

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: **ICC-02/04-01/15**
Date: **7 February 2018**

TRIAL CHAMBER IX

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

SITUATION IN UGANDA

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

PUBLIC

Public Redacted Version of ‘Defence Request for Leave to Appeal the “Decision on Defence Request for Disclosure of Certain Requests for Assistance and Related Items”’

Source: Defence for Dominic Ongwen

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

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I. INTRODUCTION

1. Pursuant to Article 82(1)(d) of the Statute, the Defence for Dominic Ongwen (‘Defence’) hereby seeks leave to appeal the Single Judge of the Trial Chamber IX’s (‘Single Judge’) “Decision on Defence Request for Disclosure of Certain Requests for Assistance and Related Items” (‘Impugned Decision’).¹
2. The Defence avers that the three requirements for an granting interlocutory appeal pursuant to Article 82(1)(d) of the Statute are satisfied in respect of five issues hereinafter identified (‘Appealable Issues’). *First*, each of the Appealable Issues for which an appellate resolution is sought arise out of the Impugned Decision, and each is essential for the determination of the Decision’s correctness. *Second*, the Decision directly concerns Mr Ongwen’s right to a fair trial, as well as, the outcome of the *Ongwen* case proceedings. *Third*, immediate resolution will materially advance the proceedings by removing doubts about the legal and factual issues that are of imminent importance to Mr Ongwen and the preparation of his defence.

II. CONFIDENTIALITY

3. Pursuant to Regulation 23 *bis*(1) of the Regulations of the Court (‘RoC’), the Defence files this request as confidential as it refers to portions of witness testimonies provided during private sessions. A public redacted version will be filed in due course.

III. PROCEDURAL HISTORY

4. On 23 March 2016, the Pre-Trial Chamber II issued its “Decision on the confirmation of charges against Dominic Ongwen” (‘CoC Decision’) and confirmed that “[T]he Prosecutor has only charged crimes within the time period between 1 July 2002 and 31 December 2005. The Court indeed does not have jurisdiction over crimes committed before 1 July 2002. As for the end date, the Prosecutor has submitted to the Chamber that the crimes committed after 31 December 2005 were not charged because they “post-date the upper limit of the charged period, 31 December 2005, which was selected because the evidence does not support the

¹ ICC-02/04-01/15-1161.

existence of a non-international armed conflict between the UPDF and the LRA or a widespread and systematic attack against a civilian population after that date.”²

5. On 7 June 2016, in his “Decision on Disclosure Issues Arising Out of First Status Conference”, the Single Judge, directed the Prosecution to disclose its requests for assistance (‘RFAs’), holding that “a case-by-case assessment in the present case requires that, at least to the extent that RFAs in the Uganda situation investigation led to information which the Prosecution relies upon as incriminating evidence against Mr Ongwen, they must be disclosed as being material to the preparation of the defence” (‘Disclosure Decision’).³
6. The Defence has on numerous occasions raised the objection regarding the scope of the temporal jurisdiction of the charges and the admissibility of uncharged allegations falling outside of the temporal jurisdiction of the present case and of this Court.⁴ The Trial Chamber has rejected the Defence objections regarding the temporal jurisdiction on several occasions.
7. At the early stage of the trial proceedings, on 17 March 2017, the Defence objected to the Prosecution’s attempt to expand the charges beyond those which were confirmed. The Prosecution responded. Then the Presiding Judge Schmitt ruled that “Of course you [referring to the Prosecution] do not intend to expand the charges on to these attacks. It’s indeed about the question, questions might be about widespread systematic, like you said yesterday, about modes of liability and about other charges that have been confirmed. So there will be of course no dealing with other attacks than the four that have been confirmed.”⁵
8. On 19 September 2017, the Presiding Judge Schmitt overruled the Defence objection and held that: “And we said it before that of course evidence can also be led concerning -- that go beyond the facts and circumstances in the charged periods if they may have an effect on the facts and circumstances in the charged period. And by the way, this can go either way. This can also be evidence that leads to exculpatory circumstances that -- so when I say the attack,

² ICC-02/04-01/15-422-Red (‘CoC Decision’), paras 2, 105.

³ ICC-02/04-01/15-457, para. 14; *see also* ICC-02/04-01/15-468.

⁴ *See e.g.* ICC-02/04-01/15-T-56-CONF-ENG ET, p. 49, lines 21-25 and p. 50, lines 1-21; ICC-02/04-01/15-T-57-CONF-ENG ET, p. 11; ICC-02/04-01/15-T-85-Red-ENG WT, p. 4, lines 16-23, p. 6, lines 4-25, and page 7, lines 1-12; ICC-02/04-01/15-T-95-CONF-ENG, pp. 2-5; ICC-02/04-01/15-T-108-CONF-ENG ET, p. 38, lines 9-25, and p. 39, line 1-5; ICC-02/04-01/15-T-111-CONF-ENG ET, p. 62, lines 15-25; ICC-02/04-01/15-T-131-CONF-ENG ET, p. 53, lines 12-19; ICC-02/04-01/15-T-145-CONF-ENG ET, pp. 17-18; ICC-02/04-01/15-T-147-CONF-ENG ET, pp. 5-6; ICC-02/04-01/15-T-148-CONF-ENG ET, p. 4, lines 21-25, and p. 5, lines 1-5.

⁵ ICC-02/04-01/15-T-56-CONF-ENG ET, p. 51, lines 7-12.

criminal conduct that might not directly relate to, for example, one of the attacks, then it might also turn out that it might be good for the Defence. It might go either way.”⁶

9. Recently, on 24 January 2018, the Presiding Judge Schmitt ruled that “We have four attacks that form part of the charges confirmed. We have in addition, of course, are aware, so to speak, of the temporal limitation of our jurisdiction, but there are, we have to say first, that this does not mean that other than four attacks and also incidents that might lie before the temporal jurisdiction cannot be evidence of other attacks and also incidents that might lie before the temporal jurisdiction cannot be evidence of other facts and circumstances are that described in the charges. Examples could include, for example, contextual elements, modes of liability, conscription and the use of child soldiers, and in addition, the witness is expected to testify about incidents that extend in to the charged period.”⁷
10. On 16 January 2018, in its “Defence Request for a Rule 77 Disclosure Order Concerning the Requests for Assistance and Other Related Items”, the Defence requested that the Trial Chamber order the Prosecution to disclose RFAs and other associated communications related to cooperation between the Prosecution and the Ugandan authorities, which led to collection of evidence used against Mr Ongwen. It included, *inter alia*, information about the death of Vincent Otti (‘Defence Request’).⁸
11. On 18 January 2018, in its “Prosecution Response to “Defence Request for a Rule 77 Disclosure Order Concerning the Requests for Assistance and Other Related Items” (ICC-02/04-01/15-1137),” the Prosecution requested the Trial Chamber to reject the Defence Request (‘Prosecution Response’).⁹
12. Finally, on 1 February 2018, the Single Judge issued his Impugned Decision and rejected the Defence Request.¹⁰

IV. APPLICABLE LAW

13. Pursuant to Article 82(1)(d) of the Statute, either party may appeal a decision that involves an issue that would significantly affect the fair and expeditious conduct of the proceedings or the

⁶ ICC-02/04-01/15-T-108-CONF-ENG ET, p. 39, lines 10-16;

⁷ ICC-02/04-01/15-T-147-CONF-ENG ET, p. 7, lines 2-15.

⁸ ICC-02/04-01/15-1137-Red (with three annexes) (a confidential version was filed on the same day).

⁹ ICC-02/04-01/15-1142-Conf (with one annex).

¹⁰ ICC-02/04-01/15-1161.

outcome of the trial, and for which, in the opinion of the Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings. The purpose of such procedure is to “pre-empt the repercussions of erroneous decisions on the fairness of the proceedings or the outcome of the trial”.¹¹ The Chamber is vested with the power to certify the existence of an appealable issue;¹² however, when determining whether leave to appeal should be granted, the Chamber must not justify or defend the correctness of its decision, but instead determine whether the issues presented significantly affect the fairness of the proceedings.¹³

14. According to Rule 155(1) of the Rules of Procedure and Evidence (‘RPE’), a party shall make a written application for leave to appeal to the Chamber that gave the decision, setting out the reasons for the request for leave to appeal. The application for leave to appeal shall state the name and number of the case or situation and shall specify the legal and/or factual reasons in support thereof, in accordance with Regulation 65(1) of the Regulations of the Court (‘RoC’). It shall also specify the reasons warranting immediate resolution by the Appeals Chamber of the matter at issue.¹⁴
15. The Appeals Chamber has ruled that only an ‘issue’ may form the subject-matter of an appealable decision, which it defined as “an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion”.¹⁵ Further, an issue is “a subject the resolution of which is essential for the determination of the matters arising in the judicial cause under examination” and may be “legal or factual or a mixed one”.¹⁶ The issue must be one apt to “significantly affect”, that is, in a material way, either the fair and expeditious conduct of the proceedings, or the outcome of the trial.¹⁷ In other words, the issue “must be one likely to have repercussions on either of these two elements of justice”.¹⁸
16. The Appeals Chamber has defined the term ‘fair’ as being associated with the norms of a fair trial and corresponding human rights, as per Articles 64(2) and Article 67(1) of the Statute.¹⁹ In particular, it noted that the “expeditious conduct of the proceedings in one form or another

¹¹ ICC-01/04-168, para. 19.

¹² ICC-01/04-168, para. 20.

¹³ *See e.g.* ICC-01/09-02/11-253, para. 28.

¹⁴ Regulation 155(2) of the RoC.

¹⁵ ICC-01/04-168, para. 9.

¹⁶ ICC-01/04-168, para. 9.

¹⁷ ICC-01/04-168, para. 10.

¹⁸ ICC-01/04-168, para. 10.

¹⁹ ICC-01/04-168, para. 11.

constitutes an attribute to a fair trial”.²⁰ The term ‘proceedings’ extends to proceedings prior to and subsequent to the current proceedings.²¹

17. The Appeals Chamber also held that an issue will be appealable “where the possibility of error in an interlocutory or intermediate decision may have a bearing” on the outcome of the trial.²² The Chamber, when deciding on a request for leave to appeal, “must ponder the possible implications of a given issue being wrongly decided on the outcome of the case”, thereby forecasting the consequences of such an occurrence.²³
18. Regarding the second aspect of a request for leave to appeal (the immediate resolution by the Appeals Chamber), the Appeals Chamber has held that this criterion will be satisfied if the relevant Chamber rules that an authoritative determination on the appeal would “move forward” the proceedings and “remove doubts about the correctness of the decision or map a course of action along the rights lines.”²⁴ The issue at stake must also be “such that its immediate resolution by the Appeals Chamber will settle the matter posing for decision through its authoritative determination, ridding thereby the judicial process of possible mistakes that might taint either the fairness of the proceedings or the outcome of the trial”.²⁵ The solving of the issue by the Appeals Chamber is aimed to “ensure that the proceedings follow the right course”.²⁶

V. SUBMISSIONS

A. The Appealable Issues that arise from the Impugned Decision

19. The Defence seeks leave to appeal the following issues arising from the Impugned Decision, namely:
- **Issue 1: Whether the Impugned Decision meets the standard articulated in the *Lubanga* Case that a) the expression “material to the preparation of the defence” has to be interpreted broadly”; and b) that Rule 77 of the RPE encompasses “all objects that are relevant for the preparation of the defence”**
20. This issue arises from the Impugned Decision. In particular, the Single Judge found:

²⁰ ICC-01/04-168, para. 11.

²¹ ICC-01/04-168, para. 12.

²² ICC-01/04-168, para. 13.

²³ ICC-01/04-168, para. 13.

²⁴ ICC-01/04-168, paras 14-15.

²⁵ ICC-01/06-168, para. 14.

²⁶ ICC-01/04-168, para. 15.

The Single Judge considers that the Defence has failed to establish that RFAs related to the death of Vincent Otti are material to the preparation of the defence. From its previous RFAs related to confirming Mr Otti's death led to any incriminating evidence in the case against Mr Ongwen. Although the Defence need not establish a direct link to incriminating or exonerating evidence when substantiating Rule 77 materiality, the Defence argument that this information is required to effectively 'challenge the reliability of the impugned evidence' appears to be untenable.²⁷

21. To support his ruling, the Single Judge's Decision cites the Appeals Chamber's Judgment in the *Lubanga* case at paras 76-82.²⁸ Here, the Appeals Chamber's held that "material to the preparation of the defence" has to be interpreted broadly²⁹ and that Rule 77 of the RPE encompasses "all objects that are relevant for the preparation of the defence".³⁰ The Impugned Decision, however, fails to apply the same legal standard in relation to the Defence Request. Moreover, considering the *Lubanga* case standard, it is irrelevant whether any of the items related to Otti's death led to any incriminating evidence in the case against Mr Ongwen or not.
22. The alleged execution of Vincent Otti is a live issue in the *Ongwen* Case. As submitted by the Defence in its Defence Request, the materiality of all items (including RFAs and associated responses) related to Vincent Otti's reported death is evidenced by a number of Prosecution witnesses testifying about this event during the trial proceedings against Mr Ongwen.³¹ Moreover, considering the allegations that it was Joseph Kony who ordered the killing of his deputy commander Vincent Otti,³² the circumstances of Vincent Otti's killing are highly material to support the defence of duress to be relied on by the Accused during his presentation of evidence and to refute the Prosecution's allegations of his involvement in a common plan.
23. Therefore, the Defence avers that the Single Judge's failure to apply the *Lubanga* case standard in respect to the Defence Request prejudices Mr Ongwen, and thus warrants the Appeals Chamber's immediate intervention at the interlocutory level.

²⁷ Impugned Decision, para. 7.

²⁸ Impugned Decision, para. 7, footnote 12.

²⁹ ICC-01/04-01/06-1433 OA 11, para. 77; *see also* Disclosure Decision, para. 4.

³⁰ ICC-01/04-01/06-1433 OA 11, para. 77; *see also* Disclosure Decision, para. 4.

³¹

See also, Defence Request, paras 23-24.

³² *See*

- **Issue 2: Whether the Impugned Decision’s position that material requested for challenging the reliability of impugned evidence in respect to, *inter alia*, [REDACTED], is unnecessary to challenge the reliability of their evidence is consistent with a) the provisions of Article 67(2) of the Statute in respect to the Prosecution’s disclosure obligations of material “which may affect the credibility of prosecution evidence”; and b) the provisions of Article 67(1)(e) of the Statute, which entitles an accused to raise defences**

24. This issue arises from the Impugned Decision. In particular, the Single Judge held:

The Defence argument that this information [items confirming Vincent Otti’s death] is required to effectively ‘challenge the reliability of the impugned evidence’ appears to be untenable.³³

25. The Single Judge also held that:

The Single Judge also fails to see how these RFAs can meaningfully assist in determining the ‘veracity of testimonies’ of Prosecution witnesses. The Single Judge considers that, if any evidence may affect the credibility of a Prosecution witness’s account of Mr Otti’s death, then this evidence – and any RFA used to acquire it – would become disclosable. However, there is nothing to suggest that the Prosecution is in possession of any such undisclosed evidence.³⁴

26. As submitted in the Defence Request,³⁵ there are several Prosecution witnesses who already testified about the alleged event of Vincent Otti’s killing and the related circumstances,³⁶ [REDACTED]

[REDACTED]³⁷ Given that these witnesses provided inconsistent accounts about this notorious event,³⁸ it is not only the substance of Vincent Otti’s reported killing that is at stake, but also the Defence’s right to challenge the reliability of the Prosecution witnesses.

27. Pursuant to Article 67(1)(e) of the Statute, Mr Ongwen shall be entitled, in full equality, “to examine, or have examined, the witnesses against him or her [...]. The accused shall also be entitled to raise defences [...]” And according to Article 67(2) of the Statute, the Prosecution shall, as soon as practicable, disclose to the defence evidence in its possession or control which it believes “may affect the credibility of prosecution evidence”.

³³ Impugned Decision, para. 7.

³⁴ Impugned Decision, para. 8.

³⁵ Defence Request, para. 23.

³⁶ [REDACTED]

Defence Request, para. 24.

³⁸ See e.g.: *Witness P-0205*, ICC-02/04-01/15-T-49-CONF ENG ET, p. 29, lines 21-25, and p. 30, lines 12-24; *Witness P-0231*, ICC-02/04-01/15-T-123-CONF-ENG ET, pp. 10-14; *Witness P-0233*, ICC-02/04-01/15-T-112-CONF-ENG ET, p. 13, lines 14-21, and p.14, lines 2-5.

28. As quoted above, the Single Judge ruled that the impugned RFA will become disclosable under Article 67(2) of the Statute if “any evidence [and any RFA used to acquire it] may affect the credibility of a Prosecution witness’s account of Mr Otti’s death.”³⁹ This ruling violates Article 67(1)(e) of the Statute because the Defence is prevented from [REDACTED], if the Defence does not have the information that the impugned RFA and associated materials may contain. In addition, the Defence is also prevented from using this information to challenge the credibility of Prosecution witnesses who already testified about this event.

29. In sum, the Single Judge’s failure to allow the Defence to fully examine and challenge the credibility of the Prosecution witnesses, as part of raising its defence, violated Mr Ongwen’s rights under Article 67(1) of the Statute, and thus requires an immediate resolution by the Appeals Chamber.

- **Issue 3: Whether the Impugned Decision’s position that the missing RFA is “obviously regrettable” is a sufficient response to implement the principle that where there is a human rights violation, there has to be a remedy**

30. This issue arises from the Impugned Decision. In particular, the Single Judge held that:

*As regards the missing RFA, the Single Judge considers it “obviously regrettable” that the Prosecution appears to have lost part of its correspondence record. However, the Single Judge notes that: (i) this is the first time the Prosecution has reported such a problem arising during this trial; (ii) nothing suggests that this RFA led to incriminating evidence against Mr Ongwen and, even if this missing RFA led to such evidence; (iii) nothing suggests that the Prosecution has not disclosed any and all disclosable information received pursuant to the missing RFA. Under the circumstances, the Single Judge does not consider that the Defence has suffered prejudice amounting to a violation of the accused’s right to a fair trial. This said, and although not a failure of ‘disclosure’ per se, the Single Judge emphasises that part of the Prosecution’s obligations under Article 54(1)(b) of the Statute and Rule 10 of the Rules are to preserve any correspondence it uses in the course of conducting its investigation.*⁴⁰

31. On the one hand, the Single Judge recognized that it is “obviously regrettable” that the Prosecution lost one of its RFAs, and thus failed to disclose an important document that it used in the course of conducting its investigation.⁴¹ On the other hand, the Single Judge ruled that

³⁹ Impugned Decision, para. 8.

⁴⁰ Impugned Decision, para. 14.

⁴¹ Impugned Decision, para. 14.

this is not a failure of ‘disclosure *per se*’.⁴² One of the justifications listed is that “this is the first time the Prosecution has reported such a problem arising during this trial.”⁴³

32. Because the Impugned Decision does not provide a reasoned opinion as to what does and what does not constitute a ‘disclosure violation *per se*’, the Defence avers that this Appealable Issue satisfies the requirements under Article 82(1)(d) of the Statute, and thus warrants an immediate resolution by the Appeals Chamber.
33. It is a fundamental principle of international human rights law that any violation of a human right entails the provision of an effective remedy.⁴⁴ The rights enumerated under fair trial in Article 67 of the Statute are human rights. But here, the Single Judge did not articulate any such remedy for the Prosecution’s loss and failure to disclose a piece of evidence that the Prosecution used in the course of their investigation leading to the case against Mr Ongwen.
34. The legal obligation of the Prosecution in a criminal case is different from the role of the Defence. Here, the failure of the Impugned Decision to order the Prosecution to disclose material relevant for the preparation of the Defence in respect to Vincent Otti’s death creates an inequality of arms between the Prosecution and the Defence. The Prosecution is permitted to use the material to satisfy its burden of proof, but the Defence is denied the right to use the material to raise defences against the charges of modes of liability confirmed for Mr Ongwen.

- **Issue 4: Whether the Impugned Decision violates the Single Judge’s Disclosure Decision regarding the disclosure of RFAs, considering that – in the CoC Decision – Mr Ongwen is charged under Article 25(3)(a) of the Statute as an indirect co-perpetrator, and Vincent Otti is identified as one of the co-perpetrators**

35. This issue arises from the Impugned Decision. In particular, the Single Judge held:

*An event in LRA history cannot be considered as material to the preparation of the defence solely because witnesses discussed it or judges were interested enough to ask questions about it.*⁴⁵

36. In this regard, the Single Judge also ruled that:

⁴² Impugned Decision, para. 14.

⁴³ The Prosecution has reported this problem only after the Defence requested the disclosure of this missing RFA in its Defence Request at paras 27-29.

⁴⁴ *Rwamakuba v. Prosecutor*, No. ICTR-98-44C-T, Decision on Appropriate Remedy (31 January 2007), para. 16; *Rwamakuba v. Prosecutor*, No. ICTR-98-44-44C-A, Decision on Appeal Against Decision on Appropriate Remedy (13 September 2007), para. 24.

⁴⁵ Impugned Decision, para. 9.

If Rule 77 of the Rules extended to RFAs sent to acquire any information referenced by Prosecution witnesses across the LRA's existence, the result would be that all RFAs in the Ugandan situation would have to be disclosed by default.⁴⁶

37. The alleged execution of Vincent Otti is not just any event in the LRA history; Vincent Otti was Joseph Kony's deputy leader of the LRA. Joseph Kony, Vincent Otti and Dominic Ongwen (and others) were named as co-perpetrators in the material facts concerning the attack on Pajule.⁴⁷ This is not a surprise, since Vincent Otti together with Joseph Kony, Raska Lukwiya, Okot Odhiambo and Dominic Ongwen were named in the original application for arrest warrants dealing with the Situation in Uganda.⁴⁸ Hence, any information concerning Vincent Otti, including the undisclosed RFAs and associated items, is material to the preparation of the Defence in line with Mr Ongwen's rights under Article 67 of the Statute.
38. In light of the above, the Single Judge's failure to meet the Disclosure Decision standard, which holds that "at least to the extent that RFAs in the Uganda situation investigation led to information which the Prosecution relies upon as incriminating evidence against Mr Ongwen, they must be disclosed as being material to the preparation of the defence"⁴⁹ prejudiced Mr Ongwen and violated his rights under Article 67 of the Statute, and thus warrants an immediate resolution by the Appeals Chamber at the interlocutory level.
- **Issue 5: Whether the Impugned Decision, especially in relation to Vincent Otti's alleged execution from 2007 was consistent with previous Trial Chamber's rulings in respect to evidence outside the temporal jurisdiction of the confirmed charges**
39. This issue arises from the Impugned Decision. In particular, the Single Judge found that:

Vincent Otti's reported death comes about two years after the time period charged in this case. The Defence makes no submission that this event is

⁴⁶ Impugned Decision, para. 10.

⁴⁷ See CoC Decision, p. 73, para 15; see also ICC-02/04-01/15-533 ('Prosecution's Pre-Trial Brief'), paras 206-207.

⁴⁸ See ICC-02/04-01/05-52, para. 13; see also ICC-02/04-01/05-431, para. 2: (The Pre-Trial Chamber II decided to terminate the proceedings against Okot Odhiambo following the Prosecution's request to withdraw the warrant of arrest issued against Okot Odhiambo on 8 July 2005 after it collected conclusive evidence that Okot Odhiambo was dead); See also ICC-02/04-01/05-248: (The Pre-Trial Chamber II decided to terminate the proceedings against Raska Lukwiya following the Prosecution's request to withdraw the warrant of arrest issued against Raska Lukwiya on 8 July 2005 after it collected conclusive evidence that Raska Lukwiya is dead); see also CoC Decision, para. 4.

⁴⁹ Disclosure Decision, para. 14.

*relevant to any of the matters for which the Chamber has previously indicated it may consider evidence falling outside the charged time period.*⁵⁰

40. Throughout this trial, the Defence has made objections⁵¹ that the Prosecution was leading evidence outside the temporal jurisdiction of the confirmed charges in the CoC Decision, and/or attempting to expand the crimes for which Mr Ongwen is on trial. Consistently, the Chamber has held that Mr Ongwen may only be convicted for crimes confirmed in the CoC Decision, but that the Prosecution is permitted to elicit evidence outside the time frame of the confirmed charges for the purposes of supporting contextual elements (such as widespread or systematic), or modes of liability. These objections and rulings are cited in the procedural history.⁵² For example, the Trial Chamber has held that such evidence [outside the temporal jurisdiction of crimes charged and confirmed]:

*[...] might be of relevance for facts and circumstances within the scope, the temporal scope of the confirmed charges that has been, like with these witnesses, happened during or outside the scope of the – temporal scope of the, of the confirmed charges. Acts and conducts put forward by the evidence can be evidence to support the facts and circumstances in the charged time period even if they did not happen during the charged time period. We have decided that before and we reiterate that. And with all evidence received in the case the Chamber will consider the appropriate use of this evidence when deliberating its judgment. So this is in line of what we have already said several times.*⁵³

41. Thus, evidence related to the killing of Vincent Otti in 2007 – including the undisclosed RFAs and associated materials – is admissible as an “act and conduct” to support “facts and circumstances in the charged time period” under the Trial Chamber’s own previous ruling. The Impugned Decision; however, contradicts the previous decisions of the Trial Chamber.
42. Lastly, the Defence submits that it has given notice that Mr Ongwen will present a defence of duress under Article 31(1)(d) of the Statute.⁵⁴ This involves a presentation of evidence concerning Joseph Kony, and his deputy Vincent Otti. By virtue of his position, Vincent Otti played a key role in any common plan of which Mr Ongwen is alleged to have been a part. Hence, any information concerning Vincent Otti’s death is relevant to the preparation of the

⁵⁰ Impugned Decision, para. 9.

⁵¹ See e.g. ICC-02/04-01/15-T-56-CONF-ENG ET, p. 49, lines 21-25 and p. 50, lines 1-21; ICC-02/04-01/15-T-57-CONF-ENG ET, p. 11; ICC-02/04-01/15-T-85-Red-ENG WT, p. 4, lines 16-23, p. 6, lines 4-25, and page 7, lines 1-12; ICC-02/04-01/15-T-95-CONF-ENG, pp. 2-5; ICC-02/04-01/15-T-108-CONF-ENG ET, p. 38, lines 9-25, and p. 39, line 1-5; ICC-02/04-01/15-T-111-CONF-ENG ET, p. 62, lines 15-25; ICC-02/04-01/15-T-131-CONF-ENG ET, p. 53, lines 12-19; ICC-02/04-01/15-T-145-CONF-ENG ET, pp. 17-18; ICC-02/04-01/15-T-147-CONF-ENG ET, pp. 5-6; ICC-02/04-01/15-T-148-CONF-ENG ET, p. 4, lines 21-25, and p. 5, lines 1-5.

⁵² *Supra*, paras 6-9..

⁵³ ICC-02/04-01/15-T-95-CONF-ENG ET, p. 8, lines 16-25 and p. 9, lines 1-3.

⁵⁴ See CoC Decision, para. 151.

defence. The active shadow of Vincent Otti hovers over almost every trial session in this case, and therefore the Single Judge's failure to recognize the materiality of impugned items related to Vincent Otti's death require an immediate resolution by the Appeals Chamber.

B. The Appealable Issues affect the fair and expeditious conduct of the *Ongwen* case proceedings

43. The Defence reiterates and emphasises to the Single Judge that when determining whether a request for leave to appeal should be granted, the Single Judge must not justify or defend the correctness of his decision, but instead focus on determining whether the issues presented significantly affect the fairness of the proceedings.⁵⁵
44. Here, the Defence submits that leaving these Appealable Issues unresolved and unsubstantiated by a reasoned opinion of the Appeals Chamber would significantly affect the fair and expeditious conduct of the *Ongwen* case proceedings. The 'fair conduct of proceedings' ensures that the proceedings are conducted in accordance with international human rights and the rights guaranteed in the Statute. For example, preventing the Defence from the use of evidence – ordering the killing of Vincent Otti by Joseph Kony⁵⁶ – that supports the defence of duress or denying the Defence's right to an effective remedy necessarily affects those rights, as well as the fairness of the proceedings against Mr Ongwen.

C. The Appealable Issues affect the outcome of the *Ongwen* case trial

45. Considering that the Appealable Issues focus on important legal issues which form an essential part of the case against Mr Ongwen, the resolution or not of such issues will significantly affect the outcome of the trial.
46. In other words, if leave is granted and the appeal ultimately successful, reversal of the Impugned Decision may lead to the disputed issues in the *Ongwen* case, such as the issue of lack of the appropriate and reasonable notice of charged crimes⁵⁷ and the leading of evidence on uncharged crime bases.⁵⁸ This could, self-evidently, have an impact on the outcome of the *Ongwen* case trial.

⁵⁵ See e.g. ICC-02/09-02/11-253, para. 28.

⁵⁶ See ICC-02/04-01/15-T-123-CONF-ENG ET, pp. 9-12; ICC-02/04-01/15-T-49-CONF-ENG ET, p. 29, lines 3-9; ICC-02/04-01/15-T-112-CONF-ENG ET, p. 13, lines 14-21, and p.14, lines 2-5.

⁵⁷ See ICC-02/04-01/15-1029-Red, para. 34; see also ICC-02/04-01/15-1098, paras 29-36.

⁵⁸ See ICC-02/04-01/15-1029-Red, para. 35.

D. An immediate resolution of the Appealable Issues may material advance the *Ongwen* case proceedings.

47. As held by the Appeals Chamber, the purpose of interlocutory appeal is “removing doubts about the correctness of a decision or mapping a course of actions along the rights lines”, which “provides a safety net for the integrity of the proceedings”.⁵⁹ In the present case, there is no such safety net since the Impugned Decision deals with an essential jurisdictional issue (temporal jurisdiction) and legal and factual issues related to the preparation of the defence, and may be affected by errors which ought to be resolved by the Appeals Chamber.
48. In light of the fact that the Single Judge expects the Prosecution to complete its presentation of evidence around the end of March 2018⁶⁰ and also the fact that the Single Judge instructed the Defence to provide certain information, including its final lists of evidence and witnesses, three weeks after formal notification of the conclusion of the Prosecution presentations of its evidence,⁶¹ the immediate and urgent resolution of the Appealable Issues by the Appeals Chamber will materially advance the proceedings. If the Appealable Issues are resolved now, they may not have to be raised throughout the ‘Defence case’, which may result in materially advancing the *Ongwen* case proceedings.
49. The correctness of the Impugned Decision can be adjudicated on an interlocutory basis without causing any interruption to trial proceedings whatsoever. Therefore, granting an interlocutory appeal will ensure that the *Ongwen* case proceedings are on proper foundations.

VI. REMEDY SOUGHT

50. For the reasons stated above, the Defence respectfully requests that leave is granted by the Trial Chamber to appeal these five issues:
- a) *Issue 1*: Whether the Impugned Decision meets the standard articulated in the *Lubanga* Case that a) the expression “material to the preparation of the defence” has to be interpreted broadly”; and b) that Rule 77 of the RPE encompasses “all objects that are relevant for the preparation of the defence”;

⁵⁹ ICC-01/04-168, para. 15.

⁶⁰ ICC-02/04-01/15-1162, para. 1.

⁶¹ ICC-02/04-01/15-1074, para. 3; *see also* ICC-02/04-01/15-1021, paras 6-7.

- b) **Issue 2:** Whether the Impugned Decision’s position that material requested for challenging the reliability of impugned evidence in respect to, inter alia, [REDACTED], is unnecessary to challenge the reliability of their evidence is consistent with a) the provisions of Article 67(2) of the Statute in respect to the Prosecution’s disclosure obligations of material “which may affect the credibility of prosecution evidence”; and b) the provisions of Article 67(1)(e) of the Statute, which entitles an accused to raise defences;
- c) **Issue 3:** Whether the Impugned Decision’s position that the missing RFA is “obviously regrettable” is a sufficient response to implement the principle that where there is a human rights violation, there has to be a remedy;
- d) **Issue 4:** Whether the Impugned Decision violates the Single Judge’s Disclosure Decision regarding the disclosure of RFAs, considering that – in the CoC Decision – Mr Ongwen is charged under Article 25(3)(a) of the Statute as an indirect co-perpetrator, and Vincent Otti is identified as one of the co-perpetrators;
- e) **Issue 5:** Whether the Impugned Decision, especially in relation to Vincent Otti’s alleged execution from 2007 was consistent with previous Trial Chamber’s rulings in respect to evidence outside the temporal jurisdiction of the confirmed charges.

Respectfully submitted,



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Hon. Krispus Ayena Odongo
On behalf of Dominic Ongwen

Dated this 7th day of February, 2018
At Gulu, Uganda