

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: **4 June 2019**

APPEALS CHAMBER

Before: Judge Luz del Carmen Ibañez Carranza, Presiding Judge
Judge Chile Eboe-Osuji
Judge Howard Morrison
Judge Piotr Hofma ski
Judge Solomy Balungi Bossa

SITUATION IN UGANDA

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

PUBLIC, with Annexes A and B

**Corrected Version of
‘Defence’s appeal against the ‘Decision on Defence Motions Alleging
Defects in the Confirmation Decision’’ (ICC-02/04-01/15-1496)**

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. Having regard to Articles 19(4), 21, 51(4), 64(2), 67(1), 81(1)(a), 82(1)(d) of the Rome Statute ('Statute'), Rules 122(4), 134(2)-(3), 155, 156, 158 of the Rules of Procedure and Evidence ('Rules'), Regulations 64, 65 of the Regulations of the Court ('RoC'), and the Trial Chamber IX's ('Trial Chamber') 'Decision on Defence Motions Alleging Defects in the Confirmation Decision'¹ and 'Decision on Defence Request for Leave to Appeal a Decision on Motions Alleging Defects in Confirmation Decision',² the Defence for Dominic Ongwen ('Defence') respectfully requests that the Appeals Chamber:

- a) **GRANT** the four grounds of appeal against the Impugned Decision;
- b) **REVERSE** the Impugned Decision, in particular the Trial Chamber's determination, based on procedural grounds alone, not to rule on the facial deficiency of the charged crimes and modes of liability and jurisdictional arguments on indirect co-perpetration and forced marriage;
- c) **REMAND** the matter to the Trial Chamber for a determination on each of the remedies sought in the Defence's Defects Series.³

II. APPLICABLE LAW

2. The ICC Appeals Chambers in the *Banda and Jerbo* and *Lubanga* cases found that:

[T]he Appeals Chamber will 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

¹ *Ongwen*, Decision on Motions Alleging Defects in the Confirmation Decision, ICC-02/04-01/15-1476, 7 March 2019 ('**Impugned Decision**').

² *Ongwen*, Decision on Defence Request for Leave to Appeal a Decision on Motions Alleging Defects in Confirmation Decision, ICC-02/04-01/15-1493, 1 April 2019 ('**Decision on Leave to Appeal**').

³ *Ongwen*, Defence Motion on Defects in the Confirmation of Charges Decision: Defects in the Charged Crimes (Part I of the Defects Series), ICC-02/04-01/15-1430, 1 February 2019; *Ongwen*, Defence Motion on Defects in the Confirmation of Charges Decision: Defects in the Modes of Liability (Part II of the Defects Series), ICC-02/04-01/15-1431, 1 February 2019; *Ongwen*, Defence Motion on Defects in the Confirmation of Charges Decision: Defects in Notice in Pleading of Command Responsibility under Article 28(a) and Defects in Pleading of Common Purpose Liability under Article 25(3)(d)(i) or (ii) (Part III of the Defects Series), ICC-02/04-01/15-1432, 1 February 2019; *Ongwen*, Defence Motion on Defects in the Confirmation of Charges Decision: Defects in the Charged Crimes (Part IV of the Defects Series), ICC-02/04-01/15-1433, 1 February 2019 (collectively, '**Defects Series**').

committed such an error, the Appeals Chamber will only intervene if the error materially affected the Impugned Decision.⁴

3. In respect of the substantiation requirements of legal errors, the Appeals Chambers found that:

Errors of law do not raise a question as to the standard of review as directly as errors of fact. Where a party contends that a Trial Chamber made an error of law, the Appeals Chamber, as the final arbiter of the law of the Tribunal, must determine whether there was such a mistake. A party [...] must be prepared to advance arguments in support of the contention; but, if the arguments do not support the contention, that party has not failed to discharge a burden in the sense that a person who fails to discharge a burden automatically loses his point. The Appeals Chamber may step in and, for other reasons, find in favour of the contention that there is an error of law.⁵

4. The Appeals Chamber in the *Situation in the Democratic Republic of the Congo* held in respect of fair trial in the context of Article 82(1)(d) appeals that:

The term “fair” in the context of article 82 (1) (d) of the Statute is associated with the norms of a fair trial, the attributes of which are an inseverable part of the corresponding human right, incorporated in the Statute by distinct provisions of it (articles 64 (2) and 67 (1)) and article 21 (3); making its interpretation and application subject to internationally recognized human rights. The expeditious conduct of the proceedings in one form or another constitutes an attribute of a fair trial. The principles of a fair trial are not confined to trial proceedings but extent to pre-trial proceedings as well as the investigation of crime; a fact directly borne out by the provisions of articles 55 and 54

⁴ *Banda and Jerbo*, 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 statements (ICC-02/05-03/09-199) and additional instructions on translation, ICC-02/05-03-09-295 OA2, 17 February 2012, para. 20, referred to in *Lubanga*, Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction, ICC-01/04-01/06-3121-Red, 1 December 2014, para. 18; see also, *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, ICC-02/04-01/05-408 OA3, 16 September 2009, para. 80; *Ruto and Sang*, Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled ‘Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute, ICC-01/09-01/11-307 OA, 30 August 2011, para 89; see also, **Annex A**: Trifterrer/Ambos, The Rome Statute of the International Criminal Court, A Commentary, Third Edition, 2016, Article 81 Appeal against decision of acquittal or conviction or against sentence, Christopher Staker/Franziska Eckelmans, p. 1933, paras 40-41.

⁵ ICTY: *Vasiljevi*, Judgment, IT-98-32-A, 25 February 2004, para. 6, available at: <http://www.icty.org/x/cases/vasiljevic/acjug/en/val-aj040225e.pdf>; *Situation in the Democratic Republic of Congo*, Judgment on the Prosecutor’s Application for Extraordinary Review of Pre-Trial Chamber I’s 31 March 2006 Decision Denying Leave to Appeal, ICC-01/04-168 OA3, 13 July 2006, paras 33-34.

(1) (c) of the Statute. Breach of or deviation from the rules of a fair trial at the pre-trial stage of the proceedings may have implications on the proceedings and may affect the outcome of the trial. Purging the pre-trial process of errors consequential in the above sense is designated as a safeguard for the integrity of the proceedings. This is at the core of article 82 (1) (d) of the Statute.⁶

III. SUBMISSIONS

5. The *Ongwen* case is unprecedented at the International Criminal Court ('ICC'). No single accused has ever faced 70 charges and 8 modes of liability in the proceedings at this Court, or – to the best of the Defence's knowledge – in any other court or tribunal in the lea of International Criminal Law.
6. This appellate brief incorporates the Defence submissions presented in its Defects Series as well as its 'Defence Request for Leave to Appeal 'Decision on Defence Motions Alleging Defects in the Confirmation Decision'.⁷ The Defence maintains that Mr Ongwen suffers prejudice due to the errors in the 'Decision on the confirmation of charges against Dominic Ongwen',⁸ which in turn, violate his right to a fair trial.

A. The appellate issue granted by the Trial Chamber

7. The Trial Chamber granted the Defence Request for Leave to Appeal on the following issue:

[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).⁹

8. In respect to the abovementioned issue, the Trial Chamber found that even though the Defence "makes explicit reference to Rules 122(4) and 134(2) of the Rules, the Chamber's

⁶ *Situation in the Democratic Republic of the Congo*, Judgment on the Prosecutor's Application for Extraordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, ICC-01/04-168 OA3, 13 July 2006, para. 11.

⁷ *Ongwen*, 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, ICC-02/04-01/15-1493, 14 March 2019 ('**Defence Request for Leave to Appeal**').

⁸ *Ongwen*, Decision on the confirmation of charges against Dominic Ongwen, ICC-02/04-01/15-422-Red, 23 March 2016 ('**Confirmation Decision**').

⁹ Decision on Leave to Appeal, para. 3; see also, Defence Request for Leave to Appeal, paras 3, 4-26.

equivalent reasoning under Article 19(4) of the Statute equally falls under this issue.”¹⁰ The Trial Chamber held that the “challenges to the formulation of the charges and of the Confirmation Decision and jurisdiction of the Court have the potential to considerably influence the charged crimes”, and thus significantly affect the outcome of the *Ongwen* trial.¹¹

9. The Trial Chamber also found that the Defence Request for Leave to Appeal mischaracterized the Impugned Decision by asserting that it failed to address Rule 134(3) of the Rules,¹² and that the Defence tried to re-litigate the issue of whether notice has been provided in accordance with Article 67(1)(a) of the Statute. In this regard, the Trial Chamber concluded that the issue is not about whether notice has been properly provided, but whether a rejection of the Defects Series on procedural grounds alone is possible.¹³

B. FIRST GROUND OF APPEAL: The Trial Chamber’s characterization of the issue and the Defence’s submissions on same is erroneous as a matter of law

10. 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.
11. In granting the leave to appeal, the Trial Chamber reframed the Defence position on the issue of 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.”¹⁴ Thus, the Trial Chamber effectively excised the fundamental fair trial matter of notice from the appellate issue granted.
12. In its Defects Series and the Defence Request for Leave to Appeal, the Defence reiterated that the central appellate issue is whether the fundamental fair trial violation being the lack of notice to Mr Ongwen can be circumvented by the Trial Chamber via procedural rules.¹⁵ The Defence emphasizes the issue of whether notice under Article 67(1)(a) of the Statute has been

¹⁰ Decision on Leave to Appeal, para. 11, footnote 19, and para. 17.

¹¹ Decision on Leave to Appeal, paras 14-15.

¹² Decision on Leave to Appeal, para. 12; see also, Defence Request for Leave to Appeal, para. 6.

¹³ Decision on Leave to Appeal, para. 13; see also, Defence Request for Leave to Appeal, paras 4, 11-26.

¹⁴ Decision on Leave to Appeal, paras 11-13.

¹⁵ Defects Series: Part I of the Defects Series, ICC-02/04-01/15-1430, paras 3, 6-19; see also, Defence Request for Leave to Appeal, paras 4, 11-12.

properly provided, because Mr Ongwen has the right to know in detail the charges and modes of liability against him, should he choose to defend himself during the trial.

13. Moreover, the Defence's submissions on the lack of notice in the charging document are further supported by Judge Marc Perrin De Brichambaut's findings in his partially dissenting opinion to the Pre-Trial Chamber II's decision rejecting the 'Defence Request for Leave to Appeal Issues in Confirmation of Charges Decision':

The fair conduct of the trial is seriously affected in the instant case because the weakness of the reasoning set out in the Bench's own decision restricts the rights of the defence. The way in which the Decision on the confirmation of charges was drafted does not provide the Defence with details of what evidence was relied on or how the Chamber defined the crimes. The principle of equality of arms is violated since the Defence is not in a situation to examine the legal and factual bases for the Bench's Decision on the confirmation of charges. The outcome of the trial may well be affected.¹⁶

14. The Defence avers that the Trial Chamber incorrectly exercised its discretion by mischaracterizing the issue at stake and the Defence arguments on the matter of notice, which amounts to an error of law that materially affects the Impugned Decision. The Trial Chamber's error materially affects the Impugned Decision because it limits the Defence in raising arguments about the lack of notice in this appellate brief. In addition, the Trial Chamber is incorrectly defining for the Appeals Chamber the parameters of its judgment on this appeal, *i.e.* the Trial Chamber's position is that the notice is not part of the issue and therefore should not be considered by the Appeals Chamber.
15. 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. The Defence recognizes that the Appeals Chamber has discretion to determine whether leave

¹⁶ *Ongwen*, Partially dissenting opinion of Judge Marc Perrin de Brichambaut, ICC-02/04-01/15-428-Anx-tENG, 14 September 2016, para. 29, for reference see *Ongwen*, Decision on the Defence request for leave to appeal the decision on the confirmation of charges, ICC-02/04-01/15-428, 29 April 2016; see also, *Gbagbo and Blé Goudé*, Dissenting Opinion to the Chamber's Oral Decision of 15 January 2019, Judge Olga Herrera Carbuccion, ICC-02/11-01/15-1234, para. 3: "The dissent is often more than just a plea: it safeguards the integrity of the judicial decision-making process by keeping the majority accountable for the rationale and consequences of its decision."

was properly granted and whether it respects the true nature of an impugned decision.¹⁷ Thus, the Defence 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 a fair trial right to notice.

C. 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)

16. In the Impugned Decision, the Trial Chamber found that Rule 134(2) of the Rules “was specifically designed to ensure that procedure which occurred between the confirmation hearing and the commencement of trial ‘are settled before the trial commences’.” It further found that the pronouncement of the Confirmation Decision falls within this period, which is why Defence reliance on Rule 134(3) of the Rules “(governing motions on issues which ‘arise during the course of trial’) is also misguided.”¹⁸
17. The Trial Chamber also held that although the challenges against the Confirmation Decision fall within the intended purpose of this Rule, Rule 134(2)’s 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 cannot be tolerated.”¹⁹
18. While the Trial Chamber was correct in finding that Rule 134(2) of the Rules applies to the trial period, it misunderstood the general purpose of Rule 134 of the Rules as a whole, which is directed toward dealing with matters that may arise *throughout* the trial proceedings.

¹⁷ *Lubanga*, Decision on the admissibility of the appeals against Trial Chamber I’s ‘Decision establishing the principles and procedures to be applied to reparations’ and directions on the further conduct of the proceedings, ICC-01/04-01/06-2953, 14 December 2012, para. 50: “[w]here necessary, the Appeals Chamber itself has to establish **the true nature of an impugned decision**, in order to ensure that the decision in question is appropriately before it, and that the appeal is determined pursuant to the correct legal basis;” see also, **Annex A: Triferrer/Ambos**, The Rome Statute of the International Criminal Court, A Commentary, Third Edition, 2016, Article 82 Appeal against other decisions, Volker Nerlich, pp 1961-1962, paras 19-20: “The Appeals Chamber has refused to consider arguments on appeal that fall outside the ‘issue’ in relation to which leave to appeal was granted, in particular, of the first-instance Chamber has rejected leave to appeal in respect of the argument now raised on appeal. Nevertheless, while the ‘issue’ therefore limits – at least in practice – the Appeals Chamber’s consideration, it determines in appeals under subparagraph (d) whether the decision under appeal – in particular, its operative part – can stand, and does not merely decide the ‘issue’ in the abstract.” (Bold added).

¹⁸ Impugned Decision, para. 22; see also, Decision on Leave to Appeal, para. 12.

¹⁹ Impugned Decision, para. 23. (Bold added).

Instead, the Trial Chamber incorrectly considered the Rule 134 of the Rules to serve as a tool against the alleged Defence strategic plans to undermine the procedural economy and expeditious conduct of the proceedings.

19. On the contrary, it is the Defence position that the purpose behind Rule 134 of the Rules is to ensure that the Trial Chamber stays within the confines of the requirements of fair and expeditious trial under Article 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 for it to rule on matters that arose “during the course of trial”.
20. The Defence submits that Rule 134 of the Rules was drafted precisely for situations like the present one. Since not all trial objections can be foreseen at the commencement of trial, nor their contexts and implications be known, Rule 134 of the 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.²⁰

The Trial Chamber erred by not applying Rule 134(3) of the Rules

21. Under Rule 134 of the Rules, nothing prohibits the parties from raising issues after the start of the trial. In fact, Rule 134(3) of the Rules permits the Trial Chamber to deal with continuing effects of motions related to the trial proceedings after the commencement of the trial. It

²⁰ The scholars in the commentaries on the Rome Statute suggest that Rule 134 of the Rules indeed permits the Trial Chamber to address parties’ challenges at a later stage, considering that a restrictive and uncompromising interpretation of the Rule would be unrealistic and potentially unfair; see, **Annex A**: Triferrer/Ambos, *The Rome Statute of the International Criminal Court, A Commentary, Third Edition, 2016*, Article 81 Appeal against decision of acquittal or conviction or against sentence, Christopher Staker/Franziska Eckelmans, p. 1935, para. 44: “[t]he Rules provide certain opportunities for the parties to raise objections or observations relevant to the proceedings and require the Trial Chamber to address them;” see also, **Annex B**: *The International Criminal Court, Elements of Crimes and Rules of Procedure and Evidence*, Roy S. Lee, *Motions Relating to the Trial Proceedings*, pp 543-544: “[t]his rule is a direct response to the concerns felt by many delegations that proceedings at the ICTR and ICTY were being delayed by endless procedural challenges. In the initial debate, the idea of prescribing explicit time limits for motions before the trial – either in the Rules or in the Regulations of the Court – was discussed. However, due to opposing views as to the feasibility of such time limits, this idea was abandoned. [...] Challenges may not however be confined to the trial procedure itself. Parties may wish to challenge procedures that occurred between the confirmation hearing and the commencement of the trial; sub-rule 2 ensures that any such issues are settled before the trial commences. [...] The sub-rule would have remained in this raw and uncompromising state but for **the concerns of some delegations that it was unrealistic and potentially unfair to insist that challenges could not be made at a later stage**. For this reason sub-rule 2 allows later challenges but only with leave of the Court.” (Bold added).

implicitly recognizes the Trial Chamber's powers and obligations under Article 64(2) of the Statute, and requires the Trial Chamber to exercise these powers and obligations.²¹

22. Rule 134(3) of the Rules, the same Rule under which the Defence brought its Defects Series before the Trial Chamber, is in place to safeguard the right to a fair trial during the conduct of the proceedings. It would be illogical to assume that all potential issues would be foreseeable prior to the commencement of the trial proceedings. Certain issues only become evident once the proceedings unfold and develop. Thus, by providing a procedural avenue to deal with these issues throughout the trial proceedings, Rule 134(3) of the Rules recognizes that not all issues related to the trial proceedings are evident prior to the commencement of the trial.
23. In its Decision on Leave to Appeal, the Trial Chamber does not provide reasons as to why the Defence is "misguided" to rely on Rule 134(3) of the Rules.²² References at paragraph 11 of the same decision to its "equivalent reasoning under Article 19(4)" are to the Defence pleadings, but shed no light on the Trial Chamber's reasoning. If this point is directed to the 'Issue Two' – the jurisdictional defect of the forced marriage allegations, for which leave was not granted, it is necessary to point out that this objection, as stated in the Defence Request for Leave to Appeal, was in fact raised in the 'Defence Brief for the Confirmation of Charges Hearing',²³ and argued at the Confirmation of Charges Hearing.²⁴ Thus, the 'Issue Two' was clearly within the time frame of Rule 134(1) of the Rules. Similarly, "issue related to proper conduct of the proceedings" referred to in Rule 122(3) of the Rules is not artificially limited to the time period of the pre-trial.
24. For the reasons stated above, 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. This resulted in

²¹ *Lubanga*, 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", ICC-01/04-01/06-1486, (OA 13), 21 October 2009, para. 46: The Appeals Chamber in *Lubanga* stated that 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." Although the Judgment on the appeal revolved around the disclosure obligations of the Prosecution, the Appeals Chamber clearly found that this is the overall role of the Trial Chamber pursuant to Article 64(2) of the Statute.

²² Decision on Leave to Appeal, para. 12.

²³ *Ongwen*, Third Public Redacted Version of "Defence Brief for the Confirmation of Charges Hearing", filed on 18 January 2016 as ICC-02/04-01/15-404-Conf, ICC-02/04-01/15-404-Red3, 26 May 2016 ('**Defence Brief for the Confirmation Hearing**'), paras 128-130.

²⁴ Transcript of hearing, 26 January 2016, ICC-02/04-01/15-T-23-CONF-ENG ET, pp 14-22; *Ongwen*, Defence Request for Leave to Appeal Issues in Confirmation of Charges Decision, ICC-02/04-01/15-423, 29 March 2016 ('**Defence Request for Leave to Appeal the Confirmation Decision**'), paras 25-35.

violation of Mr Ongwen’s fair trial rights, including his fundamental right to notice under Article 67(1)(a) of the Statute. The prejudice caused by the violation is that Mr Ongwen throughout the trial is deprived of his right to know “in detail of the nature, cause and content” of the (confirmed) charges and modes of liability.

D. 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

25. The Defence submits that the heart of this ground is the Trial Chamber’s analysis of the Defence argument that “fairness to the accused is the determinative criterion in whether this motion should be entertained by the Trial Chamber, and that procedural rules, if any, should be subordinated to the fairness criterion”; the Trial Chamber disagreed with this, writing that “[w]ere the Defence to be correct, it could subvert all procedural requirements by the mere invocation of the fair trial rights of the accused without any further explanation.”²⁵ To support this, the Trial Chamber cites the Appeals Chamber’s majority decision in the *Katanga and Ngudjolo* case (Judge Ekaterina Trendafilova and Judge Erkki Kourula dissenting).²⁶
26. First, the Trial Chamber’s assertion that the Defence argument would subvert “**all** procedural requirements by the mere invocation of the fair trial rights of the accused without any further explanation”²⁷ is legal hyperbole. Second, the context of the Appeals Chamber’s ruling in the *Katanga and Ngudjolo* case is distinguishable from the present case, because a) the *Katanga and Ngudjolo* case involved the conduct of domestic authorities prior to the surrender of the accused, and not that of the ICC Chamber; and b) the context was the stay of proceedings.²⁸

²⁵ Impugned Decision, para. 25.

²⁶ *Katanga and Ngudjolo*, 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”, ICC-01/04-01/07-2259 OA 10, 12 July 2010; *Katanga and Ngudjolo*, 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”, Dissenting Opinion of Judge Erkki Kourula and Judge Ekaterina Trendafilova, ICC-01/04-01/07-2297 OA 10, 29 July 2010. See also Impugned Decision, para. 25.

²⁷ Impugned Decision, para. 25. (Bold added).

²⁸ The Appeals Chamber was unequivocal that its main findings were based “on the facts and circumstances of the present case” being that the Defence for Mr. Katanga were seeking a stay of proceedings and the alleged unlawful pre-surrender arrest and detention of Mr. Katanga in *Katanga and Ngudjolo*, 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”, ICC-01/04-01/07-2259 OA 10, at paras 1 to 2 and see also paras. 4 to 7.

27. While both the *Katanga and Ngudjolo* and the *Ongwen* cases deal with fundamental matters of fairness, the fact that the issue in our case arises during the trial and within the ICC judicial setting makes the holding inapplicable.
28. Furthermore, to support its ruling, the Trial Chamber claimed that “[a]t the commencement of trial, the Defence did not raise any concrete objections to the charges and did not object to the trial proceeding” and that “[t]he Defence elected to remain silent before this Chamber on all these matters until now, without any valid explanation as to why this delay occurred.”²⁹
29. However, this is simply not true. It is important to note that the Defence raised its objections and observations against the defects in notice in pleading the charges and modes of liability at both the pre-trial and trial levels, on numerous occasions:
- a) On **18 January 2016**, in its Defence Brief for the Confirmation Hearing, the Defence requested that the Pre-Trial Chamber II refrain from confirming the charge of forced marriage since forced marriage is not recognised as a crime before the ICC or in the Statute.³⁰
 - b) On **26 January 2016**, at the Confirmation of Charges Hearing before the Pre-Trial Chamber II, the Defence has again raised a jurisdictional challenge with regard to forced marriage.³¹
 - c) On **29 March 2016**, the Defence submitted the Defence Request for Leave to Appeal the Confirmation Decision, in which it effectively raised the defective notice issue by arguing that the reasoning in the Confirmation Decision provides insufficient specificity in the law and the facts supporting the charges and modes of liability.³²
 - d) On **23 May 2016**, at the Status Conference hearing before the Trial Chamber, the Defence has submitted that:

²⁹ Impugned Decision, para. 26 and 27.

³⁰ Defence Brief for the Confirmation Hearing, paras 128-130.

³¹ Transcript of hearing, 26 January 2016, ICC-02/04-01/15-T-23-CONF-ENG ET, pp 14-18; see also, Defence Request for Leave to Appeal, paras 27-29; see also, Defence Request for Leave to Appeal the Confirmation Decision, para. 2(e) and paras 40-44.

³² Defence Request for Leave to Appeal the Confirmation Decision, para. 2(c), paras 25-35.

As long as it comes to the right of an accused, the right confirmed by the Statute, your Honours, I think he will exercise them, but he has to have notice. It's about notice. One of the issues about this case is about notice, notice, notice, notice, notice.³³

- e) On **12 June 2016**, during the Prosecution's Opening Statements before the Trial Chamber, the Defence has raised the following objections:

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

MR TAKU: I have a standing objection. I think I should wait until Mr Gumpert finishes or the Prosecutor finishes and then I can make my objections on the record [...] Yes, your Honour. But if the objections pertain to charges or crimes bases, allegations, not in the indictment, that we received no previous -- that were not confirmed, I think it's pertinent to raise them, put them on record.

PRESIDING JUDGE SCHMITT: Mr Taku, we have taken notice of that, and, of course, the Chamber is fully aware of the confirmed charges and how far they reach and how far they do not reach.³⁴

- f) On **27 October 2017**, the Defence filed its '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' and argued that:

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

³³ Transcript of hearing, 23 May 2016, ICC-02/04-01/15-T-25-ENG ET, p. 38, lines 15-18.

³⁴ Transcript of hearing, 12 June 2016, ICC-02/04-01/15-T-26-ENG ET, p. 21, lines 22-25, p. 22, lines 1-4, p. 40, lines 22-24, p. 41, lines 1-8.

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.³⁵

- g) On **11 December 2017**, in its ‘Defence Observations on Fair Trial and Request for Orders on Prosecution Resources and Additional Defence Resources’, the Defence averred that:

In the *Ongwen* case, Mr Ongwen was not provided notice with a sufficient degree of specificity. Instead, the Prosecution provided a smörgåsbord of charges and modes of liability, with the idea that the Chamber would make a final determination of charges based on the evidence.³⁶

- h) On **10 January 2018**, the Defence filed the ‘Addendum to ‘Defence Request for Findings on Fair Trial Violations and Remedy, Pursuant to Articles 67 and 64 of the Rome Statute’ (ICC-02/04-01/15-1127)’, and submitted that:

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’s rights.³⁷

- i) On **5 July 2018**, in its ‘Defence Request for Leave to File a No Case to Answer Motion and Application for Judgment of Acquittal’, the Defence referred to the Appeals Chamber’s judgment in the *Bemba et al.* case, which confirmed that “the accused has the right to be duly informed of the “nature, cause and content” of each “charge” of the case, pursuant to article 67(1) (a) of the Statute”,³⁸ and, *inter alia*, averred that:

³⁵ *Ongwen*, 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’, ICC-02/04-01/15-1029, 8 November 2017, para. 34.

³⁶ *Ongwen*, Defence Observations on Fair Trial and Request for Orders on Prosecution Resources and Additional Defence Resources, ICC-02/04-01/15-1098, 11 December 2017, para. 33.

³⁷ *Ongwen*, Addendum to ‘Defence Request for Findings on 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’, ICC-02/04-01/15-1129, 10 January 2018, para. 10.

³⁸ *Bemba et al.*, Judgment on the appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial

The Defence avers that where notice is insufficient, as it is in this case, the Defence cannot present a defence. As highlighted in Judge Brichambaut's separate opinion, the Confirmation of Charges Decision is deficient because it does not explicitly define some of the charges and modes of liability and the supporting evidence [i]f each charge is not identified. This is notwithstanding the Pre-Trial Chamber's duty to set out, clearly and precisely, definitions of each of the crimes charged against the accused, and supplement each definition with succinct description of the main evidence it considers relevant to make out each of these crimes and each of the modes of liability ascribed to the accused.

It is not for the Defence to guess against which conduct it must defend. Mr Ongwen has the right not to be called to answer a charge unless there is sufficient and credible evidence of his implication in the offences with which he is charged.³⁹

- j) On **18 September 2018**, during the Defence's presentation of Opening Statements, Co-Counsel Beth Lyons argued in respect of the notice issue the following:

Now, unfortunately, the notice in this case, we believe, is defective. I will not be able to go through all of my arguments about this and will raise this in writing, but let me just briefly explain some of the ideas.

[...]

Now, it is our position that – and we agree with Judge Brichambaut on this – that the reasoning of the Confirmation of Charges Decision and the charges, there ha[s] to be some kind of connection to make a well-reasoned opinion. And this is important because he criticised -- he agreed with, but he also criticised in a separate opinion the decision from the Pre-Trial Chamber saying it does not provide the Defence with details of what evidence was relied on and how the Chamber defined the crimes. Now, Judge Brichambaut makes a number of other points regarding the lack of contextual elements; minimal, small amounts of elements from modes of liability; no explanations by the judges for their decisions; no explanation of the

Chamber VII entitled "Judgment pursuant to Article 74 of the Statute", ICC-01/05-01/13-2275-Red, 8 March 2018, para. 185.

³⁹ *Ongwen*, Defence Request for Leave to File a No Case to Answer Motion and Application for Judgment of Acquittal, ICC-02/04-01/15-1300, 5 July 2018, paras 23-24.

underlying crimes and their elements, et cetera. And I urge you to look at his separate opinion because he can explain it better than I can, obviously, but it is an important overview as a starting place for this.⁴⁰

k) Finally, on **1 February 2019**, after the extensive record of objections raised within the period of almost three years, of which all of them were either dismissed or remained unaddressed by both the Pre-Trial Chamber II (save for Judge Marc Perrin de Brichambaut)⁴¹ and the Trial Chamber, the Defence proceeded to file its Defects Series.

30. While the Trial Chamber remains critical of the Defence attempts to raise notice issues,⁴² the Defence maintains that the issue of notice in relation to the charged crimes and modes of liability is so fundamental to fair trial in this case that it would be derelict in its duty not to raise and litigate the issues at every possible opportunity as they arise in the trial.
31. Moreover, the *ad hoc* appellate jurisprudence has held that fair trial issues, including defects in the indictment can be raised at any time, even post-trial.⁴³ In particular, when lack of notice is raised during trial, the Trial Chamber must consider whether fairness requires amendment of the indictment.⁴⁴

⁴⁰ Transcript of hearing, 18 September 2018, ICC-02/04-01/15-T-179-CONF-ENG ET, page 94, lines 19 to 21, page 95, lines 5 to 16. See further, pages 95 to 101.

⁴¹ *Ongwen*, Partially dissenting opinion of Judge Marc Perrin de Brichambaut, ICC-02/04-01/15-428-Anx-tENG, 14 September 2016, para. 29; *Ongwen*, Separate opinion of Judge Marc Perrin de Brichambaut, ICC-02/04-01/15-422-Anx-tENG, 6 June 2016.

⁴² Decision on Leave to Appeal, paras 12-13.

⁴³ ICTY and ICTR: *Kupreški et al.*, Appeal Judgment, IT-95-16-A, 23 October 2001, paras 114, 124, 246, available at: <http://www.icty.org/x/cases/kupreskic/acjug/en/kup-aj011023e.pdf>; *Ntagerura et al.*, Judgement and Sentence, ICTR-99-64-T, 25 February 2004 (judgment affirmed by the Appeals Chamber on 7 July 2006), paras 29-39: available at <http://unictr.irmct.org/sites/unictr.org/files/case-documents/ict-99-46/trial-judgements/en/040225.pdf>: Where the allegations are deficient and violate a defendant's right to fair trial, defects in the indictment are post-trial issue.

⁴⁴ ICTR: *Muvunyi*, Judgment, ICTR-2000-55A-A, 29 August 2008, para. 18, available at: <http://www.worldcourts.com/ict-99-64-A>; *Mpambara*, Judgment, ICTR-01-65-T, 12 September 2006, para. 29, available at: http://hrlibrary.umn.edu/instrree/ICTR/MPAMBARA_ICTR-01-65/MPAMBARA_ICTR-01-65-T.pdf; see also, *Ntagerura et al.*, Judgement, ICTR-99-64-A, 7 July 2006, para. 27, available at: <http://www.worldcourts.com/ict-99-64-A>; *Ndindiliyimana et al.*, Appeals Judgment, ICTR-00-56-A, 11 February 2014, paras 237-241, 254, available at: <http://unictr.irmct.org/sites/unictr.org/files/case-documents/ict-00-56/appeals-chamber-judgements/en/140211.pdf>: As a case in point, the Appeals Chamber in the "Military II" case reversed Mr Nzuwonemeye's conviction based on lack of notice, *i.e.* defects in the indictment.

32. Thus, in exercising its Article 64(2) discretion, the Trial Chamber assessed the procedural factors of ‘untimeliness’ and alleged ‘lack of objections’⁴⁵ against the guarantees of the rights of the accused under Article 67(1) of the Statute. In this regard, the Trial Chamber concluded that the procedural factors can and should take precedence over Mr Ongwen’s right to a fair trial, and decided not to rule on the substance of the Defects Series. Thus, leaving the potential fair trial violations unaddressed and in limbo.
33. Put differently, when considering the array of the elements (‘fairness’ and ‘expeditiousness’) contained within Article 64(2) of the Statute, the Trial Chamber paid, in the Defence view, paramount importance to the latter. The only common denominator in the Trial Chamber’s reasoning which ultimately resulted in the Impugned Decision is that of Mr Ongwen’s overdue objections, and alleged interference with expeditiousness and procedural economy of this trial.
34. In this exact instance, the Trial Chamber incorrectly exercised its discretion which amounted to an error of law. This error of law materially affects the Impugned Decision because Mr Ongwen is not informed in detail of charges and modes of liability for which he is being tried. Hence, this prejudices his ability to exercise his right to present an effective defence.
35. To conclude, the Trial Chamber’s assertion that “the Chamber will decide upon the **proper** legal interpretation of the charged crimes and modes of liability in the applicable law of its judgment”⁴⁶ is late. If the Trial Chamber rules on these matters in its Article 74 judgment after the conclusion of the trial-phase, then Mr Ongwen’s right to prepare and present his defence (*e.g.*, submitting relevant evidence or calling witnesses and experts) in defence of charges and modes of liability, as required under Articles 67(1)(a) and (e) of the Statute, will be moot.

E. FOURTH GROUND OF APPEAL: The purpose of the procedural rules concerning the conduct of proceedings cannot be antithetical to the core principles of the Rome Statute, including the fair trial rights of the accused

36. The Statute, prior to its adoption in 1998 and entry into force in 2002, was negotiated by State Parties and other participants through the Preparatory Committee for the ICC. At stake were the interests of different parties who would be involved directly in the Court, as well as State

⁴⁵ Impugned Decision, paras 24-27.

⁴⁶ Impugned Decision, para. 37. (Bold added).

Parties who comprised the Assembly of States Parties ('ASP'). Since 2002, the ASP has continued to be the forum for such discussion and negotiation.

37. Within this context, the rights of the accused under Articles 66 and 67 of the Statute, which mirror the International Covenant on Civil and Political Rights ('ICCPR') were a cornerstone. An accused's right to a fair trial and to the presumption of innocence are principles embodied in a number of international instruments.⁴⁷
38. The language of Article 21(1)(a) of the Statute is clear: the Court needs to apply "in the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence". It follows that primacy is given to the Statute, and thus the Elements of Crimes and the Rules need to be interpreted in line with the Statute.⁴⁸ Thus, the Defence submits that the tenets and principles of the Statute govern, and where there is a difference of interpretation, the issue of what serves the purposes of the Statute must be considered. Moreover, Article 21(3) of the Statute necessitates that the Court interpret and apply the applicable law in accordance with international human rights. The Defence avers that fair trial rights form part of Mr Ongwen's international human rights and thus the fundamental importance of these rights needs to be addressed and respected.
39. Although the Trial Chamber explicitly recognized that the Defence "challenges to the formulation of the Confirmation Decision and the jurisdiction of the Court have the potential to considerably influence the charged crimes"⁴⁹ and that "[t]he Chamber must always act in fairness to the accused",⁵⁰ it refuses to rule on this significant matter. It does so by relying on restrictive interpretation of procedural Rules 122(4) and 134 of the Rules to support its view of the untimeliness of the Defects Series. This view is antithetical to the core principles of the Statute.
40. It is clear from the Trial Chamber's own characterization of the issue that what is at stake is ensuring that the trial proceeds "business as usual" at an uninterrupted expeditious pace, regardless of the legal context and its potential implications on the outcome of the case.

⁴⁷ Articles 66 and 67 of the Statute, Article 20 of the ICTR Statute, as well as, in international instruments including, inter alia: Article 11 of the Universal Declaration of Human Rights ('UDHR'), Article 14(3)(a) of the International Covenant on Civil and Political Rights ('ICCPR'), Article 8(2)(b) of the African Charter on Human and Peoples' Rights ('ACHR'), Article 6(3)(a) and 7 of the European Convention on Human Rights ('ECHR').

⁴⁸ In accordance with Article 51(4) of the Statute "[t]he Rules of Procedure and Evidence, amendments thereto and any provisional Rule shall be consistent with this Statute."

⁴⁹ Decision on Leave to Appeal, para. 14.

⁵⁰ Impugned Decision, para. 25.

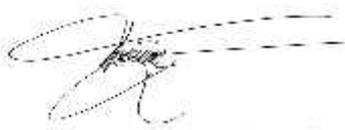
41. Thus, in taking the Impugned Decision under Article 64(2) of the Statute, the Trial Chamber failed to ensure that, as required under Article 21(3) of the Statute, the law is interpreted and applied in line with internationally recognized human rights, including Mr Ongwen's fair trial rights under Articles 67(1)(a) and (e) of the Statute. This amounted to an error of law, which materially affects the Impugned Decision.

42. To conclude, expeditiousness or a trial without undue delay is a right that must be guaranteed to the accused under Articles 64(2) and 67(1)(c) of the Statute. However, it must not be at the expense of other rights of the accused. Failure to ensure Mr Ongwen's fair trial rights becomes even more important when the issue at stake – as in the present case – may have a direct and significant impact on the outcome of the trial, *i.e.* Mr Ongwen's potential conviction.

IV. REMEDY SOUGHT

43. For the reasons stated above, the Defence respectfully requests that the Appeals Chamber:
- a) **GRANT** the four grounds of appeal against the Impugned Decision;
 - b) **REVERSE** the Impugned Decision, in particular the Trial Chamber's determination, based on procedural grounds alone, not to rule on the facial deficiency of the charged crimes and modes of liability, and jurisdictional arguments on indirect co-perpetration and forced marriage;
 - c) **REMAND** the matter to the Trial Chamber for a determination on each of the remedies sought in the Defence's Defects Series.

Respectfully submitted,



.....
Hon. Krispus Ayena Odongo
On behalf of Dominic Ongwen

Dated this 4th day of June, 2019
At The Hague, Netherlands