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No.: ICC-02/04-01/05
Date: 13 December 2022

PRE-TRIAL CHAMBER II

Before: Judge Rosario Salvatore Aitala, Presiding Judge
Judge Tomoko Akane
Judge Antoine Kesia-Mbe Mindua

SITUATION IN UGANDA

IN THE CASE OF *THE PROSECUTOR* vs. *JOSEPH KONY AND VINCENT OTTI*

Public

Public Redacted Version of the “Renewed Request to Terminate Proceedings against Vincent Otti on Account of His Death (ICC-02/04-01/05-443 dated 28 March 2022)”

Source: Office of the Prosecutor

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

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Other

1. The Office of the Prosecutor (“the Prosecution”) seeks to terminate proceedings against Vincent Otti on account of his death, pursuant to article 58(4) of the Rome Statute (“Statute”).

2. There is persuasive evidence that Vincent Otti was killed on or around 2 October 2007 in the eastern part of Garamba National Park, Democratic Republic of the Congo. The evidence consists of credible witness testimonies given under oath before Trial Chamber IX in the case *Prosecutor v. Dominic Ongwen*, witness statements collected in the course of the Prosecution’s investigation into the Uganda situation, and statements made by officials of South Sudan and Uganda. Significantly, since October 2007, the Prosecution has also not encountered any information that would suggest that Mr Otti is still alive. His death has been reported across Uganda and internationally and is widely accepted.

Classification

3. In accordance with regulation 23*bis*(2) of the Regulations of the Court, this request is classified as under seal, because it refers to documents with the same classification, namely filing ICC-02/04-01/05-315 of 7 October 2008. The Prosecution will file a public redacted version in due course.

4. Pursuant to regulation 23*bis*(3) of the Regulations of the Court, the Prosecution requests that filing ICC-02/04-01/05-315 with its annexes and the present filing be reclassified as confidential *ex parte*, only available to the Prosecution. The justification for under seal classification has been superseded by subsequent events, whereas the need for confidentiality remains on account of witnesses referenced. Filing ICC-02/04-01/05-315 and its annexes contain evidence of prospective witnesses in the case against the remaining suspect Joseph Kony, who is still at large. In order to protect the integrity of the investigation, their identity should be kept strictly confidential and only known to the Prosecution. This request, in turn, refers to witnesses who testified in the *Ongwen* case before Trial Chamber IX with protective measures and, at least in part, in private session. Where available, the Prosecution cites to the public testimony

of witnesses. Where the Prosecution cites to confidential versions of documents in the *Ongwen* case, the Prosecution understands that these are available to Pre-Trial Chamber II (the “Chamber”), since the relevant judicial record relates to the same situation.

Background

5. On 8 July 2005, the Chamber (in its previous composition) issued a warrant of arrest for Vincent Otti, at the time Vice-Chairman of the Lord’s Resistance Army (LRA), for thirty-three counts of war crimes and crimes against humanity.¹ On the same day, the Chamber also issued warrants of arrest against four other suspects: Joseph Kony, Okot Odhiambo, Raska Lukwiya, and Dominic Ongwen.

6. Dominic Ongwen made his initial appearance before the Court on 26 January 2015. His case was severed from the present case on 6 February 2015.² Dominic Ongwen was subsequently tried before Trial Chamber IX. On 4 February 2021 he was convicted of 62 counts of war crimes and crimes against humanity.³ Mr Ongwen appealed his conviction and sentence; his case is currently pending before the Appeals Chamber. On 11 July 2007, the Chamber terminated proceedings against Raska Lukwiya on account of his death.⁴ On 27 October 2017, the Chamber terminated proceedings against Okot Odhiambo on account of his death.⁵ Joseph Kony remains at large.

7. On 8 November 2007, the Prosecution filed the “Submission of Information Regarding Vincent Otti” in which it provided preliminary information about the death of Vincent Otti.⁶

¹ ICC-02/04-01/05-4-US-Exp. *See also* ICC-02/04-01/05-54 (public redacted version).

² ICC-02/04-01/05-424.

³ ICC-02/04-01/15-1762-Conf. Public Redacted Version of the Judgment is available.

⁴ ICC-02/04-01/05-248.

⁵ ICC-02/04-01/05-431.

⁶ ICC-02/04-01/05-258.

8. On 10 December 2007, the Prosecution filed the “Prosecution’s Submission in Advance of Hearing Scheduled for 10 December 2007” providing further information about Mr Otti’s death.⁷ On 11 December 2007, the Prosecution indicated to the Chamber that the information collected suggested that Mr Otti was deceased [REDACTED].⁸

9. On 7 October 2008, the Prosecution filed the “Prosecutor’s Request that the Warrant of Arrest for Vincent Otti Be Withdrawn and Rendered without Effect because of His Death”.⁹ The Chamber never ruled on the request.

Submissions

10. The Prosecution renews its request to terminate the proceedings against Mr Otti on account of his death. The Prosecution continues to rely on the evidence cited in its submissions of 7 October 2008, namely the statements of witnesses P-0162, P-0163, P-0164, and P-0165; the audio recording of a radio interview with Joseph Kony on 22 January 2008; the statements made on 23 January 2008 by Riek Machar, then vice-president of South Sudan and mediator of the Juba Peace Talks; and on other statements reported by the media.¹⁰ In addition, the Prosecution relies on the evidence of six witnesses who testified under oath before Trial Chamber IX in the *Ongwen* case, as summarised below.

11. The body of Mr Otti has not been recovered and, according to the information available to the Prosecution, no death certificate has been issued. In accordance with the Court’s jurisprudence, production of a death certificate is not an essential prerequisite for terminating criminal proceedings, but merely one of the avenues available to prove the relevant fact, namely, that the suspect is deceased.¹¹ For instance, in the

⁷ ICC-02/04-01/05-264.

⁸ ICC-02/04-01/05-T-7-Conf-Eng, 19:21-21:2.

⁹ ICC-02/04-01/05-315-US-Exp with annexes A-H.

¹⁰ ICC-02/04-01/05-315-US-Exp with annexes A-H.

¹¹ ICC-02/05-03/09-512-Red, para. 18.

absence of a formal death certificate, Trial Chamber IV relied on the testimony of two witnesses in finding that the suspect—Mr Jerbo—was deceased.¹²

1. Witness Testimony in the *Ongwen* Case

12. In the course of the *Ongwen* trial, witnesses P-0205, P-0231, P-0233, P-0264, D-0028, and D-0075 provided evidence relevant to establishing the death of Mr Otti. All six witnesses testified under oath before Trial Chamber IX. They are former LRA members who were in the vicinity of the killing or, in the case of D-0028, discussed the matter with Joseph Kony, who explicitly confirmed Mr. Otti's death. Other witnesses, including former members of the LRA, also referenced the death of Vincent Otti in their testimonies, but did not provide direct evidence about the circumstances of his killing.¹³ Finally, the defence in the *Ongwen* case also argued that Vincent Otti was killed in 2007.¹⁴

Witness UGA-OTP-P-0205

13. Witness P-0205 is a former member of the LRA. The witness testified live before Trial Chamber IX, with protective measures.¹⁵ He was found credible by the Trial Chamber, which relied extensively on his evidence in the Trial Judgment. It described P-0205 as a calm, restrained, forthcoming witness, and his evidence as “detailed and precise”.¹⁶ The Trial Chamber also noted that the witness distinguished clearly between information he gained from personal experiences and events he was informed about.¹⁷

14. P-0205 testified that he heard the gunshots that killed Otti. He stated that he was about 200 meters away at the time.¹⁸ He explained that Otti, Ben Acellam, Otim,

¹² ICC-02/05-03/09-512-Red.

¹³ E.g. D-0026, ICC-02/04-01/15-T-191, 36:23 – 37:5; P-0209, ICC-02/04-01/15-T-161-Red2-Eng, 60:21-60:24; P-0422, UGA-OTP-0270-0004 at 0017.

¹⁴ See e.g., Defence Closing Brief, ICC-02/04-01/15-1722-Corr-Red, para. 684.

¹⁵ ICC-02/04-01/15-T-47; ICC-02/04-01/15-T-48; ICC-02/04-01/15-T-49; ICC-02/04-01/15-T-50; ICC-02/04-01/15-T-51; See also Decision on the ‘Prosecution’s application for in-court protective and special measures’ ICC-02/04-01/15-612-Red.

¹⁶ Ongwen Trial Judgement, ICC-02/04-01/15-1762-Red, para. 272.

¹⁷ *Ibid.*

¹⁸ ICC-02/04-01/15-T-49-Red3-Eng, 29:21-30:2, 30:20-21.

and other officers were killed because they were alleged to be contemplating escape.¹⁹ P-0205 was apprehended as well,²⁰ [REDACTED].²¹

Witness UGA-OTP-P-0231

15. Witness P-0231 is a former member of the LRA, who spent 13 years with the armed group. He testified live before Trial Chamber IX, with protective measures.²² The Trial Chamber found his evidence reliable, describing P-0231 as “a forthright witness, distinguishing between events he witnessed personally and matters he learned about through other means.”²³ [REDACTED].

16. [REDACTED].²⁴ [REDACTED].²⁵ [REDACTED].²⁶

17. [REDACTED].²⁷ [REDACTED].²⁸ [REDACTED].²⁹ [REDACTED].³⁰ [REDACTED].³¹ [REDACTED].³²

18. The Presiding Judge of Trial Chamber IX referred to P-0231’s description of the killing of Vincent Otti as very informative. He noted that whilst the Trial Chamber had heard other accounts about the event “this was an [...] account by nearly an eyewitness [...]”.³³

¹⁹ ICC-02/04-01/15-T-49- Red3-Eng, 29:5- 29:9.

²⁰ ICC-02/04-01/15-T-49- Red3-Eng, 30:15-30:24.

²¹ [REDACTED].

²² ICC-02/04-01/15-T-122; ICC-02/04-01/15-T-123; *See also* Decision on the ‘Prosecution’s application for in-court protective and special measures’ ICC-02/04-01/15-612-Red.

²³ Ongwen Trial Judgement, ICC-02/04-01/15-1762-Red, paras. 275-276. Trial Chamber IX did note, however, some aspects of the witness’s testimony where the witness appeared to have been minimising Dominic Ongwen’s actions, observing that the witness had testified to having a close relationship with Ongwen in the bush and that the latter had once saved his life.

²⁴ [REDACTED].

²⁵ [REDACTED].

²⁶ [REDACTED].

²⁷ [REDACTED].

²⁸ [REDACTED].

²⁹ [REDACTED].

³⁰ [REDACTED].

³¹ [REDACTED].

³² [REDACTED].

³³ ICC-02/04-01/15-T-123-Conf-Eng, 14:21-14:25.

Witness UGA-OTP-P-0233

19. Witness P-0233 is a former member of the LRA who spent more than a decade with the armed group. He testified live before Trial Chamber IX, with protective measures.³⁴ The Trial Chamber found P-0233 credible and described him as “very knowledgeable about the LRA”.³⁵

20. P-0233 testified that he witnessed Kony order Otti’s execution.³⁶ In response to a question from the Presiding Judge, P-0233 described the incident in detail.³⁷ P-0233 stated that Otti was arrested by armed officers, who asked Kony what should be done with him. Kony responded: “Before I see him or I ask him any question, go and shoot him. Because if I come and I see him, I will become merciful and I will not kill him”.³⁸ Otti was taken away, and P-0233 was told that he was then killed.³⁹ The witness stated that Kony killed Otti because he thought Otti was planning to kill him, and suggested that there was a disagreement between Otti and Kony over the peace talks.⁴⁰

Witness UGA-D26-P-0028

21. Witness D-0028 is a cultural chief of the Pageya clan. He testified live before Trial Chamber IX.⁴¹ The witness, *inter alia*, testified about his personal role in the peace talks between the Government of Uganda and the LRA.⁴² D-0028 described a discussion with Kony in April 2008 during which Kony narrated how Otti was killed.⁴³ D-0028 stated that Kony “admitted” that Otti was deceased and was killed because he had planned to kill Kony. D-0028 narrated an exchange with Kony on this, during

³⁴ ICC-02/04-01/15-T-111; ICC-02/04-01/15-T-112. *See also* Decision on the ‘Prosecution’s application for in-court protective and special measures’ ICC-02/04-01/15-612-Red.

³⁵ ICC-02/04-01/15-1762-Conf, para. 319.

³⁶ ICC-02/04-01/15-T-112-Red2-Eng, 13:20-13:21.

³⁷ ICC-02/04-01/15-T-112-Red2-Eng, 14:2-16:19.

³⁸ ICC-02/04-01/15-T-112-Red2-Eng, 16:4-16:7.

³⁹ ICC-02/04-01/15-T-112- Red2-Eng, 16:8-16:13.

⁴⁰ ICC-02/04-01/15-T-112- Red2-Eng, 20:8-21:25.

⁴¹ ICC-02/04-01/15-T-180; ICC-02/04-01/15-T-181; ICC-02/04-01/15-T-182.

⁴² Trial Chamber IX did not base its findings on D-0028 evidence, however it specifically stated it is not deeming him not credible. Ongwen Trial Judgment, ICC-02/04-01/15-1762-Red, para. 515.

⁴³ ICC-02/04-01/15-T-181-Eng, 10:3 – 10:24.

which he also told Kony that, if possible, they wanted to retrieve Otti's remains.⁴⁴ This, however, did not materialise.

Witness UGA-D26-P-0075

22. Witness D-0075 is a former LRA member. He testified live before Trial Chamber IX.⁴⁵ The witness stated that Otti was killed by Kony. The latter thought that Otti was trying to take over the movement.⁴⁶ D-0075 testified that Kony did not want to go for peace talks but Otti insisted, and it was that different opinion that led to Kony's decision to kill him.⁴⁷ D-0075 testified that Ben Acellam, Otim Record, Pope, and Major Adjumani were killed together with Otti.⁴⁸

23. Trial Chamber IX found parts of D-0075's testimony evasive and his testimony about the attack on Odek IDP camp (one of charged incidents in the case) unreliable.⁴⁹ Trial Chamber IX did not evaluate the Witness's evidence in relation to the killing of Otti, presumably because it was not relevant for determination of the charges. D-0075's evidence on this event is consistent with other available evidence.

Witness UGA-OTP-P-0264

24. Witness P-0264 was a member of the LRA from 2002 until 2014. He testified live before Trial Chamber IX, with protective measures.⁵⁰ The Witness's immediate commander was Ben Acellam, who was killed together with Otti, although P-0264 was not with him at the time.⁵¹

25. P-0264 testified that he heard that commanders including Ben Acellam and Otti were summoned by Kony and were then arrested and executed.⁵² The witness also

⁴⁴ ICC-02/04-01/15-T-181-Eng, 10:16-10:20.

⁴⁵ ICC-02/04-01/15-T-224; ICC-02/04-01/15-T-225.

⁴⁶ ICC-02/04-01/15-T-224-Red2-Eng, 44:7-45:10.

⁴⁷ ICC-02/04-01/15-T-224-Red2-Eng, 44:8-45:10.

⁴⁸ ICC-02/04-01/15-T-224-Red2-Eng, 45:3-45:10.

⁴⁹ Ongwen Trial Judgment, ICC-02/04-01/15-1762-Red, para. 383-384.

⁵⁰ ICC-02/04-01/15-T-64; ICC-02/04-01/15-T-65; ICC-02/04-01/15-T-66. *See also* Decision on the 'Prosecution's application for in-court protective and special measures' ICC-02/04-01/15-612-Red.

⁵¹ ICC-02/04-01/15-T-65-Red-Eng, 79:12-79:17.

⁵² ICC-02/04-01/15-T-65-Red-Eng, 79:12-80:9.

confirmed hearing that Otti, Ben Acellam, and others were killed because there was a rumour that they were planning to escape.⁵³

2. Stipulation of fact by the Prosecution in the *Ongwen* case

26. In the context of disclosure litigation during the *Ongwen* trial proceedings, the Prosecution stipulated that Kony ordered Otti's killing, and that a person who spoke with Kony around the time understood that Kony accepted responsibility for Otti's death.⁵⁴

3. Conclusion

27. The evidence referenced above further corroborates the evidence of witnesses P-0162, P-0163, P-0164, and P-0165, presented to the Chamber in the Prosecution's submissions of 7 October 2008. Although there are minor discrepancies, their evidence is consistent with regard to the location (Garamba National Park), approximate timing (October 2007), and the description of events leading up to the execution, the manner of execution, and the reasons for Otti's death. The witnesses, most of whom had previously closely interacted with Vincent Otti, never saw him again. What is more, in the last 15 years of investigation, the Prosecution has not encountered any information suggesting that Mr Otti would still be alive. To the contrary, Mr Otti's death is widely accepted in Uganda, including among former LRA members who were members of the armed group at the time. Finally, the death of Mr Otti is accepted by officials of the Government of Uganda.⁵⁵

⁵³ ICC-02/04-01/15-T-66-Red-Eng, 51:3-51:11.

⁵⁴ ICC-02/04-01/15-1256, para 31; *see also* ICC Decision ICC-02/04-01/15-1267. The stipulation reads: *At a time approximately two years after the charged time period, Joseph Kony caused his deputy, Vincent Otti, to be killed. This is consistent with the implicit threat of lethal violence which Joseph Kony held over his subordinates if he considered that they had disobeyed or disrespected him. One person who spoke with Joseph Kony at about this time understood from their conversation that Joseph Kony was accepting his responsibility for the death of Vincent Otti.*³³ ('Proposed Stipulation').

⁵⁵ ICC-02/04-01/05-315-US-Exp, para. 24, fn. 59. The Prosecution has requested additional information from the Ugandan Government, but has not received any response to date. If any further relevant information is provided, the Prosecution will provide it to the Chamber.

Relief Sought

28. On the basis of the information above, and information submitted to the Chamber on 7 October 2008, the Prosecution requests Pre-Trial Chamber II to terminate the proceedings against Vincent Otti on account of his death, in accordance with article 58(4) of the Statute.



Karim A.A. Khan KC, Prosecutor

Dated this 13th day of December, 2022
At The Hague, The Netherlands