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No.: **ICC-02/04-01/15 OA4**
Date: **4 June 2019**

APPEALS CHAMBER

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

SITUATION IN UGANDA

IN THE CASE OF
THE PROSECUTOR v. DOMINIC ONGWEN

PUBLIC, with Annex A

Corrected Version of 'Defence's Further Submissions' (ICC-02/04-01/15-1536)

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. Following the Appeals Chamber's 'Order for Further Submissions',[1] the Defence for Mr Ongwen ('Defence') submits its additional observations on the issues **A-D** as outlined below.

II. SUBMISSIONS

2. The Defence notes Articles 21, 51(4), 64(2), 64(3), and 67 of the Rome Statute ('Statute'), and Rule 134 of the Rules of Procedure and Evidence ('Rules'). Furthermore, according to Article 21(3) of the Statute the "application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights […]".[2] In this respect, the Defence also notes relevant international human rights instruments concerning the fair trial rights of an accused subject to proceedings before a criminal court.[3]

A. Which are the specific issues that, in the view of Mr Dominic Ongwen, arose during the course of the trial warranting the application of rule 134(3) of the Rules?

3. The Defence maintains that the key issue that has permeated the whole trial to date is the continuing violation of Mr Ongwen's fundamental right to notice under Article 67(1)(a) of the Statute of being informed "in detail of the nature, cause and content of the charge […]".[4]

4. The lack of specificity in the charges against Mr Ongwen in the 'Decision on the confirmation of charges against Dominic Ongwen'[5] has also undermined the exercise of Mr Ongwen's Article 67(1)(e) right "to examine, or have examined, the witnesses against him or her" and

[1] *Ongwen*, Order for Further Submissions, ICC-02/04-01/15-1524 OA4, 24 May 2019.
[2] *Lubanga*, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19(2)(a) of the Statute of 3 October 2006, ICC-01/04-01/06-772, 14 Dec. 2006, para. 37.
[3] Article 14(3)(a) of the International Covenant on Civil and Political Rights; Article 6(3)(a) of the European Convention on Human Rights; Article 8(2)(b) of the American Convention on Human Rights; Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, 2003 at N(1) on Notification of charge and see also African (Banjul) Charter on Human and Peoples' Rights.
[4] The Defence has provided a detailed analysis of issues that arose during the course of the trial in its four volumes of 'Defects Series', see *Ongwen*, Defence Motion on Defects in the Confirmation Decision: Defects in Notice and Violations of Fair Trial (Part I of the Defects Series), ICC-02/04-01/15-1430; *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; *Ongwen*, Defence Motion on Defects in the Confirmation of Charges Decision: 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; *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 ('**Defects Series**').
[5] *Ongwen*, Decision on the confirmation of charges against Dominic Ongwen, ICC-02/04-01/15-422, 23 March 2016 ('**CoC Decision**').

"to raise defences and to present evidence". In particular, and as demonstrated *via* specific issues below, the Defence's attempts to anticipate how to plan defence work, take strategic decisions in relation to its presentation of evidence and effectively manage limited personnel and monetary resources were severely impaired during the course of this trial.

5. *A first issue* that arose during the course of the trial is related to modes of liability. The Defence submits that the pleading of modes of liability in the CoC Decision is defective. The *mens rea* element is missing in the pleading of indirect co-perpetration, ordering and command responsibility.[6] Further, the element of indirect co-perpetration of "ability to frustrate the commission of the crime" is not pleaded. This results in defective pleading of both the *actus reus* and *mens rea* of indirect co-perpetration. In addition, the confirmation of indirect co-perpetration is jurisdictionally defective. In sum, Mr Ongwen is placed by the CoC Decision in the position of having to defend himself against a mode of liability which is not in the Statute, and whose requirements are incomplete and/or not fully articulated nor supported by factual allegations. Hence, for these modes of liability, no notice under Article 67(1)(a) of the Statute was provided to Mr Ongwen.

6. Additionally, the pleading of command responsibility is defective because the CoC Decision simply tracks the statutory language and makes unsupported allegations that Mr Ongwen did not 'prevent or repress' the actions of his subordinates without indicating any factual allegations to substantiate the requirements.[7] Moreover, in its 'Pre-Trial Brief', the Prosecution explains that it charged Mr Ongwen with command responsibility under Article 28(a) of the Statute for crimes perpetrated at Pajule, Lukodi, Abok and Odek IDP camps as well as SGBC and child soldier associated crimes perpetrated by others.[8] However, while the PPTB mentions 'prevent or repress' in six areas, it lacks any citation of specific evidence to substantiate that Mr Ongwen failed to 'prevent or repress' for the abovementioned charged crimes.[9]

7. The above impacted the trial since it does not give Mr Ongwen notice of the underlying acts against which he should defend. This resulted in command responsibility seemingly being held to a standard of strict liability, as the CoC Decision and PPTB do not specify allegations

[6] Part II of the Defects Series, ICC-02/04-01/15-1431, paras 8-16.
[7] CoC Decision, para. 149; and Part III of the Defects Series, ICC-02/04-01/15-1432, para. 12; *Ongwen,* Separate opinion of Judge Marc Perrin de Brichambaut, ICC-02/04-01/15-422-Anx-tENG, 6 June 2016, para. 26.
[8] *Ongwen*, Prosecution's Pre-Trial Brief, ICC-02/04-01/15-533, 6 Sept. 2016 ('**PPTB**'), para. 154.
[9] PPTB, paras 154, 286, 369, 427 and 746, Para. 18 of Part III of the Defects Series, ICC-02/04-01/15-1432, contains an error as there is a sixth mention in para. 498 of the PPTB.

that Mr Ongwen failed to 'prevent or repress', but it appears to refer to hypothetical[10] acts that Mr Ongwen could have done. This leads to the erroneous conclusion, contrary to the Appeals Chamber holding in the *Bemba* case, that the standard to be applied to command responsibility is strict liability.[11] Lastly, the requirements of common purpose are not pleaded either.[12]

8. *A second issue* that arose during the course of the trial has been the parameters of the Prosecution disclosure obligations, in respect to what should be disclosed as relevant to Defence preparation or exculpatory material. For example, on 17 September 2018, prior to the Defence's presentation of evidence, the Defence sought a disclosure order[13] so as to understand the charges involving indirect co-perpetration pursuant to Article 25(3)(a) of the Statute and other contributions pursuant to Article 25(3)(d) of the Statute.[14]

9. Specifically, the materials sought for disclosure included the investigation of individuals referred to by generalities in the charges,[15] including senior members,[16] encompassing those on a Government of Uganda "List of the Most Notorious LRA Commanders Recommended for Trial by the ICC".[17] Following the failure of *inter partes* discussions on the merit of the request,[18] the Defence brought the matter before the Trial Chamber.[19] The Single Judge rejected the Defence request[20] and also the Defence's leave to appeal.[21] This rejection prejudiced the ability of the Defence to form a strategy and plan a presentation of evidence; because in order to evaluate and challenge the Prosecution's evidence, it is necessary to understand Mr Ongwen's specific alleged contribution to certain crimes pursuant to Articles 25(3)(a) and (d) of the Statute.

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[10] *Bemba*, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber's "Judgment pursuant to Article 74 of the Statute", ICC-01/05-01/08-3636-Red A, 8 June 2018 ('**Bemba Appeal Judgment**'), para. 170
[11] Bemba Appeal Judgment, para. 170; see also Part III of the Defects Series, ICC-02/04-01/15-1432, para. 25.
[12] Part III of the Defects Series, ICC-02/04-01/15-1432, paras 53-63.
[13] *Ongwen*, Defence Request for Disclosure Pursuant to Rule 77 and Article 67(2) and Request for a Remedy in Light of Late and Untimely Disclosure, ICC-02/04-01/15-1329-Corr-Red ('**Late Disclosure Request**').
[14] Late Disclosure Request, paras 9, 13(4), 15, 24, and 26; and *Ongwen*, Decision on Defence Request for Disclosure and Remedy for Late Disclosure, ICC-02/04-01/15-1351, 28 Sept. 2018 ('**Decision on Late Disclosure Request**').
[15] Late Disclosure Request, paras 40-42.
[16] Late Disclosure Request, para. 18.
[17] ERN: UGA-OTP-0032-0036.
[18] Late Disclosure Request, para. 16, and see also 17.
[19] Late Disclosure Request, para. 27.
[20] Decision on Late Disclosure Request, paras 17, 21 and 27.
[21] *Ongwen*, Defence Request for Leave to Appeal 'Decision on Defence Request for Disclosure and Remedy for Late Disclosure', ICC-02/04-01/15-1360, 5 Oct. 2018, paras 5 and 7; *Ongwen*, Decision on Defence Request for Leave to Appeal the Decision on Disclosure and Remedy for Late Disclosure, ICC-02/04-01/15-1364.

10. Many of the Article 25(3)(a) and (d) charges against Mr Ongwen contain generalities[22] of the other alleged perpetrators. Numerous identities are not specified. Neither the Prosecution nor Pre-Trial Chamber II specified the basis on which the alleged perpetrators are purported to be part of the various plans. For example, the Prosecution alleged that "Dominic Ongwen's **conduct** and **presence** expressly **encouraged** LRA fighters to commit crimes"[23] at the Pajule IDP camp amounts to indirect co-perpetration. To address this alleged conduct it is necessary for the Defence to know who were the "other senior members" present and their comparative stature in the LRA, *e.g.* rank and experience. Information about these other alleged co-perpetrators is necessary for the preparation of the defence during the trial.

11. The lack of specificity in the charges and notice has hindered the Defence preparation and caused prejudice. Disclosure was sought *inter alia* to prepare the then upcoming 'Defence case',[24] to assist with questioning of the Defence senior LRA command witness about the LRA command-structure,[25] and with setting a line of defence.[26] Some of the senior-command witnesses have yet to testify. For them, some prejudice can still be avoided if there was full disclosure; however, the lack of this information has already deprived the Defence of an important basis upon which to shape its strategy. The Defence will not be able to establish the full scale of prejudice until receiving the trial judgment; however, it has impacted on the Defence's preparation under Article 67(1)(e) of the Statute and also on the potentially exculpatory material that has not been disclosed to the Defence, thus implicating the right to a fair trial right as guaranteed by Article 67(2) of the Statute.

12. *A third issue* that arose during the course of the trial is the dispute over questioning witnesses on uncharged events and matters that occurred outside of the 1 July 2002 to 31 December

[22] See charges 1 to 10: CoC Decision, p. 73, para. 15: "On or about 10 October 2003, between 05:00-06:00 approximately, Dominic Ongwen together with **other senior members of the LRA**, including Vincent Otti, Raska Lukwiya, and Bogi Bosco […] put into action a common plan to attack Pajule and Lapul IDP camps […]"; see also charges 61 to 68, p. 61, para. 137: "This evidence demonstrates that there was a common plan between Joseph Kony and **the senior leadership of the Sinia brigade**, including Dominic Ongwen, to abduct women and girls in order for them to serve as forced "wives", domestic servants and sex slaves to male LRA fighters", and charges 69 to 70, CoC Decision, p. 102, para 126: "Between at least 1 July 2002 and 31 December 2005 Dominic Ongwen, Joseph Kony, **and the Sinia brigade leadership** ("child soldiers co-perpetrators") pursued a common plan to abduct children in the territory of northern Uganda and conscript them into the Sinia Brigade in order to ensure a constant supply of fighters ("child soldiers common plan")." (Bold added).
[23] *Ongwen*, Prosecution's Pre-Trial Brief, ICC-02/04-01/15-533, 6 Sept. 2016, para. 267 (Bold added).
[24] Late Disclosure Request, para. 3.
[25] Late Disclosure Request, para. 23.
[26] Late Disclosure Request, para. 38.

2005 temporal jurisdiction.[27] The Defence objected multiple times to this practice, yet it was consistently provided with the explanation that the testimony adduced by the Prosecution can be put forward "as evidence to support the facts and circumstances in the charged time period"[28] even if the Court "cannot convict on incidents that have happened at that time".[29]

13. Presiding Judge Schmitt later stated that testimony beyond the temporal jurisdiction could be "evidence of other facts and circumstances are that (sic) described in the charges" such as "for example, contextual elements, modes of liability, conscription and the use of child soldiers".[30] Such a wide scope is of great concern to the Defence and a source of fair trial violations since the Defence has not received notice regarding the contextual elements or their scope, and thus the opportunity for it to investigate and mount a defence is greatly prejudiced. Secondly, this prejudice is amplified in the context of deficient charged crimes and modes of liability since it is difficult to determine whether evidence beyond the scope supports an allegation or not.

14. The Defence avers that the issue at hand arose in part due to the ambiguities and gaps concerning the allegations discussed in the Defects Series. Presiding Judge Schmitt explicitly included "conscription and the use of child soldiers" within the ambit of permissible evidence that falls outside of the temporal jurisdiction of the charged period. The Defence has made submissions in respect to charges 69 and 70 regarding the use and conscription of child soldiers.[31] In this regard, the Defence has objected that factual allegations are missing, *mens rea* elements are not pleaded,[32] generalisations are made and factual allegations are made without supporting evidence,[33] and also that factual allegations are not matched to legal elements.[34] The lack of identity of the co-perpetrators is also a notice problem.[35]

15. Additionally, the Defence submits that there is another 'impacted area' of fair trial rights which is intimately linked to the lack of notice issue – the issue of translation. Under Article 67(1)(a) of the Statute, Mr Ongwen has not only a right to be informed in detail of the nature,

[27] Transcripts of hearings: ICC-02/04-01/15-T-85, p. 7, line 15 to p. 8, line 3; ICC-02/04-01/15-T-95, p. 8, line 16 to p. 10, line 10; ICC-02/04-01/15-T-108, p. 39, line 6 to 19; ICC-02/04-01/15-T-111, p. 63, lines 2 to 8; and ICC-02/04-01/15-T-147, p. 7, lines 2 to 15.
[28] Transcript of hearing, ICC-02/04-01/15-T-85, p. 7, lines 20 to 21.
[29] Transcript of hearing, ICC-02/04-01/15-T-85, p. 7, line 19.
[30] Transcript of hearing, ICC-02/04-01/15-T-147, p. 7, lines 8 to 11.
[31] Part IV of the Defects Series, ICC-02/04-01/15-1433, paras 61 to 70.
[32] Part IV of the Defects Series, ICC-02/04-01/15-1433, para. 62.
[33] Part IV of the Defects Series, ICC-02/04-01/15-1433, para. 64.
[34] Part IV of the Defects Series, ICC-02/04-01/15-1433, para. 66.
[35] Part IV of the Defects Series, ICC-02/04-01/15-1433, paras 62 and 68.

cause and content of the charges against him, but also a right to be informed of the charges "in a language which [he] fully understands and speaks".[36] For Mr Ongwen, this is Acholi.

16. Even if the Trial Chamber were to find that the charges against Mr Ongwen were not defective, the failure to have provided a full translation of the CoC Decision to Mr Ongwen, is the basis for violation of Article 67(1)(a) of the Statute. On 6 December 2016, at the time Mr Ongwen entered the plea, he did not have a complete translation of the 104-page-long CoC Decision in Acholi. This did not occur until mid-December 2017.[37] Similarly, a translation of the 52-page-long 'Separate opinion of Judge Marc Perrin de Brichambaut'[38] in Acholi was not provided to Mr Ongwen until February 2018. The charts below illustrate the exact delay in providing the translated versions of both essential documents to Mr Ongwen:

CoC Decision – English Version	**CoC Decision – Acholi Version**
23 March 2016	13 December 2017
Delay: 630 days; or 1 year, 8 months, and 20 days	

Separate Opinion – English Version	**Separate Opinion – Acholi Version**
6 June 2016	19 February 2018
Delay: 623 days; or 1 year, 8 months, and 13 days	

17. The lack of notice, based on the failure to fully translate the charging document before the plea, negatively impacted on Mr Ongwen's ability to understand the charged crimes and modes of liability against him, and was prejudicial.[39] This resulted in the Trial Chamber accepting a plea which was not unequivocal and not informed. Even the Trial Chamber acknowledged that "Mr Ongwen did not give an unqualified affirmation that he understood the charges".[40]

[36] See also Article 67(1)(f) of the Statute: Accused before this Court also have a right to translations, but this right is qualified as a right "[t]o have, free of any cost, the assistance of a competent interpreter and such translations as are **necessary to meet the requirements of fairness**" (Bold added).
[37] At the time of the proceedings in December 2016, only pieces of the CoC Decision had been translated (up to para. 145 which was approximately at p. 64 in a 104-page-long CoC Decision), without the Separate Opinion.
[38] *Ongwen*, Separate Opinion of Judge Marc Perrin de Brichambaut, ICC-02/04-01/15-422-Anx-tENG, 6 June 2016 ('**Separate Opinion**').
[39] The Defence considers it important to note that the 'operative part' of the CoC Decision (*i.e.* recitation of the charges from the Document Containing the Charges) is not identical with the Document Containing the Charges filed by the Prosecution on December 2015 (see ICC-02/04-01/15-375-AnxA-Red), and read by Mr Ongwen prior to the confirmation hearing in January 2016 (see ICC-02/04-01/15-T-20-ENG, p. 6, lines 9-14). Moreover, as detailed in the CoC Decision and confirmed by the Trial Chamber, the 'operative part' of the CoC Decision contains certain modifications. At least one of them is a modification in terms of the dates of charged crimes, which is a specific element of the notice requirement, see CoC Decision, para. 158, and *Ongwen*, Decision on Defence Request for Findings on Fair Trial Violations Related to the Acholi Translation of the Confirmation Decision, ICC-02/04-01/15-1147, 24 Jan. 2018 ('**Acholi Translation Decision**'), para. 7.
[40] Acholi Translation Decision, para. 9(iii); see also Transcript of hearing, ICC-02/04-01/15-T-26, p. 16, lines 11-25, p. 17, lines 1-19.

18. In conclusion, the lack of translation, combined with the lack of notice in the CoC Decision as well as the Trial Chamber's admission of evidence of acts not charged and evidence of events outside the temporal jurisdiction of the Court – individually and in aggregate – prejudiced the fair trial rights of Mr Ongwen.

B. Why did Mr Dominic Ongwen raise concrete alleged defects in the confirmation of charges decision three years after it was issued?

19. The lack of notice is the fundamental issue of alleged defects in the CoC Decision.[41] The Defence raised the issue for the first time in its 'Defence Request for Leave to Appeal Issues in Confirmation of Charges Decision' on 29 March 2016. In particular, the Defence argued that the CoC Decision was insufficient in its reasoning and failed to provide a full and reasoned statement of the Pre-Trial Chamber II's findings on the evidence and conclusions.[42]

20. In his Partially Dissenting Opinion to the 'Decision on the Defence request for leave to appeal the decision on the confirmation of charges',[43] Judge de Brichambaut agreed with the Defence's third ground emphasizing that fair trial is connected to a well-reasoned opinion,[44] and that an insufficiently reasoned CoC Decision amounts to lack of notice, and thus impacts on the fairness of the trial. In this regard, Judge de Brichambaut specified:

> [T]he 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

[41] Part I of the Defects Series, ICC-02/04-01/15-1430, paras 4, 13-19, 39, 51-58; *Ongwen*, Defence Request for Leave to Appeal 'Decision on Defence Motions Alleging Defects in the Confirmation Decision, ICC-02/04-01/15-1480, 14 March 2019 ('**Defence Leave to Appeal Defects Decision**'), paras 4, 6; *Ongwen*, Defence's Appeal against the 'Decision on Defence Motions Alleging Defects in the Confirmation Decision', ICC-02/04-01/15-1496, 11 April 2019 ('**Interlocutory Appeal**'), paras 10-15.

[42] *Ongwen*, Defence Request for Leave to Appeal Issues in Confirmation of Charges Decision, ICC-02/04-01/15-423, 29 March 2016 ('**Defence Leave to Appeal CoC Decision**'), pp 9-12: the Defence contends that the following demonstrate that the insufficient reasoning of the CoC Decision is equivalent to raising notice issues: lack of evidence on the year of Mr Ongwen's birth (para. 28), no reference to evidence to support the finding on the effective hierarchical structure of the LRA (para. 28), lack of factual support to establish the conclusion on command structure for the chain of communication for alleged crimes of Mr Ongwen (para. 29), no specificity of evidence to support finding that Mr Ongwen shared view that civilian camps should be deliberately attacked (para. 30), no statement of the facts supporting the finding that Mr Ongwen believed in the ideology of the LRA (para. 30), lack of specificity in which records of intercepted LRA radio communications were relied upon (para. 31); see also Article 74(5) of the Statute.

[43] *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; and *Ongwen*, Partially Dissenting Opinion of Judge Marc Perrin de Brichambaut, ICC-02/04-01/15-428-Anx-tENG, 14 Sept. 2016 ('**Partially Dissenting Opinion**').

[44] Partially Dissenting Opinion, para. 4, see also Defence Leave to Appeal CoC Decision, paras 28-31.

drafted does not provide the Defence with details of **what evidence was relied** on or how the Chamber **defined the crimes**.[45]

21. Thus, the Defence raised the lack of notice on the basis of insufficient reasoning of the CoC Decision at the earliest opportunity possible. Moreover, considering the constraints of the procedure under Article 82(1)(d) of the Statute, the Defence had *merely* five days to analyse and seek leave to appeal the 104-page-long CoC Decision (without translation in Acholi).[46] Following the dismissal of the Defence's request for leave to appeal, the Defence's priority, given its limited personnel and financial resources at the time as per the ICC Legal Aid Policy,[47] was to start preparing for the Prosecution's presentation of evidence.

22. Nevertheless, as the trial proceeded the Defence continued to raise its objections concerning the issue of lack of notice in the CoC Decision, as outlined on pages 11-14 in the Defence's Interlocutory Appeal.[48] Thus, the Trial Chamber's finding 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",[49] implying that no Defence objections as to lack of notice were made, is misreading of the procedural history in this case.

23. That said, the Defence avers that the detailed analysis of 70 charged crimes and 8 modes of liability is a formidable task. The timing of when it was able to raise concrete defects in key modes of liability and elements of crimes charged was prejudiced by factors, such as the vast smörgåsbord of charges of the Prosecution case, the inequality of resources between the Defence and Prosecution,[50] and Mr Ongwen's mental health condition and disability.

24. To date, the Prosecution has disclosed 25,470 items to the Defence. Following the disclosure, the Defence is left 'in the dark' in evaluating as to what mode of liability or element of crime these items allegedly prove or to which they relate. The struggle to grasp the magnitude of 70 charged crimes and 8 modes of liability is further aggravated by the Trial Chamber's

[45] Partially Dissenting Opinion, para. 29. (Bold added).
[46] See above, paras 15-16.
[47] Mr Ongwen is an indigent person who benefits from funding under the Court's legal aid system ('LAP'). The LAP provides for different levels of funding at different stages of proceedings with greater funding if the charges against the suspect are confirmed. The person charged is only entitled to funding for the assistance of second lawyer with 8 years or more experience at the start at the trial phase, see ICC-ASP/12/3, paras 38-45.
[48] Interlocutory Appeal, pages 11-14, para. 30.
[49] *Ongwen*, Decision on Defence Motions Alleging Defects in the Confirmation Decision, ICC-02/04-01/15-1476, 7 March 2019 ('**Impugned Decision**'), para. 27.
[50] *Ongwen*, Defence Observations on Fair Trial and Request for Orders on Prosecution Resources and Additional Defence Resources, ICC-02/04-01/15-1098, 11 Dec. 2017, para. 40: The Defence requested that Trial Chamber address the matter of resources to ensure that the Defence is treated in full equality with the Prosecution.

evidentiary regime that "does not involve making any relevance, probative value or potential prejudice assessments at the point of submission – not even on a *prima facie* basis […]".[51]

25. Trial Chamber's evidentiary regime[52] is prejudicial as it floods the 'case file' with items that the Defence maintains are inadmissible and/or irrelevant. To date, there are over 4200 items formally submitted into evidence.[53] The combination of lack of notice and no evidentiary rulings, especially on relevance of thousands of items, puts an impermissible burden on the Defence given that it must work on the assumption that all the items submitted into evidence by the Prosecution may eventually be used by the Trial Chamber to prove the (defective) charges.

26. Furthermore, Mr Ongwen is an accused who suffers from a vulnerable mental health condition and disability. The Defence submits that such condition diminishes Mr Ongwen's ability to follow the proceedings and effectively instruct his counsel. Moreover, the Defence uses a significant amount of time and resources to assist with Mr Ongwen's needs on a daily basis.[54] The Defence has been litigating matters such as the need for Mr Ongwen's medical examination under Rule 135 of the Rules and the amendments in the sitting schedule to allow for Mr Ongwen's full participation in the proceedings; however, the Trial Chamber continues to dismiss the Defence's requests in this regard.[55]

27. In light of the above, the Defence contends that there has not been a 3-year silence. The Defence raised the issue of lack of notice and insufficient reasoning in the CoC Decision at the earliest opportunity. Given that the lack of notice is a continuing problem and one that particularly arises as the Defence organizes and presents its own evidence; the Defence has recognized the full and detrimental impact of the notice issue at this point in the trial. Moreover, it would be unfair to penalize the Defence for an untimely request considering that the combination of the abovementioned factors exhausted the limited personnel and financial resources and forced the Defence to make difficult decision as to its priorities.

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[51] *Ongwen*, Decision on Prosecution Request to Submit Interception Related Evidence, ICC-02/04-01/15-615, 1 Dec. 2016, para. 7.
[52] The matter is *subjudice* and it has not been decided by the Trial Chamber yet. For this reason, the Defence raises it only for the informational purposes; see *Ongwen*, Defence Request and Observations on Trial Chamber IX's Evidentiary Regime, ICC-02/04-01/15-1519, 21 May 2019.
[53] For example, of the 2507 (see ICC-02/04-01/15-580) and 1006 (see ICC-02/04-01/15-654) items requested to be submitted into evidence by the Prosecution via 'bar table motions' only 47 were rejected by Trial Chamber.
[54] The Defence is expected to assist Mr Ongwen with his medical needs that arise during the trial; in this context, see Transcript of hearing, ICC-02/04-01/15-T-210-Conf, p. 3, lines 2 to 14.
[55] See, for example, *Ongwen*, Decision on Defence Request for Amendment of the Seating Schedule, ICC-02/04-01/1512, 15 May 2019; *Ongwen*, Decision on Defence Request for Amendment of the Seating Schedule, ICC-02/04-01/15-1330-Red, 5 Sept. 2018.

28. The Defence also reiterates that even if the concrete defects in the CoC Decision were not raised at an earlier point, the fair trial issue does not disappear and must be addressed in its substance. In other words, the timing cannot be paramount to fair trial rights.[56]

C. What type of issues, objections or observations can be raised prior to or during trial under rule 134 of the Rules? In this regard, are 'observations concerning the conduct of the proceedings' limited to procedural aspects or can substantive aspects be raised as well?

29. To the best of the Defence's knowledge, the above question pertaining to Rule 134 of the Rules is an issue of first impression.[57] That said, the Defence maintains that any issue, objection or observation that relates or impacts on the trial proceedings can be raised pursuant to Rule 134 of the Rules prior to or during trial, especially if it may have a significant impact on the outcome of the case. Rule 134 of the Rules thus provides for an avenue to raise matters that occurred at the pre-trial stage as long as they impact on the trial proceedings at the trial stage.[58]

30. The Defence also avers that any issue, objection or observation related to the trial proceedings which may have an impact on the fairness and expeditiousness of the trial proceedings can equally be raised pursuant to Rule 134 of the Rules. Trial Chambers are mandated by Article 64(2) of the Statute to guarantee that the trial is both fair and expeditiousness,[59] without tilting the balance towards one at the expense of the other.[60] Therefore, if a matter concerns the

[56] Part I of the Defects series, ICC-02/04-01/15-1430, paras 34-36; Defence Leave to Appeal Defects Decision, paras 18-19; Interlocutory Appeal, para. 31.
[57] The Defence has analysed the following sources, among others, however it cites below the most informative ones: *Ruto and Sang*, 'Decision on Mr David Nyekorach-Matsanga's filing ICC-01/09-01/11-1810-Conf-Exp-Anx1', ICC-01/09-01/11-1859, 1 December 2017; *Gbagbo and Blé Goudé*, Decision adopting amended and supplemented directions on the conduct of the proceedings, ICC-02/11-01/15-498, 4 May 2016; *Gbagbo and Blé Goudé*, ICC-02/11-01/15-T-9-ENG, pp 19 to 35: pursuant to Rule 134(2) of the Rules the Gbagbo Defence raised points impacting the fair trial of Mr Gbagbo which were the role of the Legal Representative of Victims, the time and facilities provided to the Defence and the Prosecution's obligations concerning investigations.
[58] 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 (for reference, see Annex B to the Interlocutory Appeal, ICC-02/04-01/15-1496-AnxB).
[59] George Mugwanya, Fairness, Expeditiousness of the Proceedings, and Rights of the Accused in Guariglia *et al*., The Appeals Chamber of the International Criminal Court, Commentary and Digest of Jurisprudence, (Cambridge University Press, 2018), p. 253 (attached as '**Annex A**').
[60] *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, para. 49; in this context, the Defence avers that placing too much importance on expeditiousness can equally deprive any other fundamental human right.

fairness of the trial process, Rule 134 of the Rules can serve as a procedural avenue for the Trial Chamber to discharge its mandate under Article 64(2) of the Statute.

31. The Defence maintains that fair trial is a broad concept that applies to the entire judicial process,[61] and thus if a matter is raised after a lapse of time, Article 64(2) of the Statute and Rule 134 of the Rules act as a safeguard by providing procedural standing for the party to raise matters that impact on the fairness of the trial proceedings. Although the impetus for Rule 134 was to avoid delays that had occurred at the ICTY and ICTR, concerns were raised by delegates that there should be avenues for raising procedural issues even at a later time during the trial.[62] As a result, Rule 134(2) of the Rules was drafted to allow objections and observations that were not raised prior to the commencement of trial, with leave of the Trial Chamber. As a further safeguard to guarantee that the procedural time bars would not be so rigid as to preclude consideration of issues related to the fairness of the trial, Rule 134(3) of the Rules was also added to give the Chamber discretion to consider issues arising during trial.[63]

32. That said, the Defence does not aver that raising matters pursuant to Rule 134 of the Rules on the basis that the matter raised impacts on the fair conduct of the proceedings or a particular fair trial right of an accused allows for a blanket justification. On the contrary, the Defence recognizes that the party raising the issues must specify how the matter impacts upon the fair conduct of the proceedings or violates an accused's fundamental fair trial right. The Defence submits that specific and significant impacts on its ability to defend Mr Ongwen at this point in the trial have been identified.

33. In respect to the second prong of this issue, the Defence submits that Rule 134 of the Rules is a procedural tool that gives standing for parties to raise 'observations concerning the conduct of the proceedings', which can include both procedural and substantive aspects. The Defence also submits that there is a false dichotomy between procedural and substantive aspects of the criminal proceedings. The two cannot be strictly bifurcated as one aspect affects the other.

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[61] *Lubanga*, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19(2)(a) of the Statute of 3 October 2006, ICC-01/04-01/06-772 OA4, 14 Dec. 2006, para. 37.

[62] 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 (for reference, see Annex B to the Interlocutory Appeal, ICC-02/04-01/15-1496-AnxB).

[63] *Id.* "[Sub-rule 2] would have remained in this raw and uncompromising state [barring later objections or observations] 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." Sub-rule 3 was included because "[s]ome delegates argued that it would be impossible to settle all procedural issues at the start of a lengthy trial."

34. The "conduct of the proceedings" is a general phrase that the Defence submits includes not only the logistics of the proceedings, but also the fairness of the trial process. Moreover, procedural issues often are based on underlying substantive issues. Consequently, a complete bifurcation of procedure and substance is not possible in this context. For example, in order to determine the **procedural aspect** being how many days per week a court can sit requires the Chamber to take into account the **substantive aspect** being a defendant's mental health condition and disability. The Chamber's decision on the sitting schedule, taking into account both procedural and substantive aspects, will ultimately impact the conduct of the proceedings.

35. Put differently, were the Defence to file objections on the conduct of the proceedings concerning the sitting schedule (*i.e.* procedural aspect), it would inevitably have to substantiate its objections with medical recommendations concerning a defendant's mental health and disability (*i.e.* substantive aspect). Moreover, procedural rules oversee the conduct of a criminal trial by ensuring that a defendant is able to exercise his rights, mount a defence and guarantee that judges respect the rights of an accused, ultimately governing the substance of the case.[64] Similarly, challenges to the adequacy of notice of the charges to the accused are based on underlying substantive issues. For example, if the charging document fails to adequately allege and factually support the elements of command responsibility, the procedural issue of notice is grounded on the substantive law of modes of liability.

36. Thus, the Defence submits that procedure and substance are interrelated and for this reason, it maintains that both substantive and procedural aspects can be raised when making observations concerning the conduct of the proceedings pursuant to Rule 134 of the Rules, as long as the issues relate or impact the trial proceedings like in the present case.

D. The Appeals Chamber notes that Mr Dominic Ongwen raises arguments concerning the possible violation of his fundamental rights as a result of the Impugned Decision, referring, *inter alia*, to his right under article 67(1)(a) of the Statute. Are there any additional submissions that the parties and participants intend to raise in this regard?

37. The Defence submits that the allegations of fair trial violations, especially under Articles 67(1)(a) and (e) of the Statute, are a serious matter. Having notice means that Mr Ongwen can understand (in his own language) and follow what he is accused of in sufficient details needed

[64] Transcript of hearing, ICC-02/11-01/15-T-9-ENG ET, page 20, lines 11 to 25 and page 21 line 1.

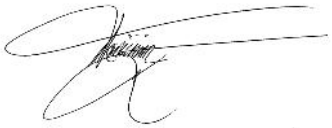
to allow him to instruct his counsel and/or prepare a defence against the said charges. It matters because it determines what evidence the Defence challenges, whether the Defence should present any evidence, and it also affects Mr Ongwen's decision as to whether he will testify.

38. The right to notice under Article 67(1)(a) of the Statute is linked to the right to prepare a defence under Article 67(1)(b), (e) and (f) of the Statute.[65] The Appeals Chamber considers it an axiomatic right[66] and an essential fair trial right enshrined in human rights treaties.[67] Breach of the right under Article 67(1)(a) of the Statute is a violation of human rights; however, the consequences of that breach may also be violations of other international fair trial rights. For example, a lack of specificity in the charges could lead Mr Ongwen to wrongly conclude that he must testify to clear his name. The Defence submits that effectively being compelled to testify would be a violation of the right against self-incrimination which is protected by Article 67(1)(g) of the Statute. In short, the requirement to have specifically formulated charged crimes and modes of liability is an important guarantee against wrongful convictions and ensures that trials are fair. Finally, the Defence reserves the right to raise other fair trial violations, if necessary, depending on the course of the proceedings.

III. REMEDY SOUGHT

39. For the additional reasons stated above, the Defence respectfully requests that the Appeals Chamber grant the remedy sought by the Defence in its Interlocutory Appeal.[68]

Respectfully submitted,



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Hon. Krispus Ayena Odongo

On behalf of Dominic Ongwen

Dated this 4th day of June, 2019

At The Hague, Netherlands

[65] *Lubanga*, Judgment on the appeal of Mr Thomas Lubanga Dyilo against his conviction, ICC-01/04-01/06-3121-Red A5, 1 Dec. 2014 ('**Lubanga Appeal Judgment**'), paras 118-129.
[66] *Bemba* Appeal Judgment, para. 186, and footnote 368.
[67] **Lubanga Appeal Judgment**, para. 118.
[68] Interlocutory Appeal, ICC-02/04-01/15-1496, para. 43.