

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Date: 27 May 2016

TRIAL CHAMBER IX

Before: Judge Bertram Schmitt, Presiding Judge
Judge Peter Kovacs
Judge Raul C. Pangalangan

SITUATION IN UGANDA

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

**CONFIDENTIAL *EX PARTE*, Defence and Prosecution only with Confidential
Annex A**

**Defence Response to Prosecution's Request to Order the Defence to Comply with
Rule 79**

Source: Defence for Dominic Ongwen

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

The Office of the Prosecutor

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James Stewart, Deputy Prosecutor
Benjamin Gumpert, QC

Counsel for the Defence

Krispus Ayena Odongo
Charles A. Taku

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

The Office of Public Counsel for the Victims

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States' Representatives

Amicus Curiae

REGISTRY

Registrar
Herman Von Hebel

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations Other
Section**

I. INTRODUCTION

1. The Defence for Dominic Ongwen ('Defence') hereby responds to the "Prosecution's request to order the Defence to comply with rule 79" ('Prosecution Application').¹
2. At the outset, the Defence wishes to make note of the tone of the Prosecution Application, in particular paragraphs 4 and 39, which sets a condescending atmosphere of adversity, which is more than necessary for the disposition of this case. Almost all of the interactions thus far between the parties have been professional and cordial. The Defence respectfully submits that there is no necessity for any of the Parties or Participants to move the Chamber to remind the Parties or Participants of its powers and authorities over the proceedings.
3. The Defence acknowledges the provisions of Rule 79 of the Rules of Procedure and Evidence ('Rules') and has not "refused" to comply with the requirements of the Rules as alleged by the Prosecution. To the contrary, the Defence is eager to ensure the speedy and fair trial rights of its client as enshrined under Articles 64(2) and 67 of the Rome Statute. On that basis, the Defence's letter of 9 May 2016 was not a refusal to comply, but it disputes the Prosecution's interpretation and application of Rule 79 of the Rules and merely reflects the inability to respond without sufficient information, *i.e.* receipt of full disclosure from the Prosecution and time to consult the client before responding appropriately.
4. Pursuant to Regulation 23*bis*(1) of the Regulations of the Court, the Defence requests a confidential *ex parte*, Defence and Prosecution only status due to the ongoing collaborative investigative efforts described in paragraphs 10 and 11.

¹ ICC-02/04-01/15-435.

A confidential redacted version is filed concurrently as information in footnote 14 may lead to the identification of confidential Prosecution witnesses. A public redacted version is also filed concurrently.

II. BACKGROUND

5. On 23 March 2015 during an informal meeting between the Prosecution and Defence, Mr Ben Gumpert of the Prosecution asked the Defence to find out from Mr Ongwen if he wished to speak to the Prosecution. The Defence consulted with Mr Ongwen as to the request, and reverted back for the next three months that Mr Ongwen wished to enforce his right to remain silent. The Defence apprised the Prosecution that if the circumstances changed, it would give the Office of the Prosecutor notice.
6. From 21-27 January 2016, Pre-Trial Chamber II held the Confirmation of Charges Hearing ('Confirmation Hearing') in case ICC-02/04-01/15.
7. From 21 January 2016 to 14 April 2016, the Prosecution ceased disclosing material to the Defence, even though from the Prosecution's actions, which are described below, it was apparent that the Prosecution believed the case would proceed past Confirmation.²
8. On 5 February 2016, just a few days after the conclusion of the Confirmation Hearing, the Prosecution wrote to the Defence with a request for clarification akin to the one in the Prosecution's letter dated 4 May 2016, herein attached at Confidential Annex A. Interestingly, the Prosecution stated "[i]n the event that you consider this matter premature, please treat this letter as a standing

² The Defence notes that UGA-OTP-0258-0357 was disclosed to the Defence on 9 March 2016. This was to correct a factual error about the Prosecution's pleadings in relation to P-0198, which the Defence complained about during the Confirmation Hearing.

request”.³ Nonetheless, Mr Obhof met with Mr Gumpert that afternoon and informed him that the phrases quoted in the letter were not in used as legal terms of art and that he would be notified if any defences were going to be used.

9. Furthermore, during this meeting, Mr Gumpert also raised issues about possible collaboration on future protocols, agreed facts and admitting evidence through the Bar Table. This was nine days after the close of the Confirmation Hearing. It should be noted that the Defence considered the remainder of the conversation on 5 February 2016 inappropriate, even though conducted professionally, considering that the Confirmation Hearing had just closed.
10. On 24 February 2016, Mr Gumpert requested to interview Mr Ongwen for the purpose of asking him questions related to the death of Mr Otti Vincent. In the letter, Mr Gumpert vowed not to discuss anything related to the case at bar. The Defence replied on 3 March 2016, informing Mr Gumpert that even though Mr Ongwen would like to help, he had nothing of substance which he could provide.
11. On 17 March 2016, Mr Gumpert wrote to the Defence again, requesting help that Counsel Ayena Odongo offered in identifying persons that might have witnessed Mr Otti's death, or people that saw the aftermath. Counsel hopes to meet with the Prosecution to discuss this whilst in The Hague at the end of May 2016.
12. On 24 March 2016, Mr Gumpert sent a letter to the Defence asking to interview Dominic pursuant to Article 55(2).

³ Confidential Annex A.

13. On 14 April 2016, a representative from the Prosecution called Mr Obhof to inquire about the possibility of collaborating on recommendations to the Court about a site visit to Uganda for the Judges and having the opening of the trial in Uganda, preferably Gulu. Mr Obhof replied back on a later date that Counsel and Associate Counsel thought it was too early to discuss such issues because there was a pending request for leave to appeal the Confirmation Decision before Pre-Trial Chamber II.⁴

14. On 4 May 2016, Mr Gumpert called Mr Obhof and informed him that 73 hours, 56 minutes and 2 seconds of enhanced audio recordings were damaged when the .WAV files were converted to WMA.⁵ Mr Gumpert asked if the Defence wanted the files re-issued in the original enhanced .WAV format. The Defence replied back that evening, requesting the re-issuance of the audio files on an encrypted USB. The Prosecution handed over the .WAV files on 18 and 20 May 2016 after the Defence reminded the Prosecution of the files. The Defence is thankful to the Prosecution for its expedience in this matter.

15. On 4 May 2016, the Defence received a second letter from Mr Gumpert requesting notification of possible Article 31(1)(a) and (d) defences pursuant to Rule 79.⁶

16. On 9 May 2016, Counsel Ayena Odongo responded, informing Mr Gumpert that:

The Defence will not be in a position to comment on any disclosure obligations until the Prosecutor has completed her obligations for disclosure under the Statute, pursuant to any orders given by Trial

⁴ ICC-02/04-01/15-423.

⁵ Phone call from Ben Gumpert to Thomas Obhof at 09h12 on 4 May 2016, which he confirmed by email at 09h37 that morning.

⁶ ICC-02/04-01/15-435-Conf-AnxA.

Chamber IX on 23 May 2016 during the status conference or any subsequent orders given by Trial Chamber IX.⁷

Counsel Ayena Odongo stated that the case against Mr Ongwen came from a wider investigation, and that all the material from the Prosecutor about the case would be needed before it could conduct investigations and appropriately advise Mr Ongwen on his rights and possible defences. Finally, Counsel Ayena Odongo respectfully submitted to Mr Gumpert that he disagreed with his interpretation of Rule 79 of the Rules.

III. LAW

17. Article 31 of the Rome Statute provides for affirmative defences for a suspect or accused person hailed before the International Criminal Court. Specifically raised by the Prosecutor, Article 31(1)(a) states:

In addition to other grounds for excluding criminal responsibility provided for in this Statute, a person shall not be criminally responsible if, at the time of that person's conduct: The person suffers from a mental disease or defect that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law

18. Article 31(1)(d) of the Rome Statute states:

In addition to other grounds for excluding criminal responsibility provided for in this Statute, a person shall not be criminally responsible if, at the time of that person's conduct: [...] The conduct which is alleged to constitute a crime within the jurisdiction of the Court has been caused by duress resulting from a threat of imminent

⁷ ICC-02/04-01/15-435-Conf-AnxB.

death or of continuing or imminent serious bodily harm against that person or another person, and the person acts necessarily and reasonably to avoid this threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided.

Such a threat may either be:

- (i) Made by other persons; or*
- (ii) Constituted by other circumstances beyond that person's control.*

19. Rule 79(2)-(4) of the Rules state:

(2) With due regard to time limits set forth in other rules, notification under sub-rule 1 shall be given sufficiently in advance to enable the Prosecutor to prepare adequately and to respond. The Chamber dealing with the matter may grant the Prosecutor an adjournment to address the issue raised by the defence.

(3) Failure of the defence to provide notice under this rule shall not limit its right to raise matters dealt with in sub-rule 1 and to present evidence.

(4) This rule does not prevent a Chamber from ordering disclosure of any other evidence.

20. Rule 80 of the Rules requires the Defence to disclose its intent to raise a ground for excluding criminal pursuant to Article 31(3) of the Rome Statute sufficiently in advance of the commencement of trial. Article 31(3) allows for an accused to raise grounds for excluding criminal liability which are not enumerated in Article 31(1).

IV. SUBMISSIONS

The Prosecution's assumptions do not mandate Rule 79 disclosures

21. Rule 79 of the Rules provides for the disclosure obligations of a defence if it intends to raise the existence of an alibi or any other ground excluding criminal responsibility provided for in Article 31(1). The rule does not specify time limits, but provides that notification shall be given sufficiently in advance to enable the Prosecutor to prepare adequately and to respond, with due regard to other time limits set forth in other rules.
22. The Defence admits making the statements attributed to it during the Confirmation phase of the case. However, these statements do not amount to intent of the Defence to argue any of the grounds enumerated under Article 31(1) at trial. The Prosecution incorrectly states that the obligation to give notice of the intent to raise any of the defences under Article 31 only arises "as soon as that intent is formed".⁸ Applying the rationale in *Katanga*, the Defence will notify the Prosecutor and the Chamber, of its intention, if any, to raise any of the Article 31 defences as soon as a determination to rely on any of the grounds has been made.⁹
23. The Defence reiterates its position as indicated in the 9 May 2016 letter to the Prosecution that it does not have sufficient information at the moment to make such a determination for an affirmative defence under Article 31(1). In response to the Prosecution's contention that the Defence is being unnecessarily obstructionist, the Defence wishes to point out that the Prosecution is on sufficient notice to guide its investigations since the Confirmation Hearing. As a matter of fact, the Prosecution has added another

⁸ Prosecution Application, para. 15.

⁹ ICC-01/04-01/17-2388, para. 46.

category on its case mapping system to include duress, as it should have done from the beginning; perhaps following the line of thinking that this could be raised as a defence.¹⁰ This was not the case before the Confirmation Hearing.

24. The issue of duress came about because of a contextual reading of Prosecution disclosure. The Defence understands the origins of the LRA, and used that when reviewing Prosecution disclosure. With this knowledge, the Defence queried former LRA, asking deeper and more thought provoking questions. The Defence did not seek to limit its investigations to the unreasonably narrow time frame as the Prosecution has. The Situation in the Republic of Uganda originated before 1 July 2002.

25. The Defence stresses that there is a clear distinction between the possibility of raising a defence and determining the intent to raise a defence. With the new disclosure, the Prosecution is actually performing its duty under Article 54(1)(a) to “extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under this Statute.”

26. The affirmative defence of duress was discussed during the Confirmation Hearing. The Prosecution has been put on sufficient notice for the time being that the Defence is considering the possibility of raising such a defence during the trial proceedings. Prosecution investigators are now interviewing witnesses with this in mind, and its analysts are reviewing evidence with a new category.¹¹

27. Furthermore, the Prosecution's reliance on Rule 80 to show that Rule 79 requires disclosure two days after Trial Chamber IX was formed is

¹⁰ See ICC-02/04-01/15-436-Conf-AnxA, pgs 23, 25 and 42. In the “Disclosure Memo” category, a tab reading “32. DO was not under duress” has been added.

¹¹ *Ibid.*

misplaced.¹² A reasonable person can understand why Rule 80 mandates disclosure in advance of trial; the Prosecution cannot reasonably be expected to investigate affirmative defences which are not enumerated under Article 31(1). For the Prosecution to fulfil its duty under Article 54(1)(a), a reasonable person would expect the Prosecution to investigate possible affirmative defences under Article 31(1), but not Article 31(3), hence the need for disclosure in advance of trial pursuant to Rule 80 of the Rules.

28. Without full disclosure, or at least a majority of it, a counsel practicing before the Court cannot reasonably be expected to make a determination on whether or not to rely upon an Article 31(1) defence at trial. To do so would be a violation of a counsel's professional obligations to his or her client as an attorney.¹³

The Prosecution application is premature

29. It has not been demonstrated that the Defence is in violation of any of its obligations under the Rules such that an order for compliance is required. The Prosecution has not concluded its own disclosure obligations or investigations, and until the submissions in preparation for the Status Conference, there was no projected timeline for disclosure from the Prosecution. Even after reviewing the estimated time of readiness for trial, it is conspicuously clear that the current motion is premature. As more disclosures are reviewed by the Defence, more information is gleaned that affects the strategy of the case, which requires consultation with the client to formulate any possible defences.

¹² Prosecution Application, paras 26-28.

¹³ See International Criminal Court Code of Professional Conduct for counsel, Articles 14(2)(b) and 15(1).

30. The Defence wishes to remind the Prosecution and bring it to the attention of the Chamber that several of the fact witnesses relied upon during confirmation for the defence of duress are Prosecution witnesses.¹⁴ Coupled with limitations in the investigation budget and the lack of on ground resources, the Defence has had to rely on the information garnered from the Prosecution witnesses to formulate its strategy. The Defence does not have vast resources at its disposal, both in human capital and finances, to alter its investigations at the whim of the Prosecution. The Defence is mindful of the requirement to give sufficient notice if it determines to use an Article 31(1) defence and undertakes to follow through if a determination to use any possible defences under Article 31(1) arises. It is not the appropriate time at this stage of the proceedings, before the first status conference, before the trial date is set, to request disclosure pursuant to Rule 79 of the Rules.

31. The Defence also draws the attention of the Chamber to the *Lubanga* Trial Chamber decision that the Prosecutor uses to interpret Rule 79 of the Rules. Trial Chamber I ordered the defence to notify the Prosecution **three weeks** in advance of trial, not two days after Trial Chamber I was constituted.¹⁵ The general time frame used by Trial Chamber I for disclosure pursuant to Rule 79 mirrors that used by Trial Chamber VII.¹⁶

32. The Defence respectfully requests the Chamber to follow the guidance of Trial Chamber's I and VII. In any event, should the Defence form the intent and

¹⁴ See ICC-02/04-01/15-T-23-CONF-ENG, pg. 5:11-14; pgs 6:13 – 7:4; and numerous Defence witnesses, pg. 7:5-6. See also transcript of P-245, UGA-OTP-0244-0461, lns 566-641 (*discussing* how 47-48 people were killed in Mucwinyi Centre, Uganda in 2002 because a person who hailed from that area escaped with a firearm) and transcript of P-258, UGA-OTP-0243-1635, lns 548-611 (*discussing* attacks in Okungedi and Ober Abic in Amuru District in which Kony retaliated against the communities of people that escaped by abducting people and burning their houses down in 1993).

¹⁵ ICC-01/04-01/06-1235, para. 41(b). The paragraph states, "Furnish the Chamber, the prosecution and the participants three weeks in advance of the trial with a document setting out in general terms the defences the accused intends to rely on and any substantive factual or legal issues that he intends to raise (and including by way of an alibi or grounds for excluding criminal responsibility under Rule 79 of the Rules);..."

¹⁶ ICC-01/05-01/13-1209, para. 8. The Defence notes that Trial Chamber VII issued this order 27 days before the start of trial.

determination of using any possible affirmative defence under Article 31(1), it shall notify Trial Chamber IX and the Prosecutor as soon as practicable.

The Prosecution Application, if granted, would violate Mr Ongwen's rights

33. Firstly, Article 54 generally provides for the duties and powers of the Prosecutor with respect to investigations. The Defence notes that the material disclosed thus far contains only 270 pages, *i.e.* 0.339% of pages disclosed, of potentially exculpatory evidence, even though the Prosecutor has a duty to investigate the truth.¹⁷ If the Prosecution understood the Defence's submissions for the Confirmation Hearing to indicate circumstances that would fall under Article 31(1), then it is the Prosecutor's duty under Article 54 to investigate these defences as much as humanly possible.

34. Secondly, Article 54(1)(c) categorically imposes an obligation on the Prosecution to respect fully the rights of persons arising under the Statute. Mr Ongwen's rights under the Statute during investigations include, but are not limited to, the right to remain silent if the Prosecutor thinks a crime under the Statute was committed (Article 55(2)(b)); the right not to be compelled to incriminate himself or to confess guilt (Article 55(1)(a)); the right to have adequate time and facilities for the preparation of the defence (Article 67(1)(b)); and the right to remain silent and not to be compelled to confess guilt during trial (Article 67(1)(g)). The right to remain silent is enshrined twice, both during investigations and during trial. To ask the Defence to disclose information on a possible defence at this point would be a violation of this fundamental right. For purposes of investigations, the Defence submits that the Prosecution has sufficient information to proceed with its

¹⁷ The Defence acknowledges that whilst some documents are labelled Incriminatory or Rule 77, that material may contain some exculpatory evidence. The fact that the Prosecution has only disclosed 19 documents out of 7,717 is still perplexing. Furthermore, one of the 19 documents, UGA-OTP-0010-0006, was disclosed to the Defence twice. This document is 141 pages. The second disclosure, document UGA-OTP-0027-0036, is labelled as Rule 77. The sources of the documents are different, but the typed content appears to be identical.

investigations. The Defence undertakes to notify the Prosecution if it makes a determination to raise any defences enshrined in Article 31(1) for trial.

35. In the *Katanga* case, the chamber referenced the findings in *Lubanga* which acknowledged the tension between balancing an accused's fair trial rights, which include the right to remain silent, and the appropriate disclosure obligations on the defence as not easy to resolve. Both chambers were mindful that the accused's fundamental rights must not be undermined by any obligations imposed on the defence.¹⁸ In this regard, the *Katanga* chamber held that the defence teams had "the responsibility to notify their intention, if any, to raise a defence to the Prosecution and the Chamber as soon as a **determination** to rely on such ground has been made."¹⁹ Of course the Chamber was mindful of the necessity of efficiency in the proceedings and held that this disclosure should be made within a reasonable time prior to the hearing in order to allow the prosecution an opportunity to prepare adequately.²⁰ The Prosecution however has indicated its haste in knowing the Defence case as indicated by the letter sent on 5 February 2016.

36. Disclosure by the Defence now would not necessarily mean efficiency, since further disclosure could potentially change the defences available to Mr Ongwen. A required disclosure at this point, so early in the trial proceedings, will violate Mr Ongwen's fundamental right to remain silent.

The Prosecution improperly seeks an examination of Mr Ongwen

37. The Defence observes the unconventional approach of the Prosecution in this case by repeated attempts to gain access to Mr Ongwen. Neither the Statute nor the Rules provide for any possibility for the Prosecutor to appoint medical

¹⁸ ICC-01/04-01/07-2388, para. 37.

¹⁹ *Ibid*, para. 42. [Emphasis added.]

²⁰ *Ibid*, para. 50.

experts to evaluate an accused's competency to understand the proceedings against him. In paragraph 24 of the Prosecution Application, the Prosecutor incorrectly relies on Rule 135 to suggest an evaluation of Mr Ongwen's suitability for trial. A reading of the rule together with Article 64(8)(a) indicates that the Chamber has the responsibility to ensure that the accused understands the proceedings against him, not the Prosecution.

38. In the *Gbagbo* case, the Prosecutor argued that an accused has the burden to prove that he is unfit to stand trial.²¹ Indeed in that case, this was in response to a defence motion.²² The Chamber pointed out that this role is not necessarily for the parties but falls within the duties of the chamber in ensuring a fair trial.²³ Trial Chamber I further pointed out that the experts were appointed not by the parties, but by the chamber to assist its assessment of Mr Gbagbo's mental state.²⁴ Since the initial appearance of Mr Ongwen, none of the Judges has seen any indication to show unsuitability to stand trial and the Defence has not evoked anything of the sort.

39. It is bizarre to say the least that the Prosecution is eager to offer Mr Ongwen a psychiatric or psychological examination and report under Rule 135. This is merely another Prosecution step towards gaining access to Mr Ongwen and interviewing him against his express wishes, as evidenced by the several requests by the Prosecution, even though apprised that the Defence would notify the Office of the Prosecutor if the situation changed.²⁵

²¹ ICC-02/11-01/11-286-Red, para. 20. Pre-Trial Chamber I cited the Prosecutor's observations, found at ICC-02/11-01/11-214-Conf-Corr, para. 20.

²² *Ibid.*

²³ *Ibid.*, para. 56.

²⁴ *Ibid.*

²⁵ The Defence make reference to paras 3, 9, 11 and 13 above.

The Prosecution is improperly seeking an admission of guilt from Mr Ongwen

40. The Defence is particularly worried by the Prosecution's submissions that seek not only to infringe Mr Ongwen's absolute right to remain silent, but also threaten to taint the very essence of the proceedings. Paragraph 20 of the Prosecution Application is particularly telling and is erroneous in that it misstates the provisions of the Statute.
41. Article 65 provides for proceedings on an admission of guilt by an accused after the charges have been read to him. Article 65(1)(c) sets out the factors to support an admission of guilt, and not one of them reference Article 31 defences. As a matter of fact, grounds in Article 31 exclude criminal responsibility in its entirety and there is no bifurcation of the *mens rea* and *actus reus* as suggested by the Prosecution. The Prosecution's submissions are misplaced in this case because an admission of guilt under these circumstances would infringe on Mr Ongwen's right to remain silent.
42. In paragraph 33 of the Prosecution Application, the Prosecution evokes the Chamber's authority to freely asses the entirety of the evidence and suggests that if Mr Ongwen maintains his right to remain silent, then adverse inferences may be drawn against him. This is in direct contravention of the provisions of Article 67(1)(g) which provides that an accused's silence shall not be used in the determination of guilt or innocence.
43. Finally, the Defence politely reminds the Prosecution that defences may be stated in the alternative. Mr Ongwen does not admit anything within the charges. The Prosecution seriously misrepresents the submissions of the Defence during and for the Confirmation Hearing. It isolates statements, and removes them from the context of the Confirmation Hearing as a whole.

The Prosecution's Article 54(1)(a) duty does not trump fair trial rights of the Accused

44. The Prosecution relies on the provisions of Article 64(2) to claim fair trial rights and further seeks to buttress this argument with a stretch of the findings of the Appeals Chamber in the *Ngudjolo* case. The Defence submits that the issues in the *Ngudjolo* case are distinguishable from the issues in this case and therefore no parallels can be reasonably drawn. Whereas the Prosecution indeed should be able to fully perform its truth seeking duties pursuant to Article 54(1)(a), this duty does not trump the fair trial rights guaranteed to an accused, including the right to remain silent.

45. The Appeals Chamber in *Ngudjolo* specifically refused to decide whether the Prosecutor had an abstract right to a fair trial,²⁶ that “[w]hat [was] at issue [was] not the overall fairness vis-à-vis the Prosecutor.”²⁷ Furthermore, the Appeals Chamber stated, “[i]t is commonly understood that the right to a fair trial/fair hearing in criminal proceedings, first and foremost, inures to the benefit of the accused. Indeed, the specific rights entrenched in article 67(1) of the Statute are specifically tailored to the needs of the accused person.”²⁸ Any supposed Prosecutorial right to a fair trial ends when it does not respect the rights of the Accused.

46. Article 64(2) requires the Chamber to conduct a fair trial “with full respect for the rights of the Accused.”²⁹ The Chamber conducts a fair trial, and the right to that fair trial resides with the Accused, with due regards to the protection of victims and witnesses.

²⁶ ICC-01/04-02/12-271-Corr, para. 256.

²⁷ *Ibid.*

²⁸ *Ibid.*, para. 255. [Internal footnotes omitted.]

²⁹ Article 64(2) of the Rome Statute.

The Trial Chamber need not intervene at this time

47. The Defence counters the Prosecution submission that Rule 79 is silent as to the consequences of a party's failure to conform to the obligations under Rule 79. Rule 79(3) categorically states that failure by the Defence to provide notice under this rule shall not limit its right to raise matters dealt with in sub-rule 1 and to present evidence.³⁰ While the Defence has every intention of notifying the Prosecutor and the Chamber should it make a determination on any intent to present Article 31(1) defences, it is erroneous for the Prosecution to suggest that some consequence for non-compliance has to be available in total disregard of the plain language in the rules.

48. The Defence submits that Rule 79(4) must be exercised in accordance with the Statute and the Rules, and particularly with respect to the rights of Mr Ongwen. As argued above, the Prosecution Application is premature, alarmist and overreaching, and as such, should be denied. The Defence has not refused to comply with its disclosure obligations under Rule 79 to warrant the intervention of the Chamber. As a matter of law, the Defence will disclose any defence under Article 31(1) if it determines that it will raise such defence(s) for trial sufficiently in advance so the Prosecution can prepare its case.

49. Finally, the Defence was perplexed by the due diligence exercised by the Prosecution regarding this matter when it received the Prosecution's 4 May 2016 letter, a mere 2 days after the constitution of Trial Chamber IX. The Defence wonders why the same diligence was not given to its own disclosure obligations, especially regarding exculpatory evidence. Why was disclosure ceased from 21 January 2016 to 14 April 2016? The Prosecution missed two regularly scheduled disclosure dates, but consistently acted as if it desired an expeditious trial. A speedy trial is best conducted if the Prosecution discloses

³⁰ Emphasis added.

material as soon as practicable. Mindful that the first status conference had not yet taken place, the Defence considers that its response was appropriate, and did so in its 9 May 2016 letter. Surprisingly, the Prosecution interpreted the response as a refusal to comply with the rules.

V. RELIEF

50. The Defence respectfully requests the Chamber to dismiss the Prosecution Application in its entirety.

Respectfully submitted,



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

Dated this 27th day of March, 2016
At The Hague, Netherlands