the Appeals Chamber as to why it was, according to him, not possible to challenge the formulation of charges in the Confirmation Decision earlier.²⁹⁷ These arguments, however, were never presented before the Trial Chamber and were therefore not considered and addressed in the Impugned Decision. The Appeals Chamber notes in this regard the Prosecutor's Alternative Request²⁹⁸ to dismiss Mr Ongwen's Further Submissions on this basis. In these circumstances, the Appeals Chamber will not address these arguments. Doing so would be tantamount to making factual findings for the first time on appeal. Furthermore, the Appeals Chamber notes that, if it were to decide on the new arguments advanced on appeal, this would mean that it would have advanced an opinion on issues that may eventually be presented before the Trial Chamber and potentially the Appeals Chamber in subsequent proceedings. Accordingly, the arguments containing new factual allegations advanced by Mr Ongwen in this regard are dismissed.

²⁹⁶ [Katanga and Ngudjolo OAI0 Judgment](#), para. 43.

²⁹⁷ See e.g. [Mr Ongwen's Further Submissions](#), paras 8-18, 23-25, 27.

²⁹⁸ [Prosecutor's Request to File Further Submissions](#), para. 8.

(ii) *Jurisdictional Challenges*

155. With respect to Mr Ongwen’s jurisdictional challenges contained in the Defects Series, the Appeals Chamber notes that they are governed by article 19(4) of the Statute.²⁹⁹ Pursuant to this provision, ‘[t]he admissibility of a case or the jurisdiction of the Court may be challenged only once’. The Trial Chamber correctly found that article 19(4) of the Statute ‘requires jurisdictional challenges to take place prior to or at the commencement of the trial’ and that Mr Ongwen ‘fail[ed] to justify any exceptional circumstances for raising such arguments at this time’.³⁰⁰

156. The Appeals Chamber notes in addition that the same specific jurisdictional challenges contained in the Defects Series were raised at the pre-confirmation of charges stage and were determined by the Pre-Trial Chamber in the Confirmation Decision. The Pre-Trial Chamber ruled on Mr Ongwen’s challenge concerning the existence, under the Statute, of the mode of liability of ‘indirect co-perpetration’,³⁰¹ and on the jurisdictional challenge related to charges of forced marriage.³⁰² Specifically, the Pre-Trial Chamber found that ‘indirect co-perpetration’ is provided for in the text of the Statute and that Mr Ongwen’s argument was unfounded.³⁰³ With respect to the jurisdictional challenge related to charges of forced marriage, the Pre-Trial Chamber concluded that the conduct under consideration constituted the crime of another inhumane act within the meaning of article 7(1)(k) of the Statute in the form of forced marriage, which differed from the other crimes with which Mr Ongwen is charged, and accordingly warranted a specific separate charge.³⁰⁴

157. Furthermore, in the Pre-Trial Chamber’s decision on Mr Ongwen’s request for leave to appeal the Confirmation Decision, the Pre-Trial Chamber rejected the argument that the alleged error in the determination that forced marriage was not subsumed by the crime of sexual slavery could have significant repercussions on the fair trial and expeditious conduct of the proceedings or on the outcome of the trial.³⁰⁵ According to the Pre-Trial Chamber, questions concerning concurrence of offences

²⁹⁹ [Impugned Decision](#), para. 32.

³⁰⁰ [Impugned Decision](#), para. 34.

³⁰¹ [Confirmation Decision](#), para. 41.

³⁰² [Confirmation Decision](#), paras 88, 91, 92.

³⁰³ [Confirmation Decision](#), para. 41.

³⁰⁴ [Confirmation Decision](#), paras 88, 91, 92, 95.

³⁰⁵ [Decision on Request for Leave to Appeal Confirmation Decision](#), para. 36.

are better addressed by the Trial Chamber upon airing the entirety of the evidence.³⁰⁶ It is thus clear that the jurisdictional challenges contained in the Defects Series were addressed and ruled upon at the pre-trial stage.

158. The Trial Chamber therefore did not err when it declined to consider the merits of Mr Ongwen's jurisdictional challenges contained in the Defects Series. This is notwithstanding the possibility for Mr Ongwen to challenge the legal interpretation of the relevant provisions in his closing submissions before the Trial Chamber, as correctly observed by the Trial Chamber,³⁰⁷ and eventually before the Appeals Chamber, should a conviction be entered and an appeal lodged against it.

(iii) Conclusion

159. Having regard to the need to ensure the fair conduct of proceedings, the Appeals Chamber finds it important to note that in the Impugned Decision, the Trial Chamber recalled 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'.³⁰⁸ In the view of the Appeals Chamber, this further demonstrates that the Trial Chamber did not abuse its discretion when dismissing the Defects Series *in limine*. On the contrary, it is clear that the Trial Chamber was at all times considering the rights of the accused as part of the guarantee of a fair trial, including its duty to ensure the expeditious conduct of the proceedings.

160. In these circumstances, the Appeals Chamber is not persuaded that the Impugned Decision violated the rights of Mr Ongwen under article 67(1) of the Statute. Mr Ongwen is entitled to advance the arguments presented in the Defects Series in his final submissions before the Trial Chamber, and eventually before the Appeals Chamber, should a conviction be entered and an appeal lodged against it. In this regard, the Appeals Chamber notes that in the past, convicted persons have raised on appeal challenges to the formulation of charges.³⁰⁹

³⁰⁶ [Decision on Request for Leave to Appeal Confirmation Decision](#), para. 38.

³⁰⁷ [Impugned Decision](#), para. 35.

³⁰⁸ [Impugned Decision](#), para. 29.

³⁰⁹ See [Lubanga A5 Judgment](#), paras 114-137; [Bemba A Appeal Judgment](#), paras 74-119.

161. In light of the foregoing considerations, the Appeals Chamber finds that the Trial Chamber was reasonable, fair and properly exercised its discretion when determining that, in the particular circumstances of the case, the Defects Series should be dismissed *in limine* for untimeliness.

(c) Overall conclusion on the second, third and fourth grounds of appeal

162. As a result of the above analysis, the Appeals Chamber finds that the Trial Chamber did not err in its interpretation of the applicable law and properly exercised its discretion under rule 134(2) of the Rules when, in the particular circumstances of the case, it dismissed the Defects Series *in limine*. Accordingly, the Appeals Chamber rejects the second, third and fourth grounds of appeal.

VI. GENERAL CONCLUSIONS

163. The Appeals Chamber reaches the following conclusions:

- i) The Trial Chamber did not err when it found, in the Decision on Leave to Appeal, that the issue for which leave to appeal was granted ‘is not about whether notice has been properly provided, but whether a rejection of the Initial Requests on procedural grounds alone is possible’.³¹⁰ In any event, any alleged error in the Decision on Leave to Appeal cannot have a material impact on the Impugned Decision because the former was rendered after the latter.
- ii) Under rules 122(3) and (4) as well as 134 of the Rules, parties must raise objections as a case moves through each anticipated stage of the proceedings. The purpose is to safeguard the nature of the judicial process as an orderly succession of procedural acts provided by law that ensure the proper administration of justice, including the expeditious conduct of the proceedings.
- iii) Expeditiousness forms an integral part of a fair trial. While rule 134(2) of the Rules requires the observance of prescribed time

³¹⁰ [Decision on Leave to Appeal](#), para. 13.

limits, it provides for flexibility and does not outright deny a party the opportunity to raise an objection only because it could have been raised earlier. This is in line with the object of article 64(2) of the Statute, which is to ensure that the trial is managed properly and expeditiously, whilst giving full respect to the rights of the accused.

- iv) Given that the Defects Series were directed against errors and flaws in the charges as set out in the Confirmation Decision, the Trial Chamber was reasonable to find that they could normally have been raised at the commencement of the trial. It was therefore within the discretion of the Trial Chamber to nonetheless consider the merits of the Defects Series pursuant to rule 134(2) of the Rules or to decide not to do so.
- v) In the instant case, the Trial Chamber's decision not to consider the merits of the Defects Series in search of expeditiousness did not prejudice Mr Ongwen's right to a fair trial.
- vi) The Trial Chamber was correct, reasonable and fair and consequently did not err when it determined that the objections or challenges concerning the formulation of the charges, as contained in the Defects Series, could have been raised at an earlier point in time.
- vii) Similarly, the Trial Chamber was correct when it found that the jurisdictional challenges raised by Mr Ongwen in the Defects Series should have been raised at the commencement of the trial. In addition, they were addressed and ruled upon at the pre-trial stage.
- viii) The rights of Mr Ongwen under article 67(1) of the Statute were not violated as a result of the Impugned Decision.
- ix) The Trial Chamber was correct, did not abuse its discretion and was not arbitrary, unreasonable or unfair when, based on the

particular circumstances of the case and within the boundaries of the law, it dismissed the Defects Series *in limine*. Rather, the Trial Chamber acted in a manner consistent with its duty under article 64(2) of the Statute to ensure the fair and expeditious conduct of the proceedings.

VII. APPROPRIATE RELIEF

164. In an appeal pursuant to article 82(1)(d) of the Statute, the Appeals Chamber may confirm, reverse or amend the decision appealed (rule 158(1) of the Rules). In the present case, given that the Appeals Chamber has rejected all grounds of appeal, it is appropriate to confirm the Impugned Decision.

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



Judge Luz del Carmen Ibáñez Carranza
Presiding

Dated this 17th day of July 2019

At The Hague, The Netherlands