

**Cour
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**International
Criminal
Court**

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Date: 15 March 2017

TRIAL CHAMBER IX

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

SITUATION IN UGANDA

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

Confidential with Confidential Annexes A & B and Public Annex C

**Defence Request for a Disclosure Order Regarding Material Related to the
Circumstances of Hostilities between the LRA and Ugandan Government
Pursuant to Article 67(2) and Rule 77**

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. The Defence respectfully requests Trial Chamber IX ('Trial Chamber') to order the Prosecution to disclose a range of materials that the Defence seeks to raise in testimony. The material sought relates to certain deaths and destruction that are the subject of some charges.
2. In particular, the Defence seeks disclosure of any information that indicates:
 - a. That Local Defence Units ('LDU') and UPDF soldiers were stationed within the IDP camps in a time-frame prior and up to the period that form the basis of the charges against Mr Ongwen ('Request A');
 - b. A pattern of stationing LDUs within IDP camps in Northern Uganda during the temporal period of the charges ('Request B');
 - c. LDUs on the sites that form the charges against Mr Ongwen were armed by the UPDF, controlled by the UPDF, or trained by the UPDF near or within the IDP camps ('Request C');
 - d. The LDUs were armed by the UPDF, controlled by the UPDF, or trained by the UPDF near or within the IDP camps in Northern Uganda during the temporal jurisdiction of the charges against Mr Ongwen ('Request D');
 - e. LDUs and UPDF soldiers led attacks from the IDP camps that form the basis of the charges against Mr Ongwen within a time-frame of one month of the charged attacks ('Request E');
 - f. The LDUs and UPDF soldiers led attacks from the IDP camps during the temporal jurisdiction of the charges levelled against Mr Ongwen ('Request F'); and
 - g. Should the Trial Chamber accept the legal arguments contained within this request: information that shows that deaths of civilians or the destruction of purported civilian objects that form the charges against Mr Ongwen were (1) potentially caused by actors other than the LRA and (2) were potentially the result of proportionate attacks by the LRA against military objectives ('Request G').

3. As the Prosecution and the Defence disagree on the materiality of the above requests, the Defence respectfully requests the Trial Chamber to find that the information sought must be disclosed as it is either exculpatory pursuant to Article 67(2) or relevant to the preparation of the Defence pursuant to Rule 77.
4. Additionally, given its thematic similarity to the above requested material, and the immediate pertinence to ongoing cross-examination, the Defence takes the opportunity to request disclosure of the following additional materials.
 - a. Intelligence report UGA-OTP-0016-0287 indicates at 0292 that on 26 March 2004, there was a fire in Odek IDP Camp that destroyed around 500 huts due to “reckless handling of fire by occupants”. The Defence seeks disclosure of (1) any material resulting from Prosecution investigations concerning whether this incident may have accounted for some of the alleged damages or loss of goods attributed to Mr Ongwen and (2) any further material related to the fire in Odek or fires at any of the other sites that relate to the charges against Mr Ongwen before or after the attacks attributed to Mr Ongwen (‘Request I’); and
 - b. In addition to those disclosed, any further UPDF post-attack reports concerning any of the sites related to the charges against Mr Ongwen. Though not to limit the scope of the foregoing, the Defence seeks any reports originating from the counter-intelligence services (‘Request J’).
5. Nothing in the present request should be taken as an admission of the legal characterisation of the conflict, parties, organisational capacity of the LRA, or acts of Mr Ongwen.

II. BACKGROUND

6. At the trial status conference on 23 May 2016, the Trial Chamber indicated its expectation that the parties would seek to solve problems between themselves *inter partes* before seizing the Chamber for relief.¹
7. On 3 October 2016, the Defence wrote to the Prosecution requesting disclosure of a range of materials.² Included in this request was reports related to offences alleged to have been

¹ ICC-02/04-01/15-T-25-ENG, p. 3, lines 22-25.

² See Annex A.

committed by the UPDF, other security services, and militias.³ The request further indicated that reports that showed any of these services engaged in perfidy, reconnaissance, attacked the civilian population, or *launched attacks against the LRA from the IDP camps* were relevant to the Defence.

8. The Prosecution responded to this request on 17 October 2016⁴ indicating *inter alia*, that (a) it considered that “material intended to support a *tu quoque* defence”⁵ was “irrelevant to the present charges against Mr Ongwen”⁶ and (b) that it had searched for material related to attacks by “UPDF or security forces in the region of, and *at the time of, the four charged attacks*” (emphasis added).⁷ With regards to the search, the Prosecution identified two pages that were not disclosed and which were part of a previously disclosed document; however, the Prosecution communication did not make clear whether it found material related to UPDF attacks that it did not disclose.
9. The Defence further responded on 5 January 2017.⁸ In the letter, the initial request was further clarified. The Defence first noted that the material was not sought to pursue a *tu quoque* defence but rather to show that (1) deaths attributed to the LRA were committed by other actors, (2) deceased individuals who were the subject of the charges were at the time of death taking direct part in hostilities, and (3) deaths attributed to an alleged intentional attacks on civilian populations were in fact proportionate collateral deaths pursuant to hostilities between two armed groups – in other words not the result of intentional attacks on civilians.⁹
10. The Defence also indicated that it found that the time-frame considered relevant by the Prosecution in its communication was not clear and indicated that the subject of the Defence request was a wider time-frame. Of relevance to the Defence were attacks launched from the IDP camps that were not concurrent but rather just prior to the four charged attacks, or any information that showed that regular attacks were launched from the camps.
11. Finally, on 17 February 2017, the Prosecution responded¹⁰ to the Defence 5 January 2017 follow-up. It indicated that it had searched for all information demonstrating that the crimes

³ See Annex A, p. 4, point A.2.

⁴ See Annex B, pp. 7 to 10.

⁵ See Annex B, p. 7.

⁶ See Annex B, p. 8.

⁷ See Annex B, p. 8.

⁸ See Annex B, pp. 4 to 7.

⁹ See Annex B, p. 5, section ‘Request A.2’

¹⁰ See Annex B, pp. 2 and 3.

alleged against the Accused were committed by others, that the purported victims were taking direct part in hostilities, and that the deaths may have been the result of proportionate collateral damage (e.g. not killed in cross-fire).

12. Importantly, the Prosecution stated its position that it does:

not understand the Statute or Rules to impose on the Prosecution any obligation to search for and disclose additional information about attacks by UPDF or other security forces “setting out from within or near the four IDP camps to attack the LRA positions, either regularly over a period of time or around the time-frame of the charged attacks but not concurrently to the attacks”¹¹

13. And also that it:

does not dispute that UPDF and/or local defence forces were present in or nearby all four of the IDP camps on and around the dates of the attacks. [The Prosecution does] not see the relevance, much less the materiality, of any additional information which might be in [its] possession regarding attacks by UPDF or other security forces that were removed in time or place from the charged attacks, and [it] decline[s] to conduct further searches for such material at this time.¹²

III. CONFIDENTIALITY

14. Pursuant to Regulations 23*bis* of the Regulations of the Court (‘RoC’), this request is submitted as confidential as it refers to the Prosecution’s investigative practices and confidential information. The Defence will consult with the Prosecution on a public redacted version.

IV. APPLICABLE LAW

15. Article 67(2) of the Statute unequivocally states:

In addition to any other disclosure provided for in this Statute, the Prosecutor shall, as soon as practicable, disclose to the defence evidence in the Prosecutor's possession or control which he or she believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence. In case of doubt as to the application of this paragraph, the Court shall decide.

It is clear that a determination of whether material should be disclosed under this provision falls to the Trial Chamber, not the Prosecution.

¹¹ See Annex B, p. 2.

¹² See Annex B, p. 2.

16. Rule 77 of the Rules of Procedure and Evidence ('RPE') states that the Prosecution must permit the Defence to "inspect any books, documents, photographs or other tangible objects in the possession or control of the Prosecutor, which are material to the preparation of the Defence or are intended for use by the Prosecution as evidence for the purposes of the confirmation hearing or at trial". It is common practice at the ICC that material falling within the scope of Rule 77 is automatically disclosed to the Defence along with other disclosures.¹³
17. The ICC Appeals Chamber has held that the expression "material to the preparation of the defence" has to be interpreted broadly¹⁴ and that Rule 77 encompassed "all objects that are relevant for the preparation of the defence".¹⁵ It is noted in particular that certain objects, while not directly linked to exonerating or incriminating evidence, may otherwise be material to the preparation of the defence.¹⁶ This included material not directly related to the case but tending to explain the overall circumstances of a conflict.¹⁷
18. Under Rule 81(1) of the RPE "reports, memoranda or other internal documents prepared by a party, its assistants or representatives in connection with the investigation or preparation of the case are not subject to disclosure."
19. Article 64(3)(c) of the Statute grants the Trial Chamber the power to provide for disclosure of documents or information not previously disclosed, sufficiently in advance of the commencement of the trial, to enable adequate preparation for trial. This Statutory provision is complemented by Rule 84 of the RPE which further elaborates upon this power by specifying that the Trial Chamber may attach "strict time limits" for disclosures that are "necessary" in advance of trial. This is "in order to enable the parties to prepare for trial and to facilitate the fair and expeditious conduct of proceedings."

V. SUBMISSIONS

A. The relevance and materiality of the object of the requested material generally

20. The relevance of the requested material is that it is, firstly, exculpatory and must be disclosed pursuant to Article 67(2) of the Statute, secondly, potentially mitigating of sentence and must

¹³ See e.g. ICC-01/05-01/13-291; ICC-01/05-01/13/333.

¹⁴ ICC-01/04-01/06-1433 OA, para. 77; see also ICC-01/05-01/08-1594-red, para. 19.

¹⁵ ICC-01/04-01/06-1433 OA, para. 77.

¹⁶ ICC-01/04-01/06-1433 OA, para. 77.

¹⁷ ICC-01/04-01/06-1433 OA, paras 76-82.

be disclosed pursuant to Article 67(2), or, thirdly, at the very least relevant to the preparation of the Defence under Rule 77 of the RPE and must be disclosed.

21. The requested material is sought to support arguments and lines of defence that result from the basic rules of international humanitarian law ('IHL'). These lines of defence are aimed at undermining *inter alia* charges 1, 11, 24, and 37;¹⁸ 3, 13, 15, 26, 28, 39, and 41;¹⁹ and 35 and 48.²⁰
22. Though not listed as defences in Article 31, being based-upon and making reference to IHL concepts, certain crimes in the Rome Statute require the establishing of particular IHL legal criteria that implicitly recognise a form of definitional defence.²¹ Without the presence of specific criterion there is either no *mens rea* and/or *actus resus*. In other words, in addition to reaching the standard of proof, if the necessary legal condition is not present, then the crime cannot be established.
23. By example, and relevant to charges facing Mr Ongwen, following the Rome Statute Article 8(2)(e)(i) and Elements of Crimes, "the directing [of] attacks against the *civilian population*"²² presupposes the population is a civilian one and the targeting of individual civilians requires that they are "not taking *direct part in hostilities*".²³ Murder pursuant to Article 8(2)(c)(i) is only murder where the individuals concerned are "persons taking no active part in the hostilities".²⁴
24. "Destroying or seizing the property of an adversary" pursuant to Article 8(2)(e)(xii) is conditioned on the absence of the fact that the "destruction or seizure be imperatively *demand*ed by the *necessities of the conflict*". The Elements of Crimes element 3 of Article 8(2)(e)(xii) further specifies that criminal liability only attaches if the object "was protected from that destruction or seizure *under the international law of armed conflict*"²⁵ and under element 5 destruction "was not required by *military necessity*"²⁶.

¹⁸ Attack on a civilian population as a war crime pursuant to Article 8(2)(e)(i).

¹⁹ Murder and attempted murder as a war crime pursuant to Article 8(2)(c)(i).

²⁰ Destruction of property as a war crime pursuant to Article 8(2)(e)(xii).

²¹ See for further explanation, p. 7 of Annex C to the present filing: Krabbe M, *Excusable Evil: An Analysis of Complete Defences in International Criminal Law* (2014), p. 6.

²² (emphasis added).

²³ (emphasis added).

²⁴ Rome Statute, Article 8(2)(c) *chapeau*.

²⁵ (emphasis added).

²⁶ (emphasis added).

25. At the present moment, there is some evidence on record to support the position – which is that of the Defence, that the LDUs were members of the UPDF and thus were combatants and not civilians. This is an important distinction for the purposes of IHL. When asked whether the LDUs were part of the armed forces of Uganda, witness P-0059, and member of a government agency, described the LDUs thus:

The Local Defence Unit is part of the army of - the army of Uganda. I am not familiar with the army laws, but *they are part of the army*. [...] To ask me if these are established armed forces, you should ask the government of Uganda.²⁷

26. In discussing LDUs²⁸ Expert Witness P-0422 said:

[The LDUs] were equipped by the UPDF. Those that I interviewed had weapons that were given to them by the UPDF and they, insofar as I was able to ascertain it, were under UPDF command or at least regulation.²⁹

Later adding:

[I]t was frankly sometimes difficult to discern which were local defence forces and which were part of the UPDF particularly when they seemed to have similar uniforms.³⁰

27. Item UGA-D26-0018-0003 submitted through witness P-0422³¹ sets out further information about the background, numbers of those recruited, manner of recruitment, and that the LDUs were more formally incorporated into the UPDF by a Ugandan law in 2005.³² In any case, the Prosecution's position is that the LDUs "were integrated into UPDF command structures."³³ The Prosecution furthermore indicates that it "does not dispute that UPDF and/or local defence forces were present in or nearby all four of the IDP camps on and around the dates of the attacks."³⁴
28. Though not legally definitive, it is also significant that the ICRC commentary on Additional Protocol II ('AP II') to the Geneva Conventions of 1949 indicates that the meaning of "armed

²⁷ ICC-02/04-01/15-T-38-CONF-ENG, p. 46, lines 13-16 (emphasis added).

²⁸ ICC-02/04-01/15-T-29-CONF-ENG, pp. 72 to 82.

²⁹ ICC-02/04-01/15-T-29-CONF-ENG, p. 77, lines 1-3.

³⁰ ICC-02/04-01/15-T-29-CONF-ENG, p. 82, lines 17-19.

³¹ Email, dated 18 January 2017, subject: 'Defence items to be submitted to Trial Chamber IX pursuant to ICC-02/04-01/15-497, para. 28(i)'.

³² UGA-D26-0018-0003, at 0021.

³³ ICC-02/04-01/15-533, para. 25, *citing*: The anguish of northern Uganda, UGA-OTP-0231-0271 at 0305; Behind the violence, UGA-OTP-0231-0383 at 0421-0425; War in Acholi land, UGA-OTP-0231-0484 at 0540-0541. That the LDU were established by, and affiliated with, the Ugandan Government is an agreed fact between the parties. See ICC-02/04-01/15-487-ConfAnxA, p. 3.

³⁴ See Annex B, p. 2.

forces” within Article 1 of AP II may include National Guard, customs, police forces or *any other similar force*.³⁵ AP II³⁶ forms much of the legal background to the crimes concerning non-international armed conflict that appear in the Rome Statute.

1. Combatant status of the LDUs

29. If the LDUs were members of the UPDF and the LDUs were present at the charged attacks, the simplest legal implication is that some deaths reported to be that directed at civilians at the sites of the charged attacks may be that of combatants. A further implication is that even civilian structures within the IDP camps may, upon deliberation by the Trial Chamber, have attained the status of military objects during the time of the attack due to fact that their “*location, purpose, or use*” offers a definite military advantage³⁷ – a status which brings the necessity³⁸ of their destruction into question.
30. Combatants and military objects may be targeted and have attacks directed against them provided that the damage to civilian objects and harm to civilians is not “clearly excessive in relation to the concrete and direct overall military advantage anticipated”³⁹ – in other words military objects and combatants may be the object of not-disproportionate attacks.⁴⁰ The implication of this in laymen’s terms is that a certain amount of collateral damage and death may be permitted by the rules of IHL insofar as civilians are not directly targeted.

³⁵ Commentary of 1987 on the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977 §4462 (“The term ‘armed forces’ of the high contracting party should be understood in the broadest sense. In fact, this term was chosen in preference to others suggested such as, for example, ‘regular armed forces’, in order to cover all the armed forces, including those not included in the definition of the army in the national legislation of some countries (national guard, customs, police forces or any other similar force)”), available at: https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=15781C741BA1D4DC_C12563CD00439E89, accessed 8 March 2017.

³⁶ Alongside Article 3 Common to the Geneva Conventions of 1949.

³⁷ See *Katanga Judgment*, ICC-01-04-01/07-3436-tENG, para. 893 (emphasis added).

³⁸ See element 3 quoted above which prohibits destruction of objects “protected from that destruction [...] *under the international law of armed conflict*” (emphasis added).

³⁹ See ICC-01/04-01/07-3436-tENG, para. 889 (“the Chamber notes that there is nothing to suggest that the constituent elements of the crime defined under article 8(2)(e)(xii) differ from those of the crime of destruction of enemy property committed in an international armed conflict, under article 8(2)(b)(xiii)”). Further, while Article 8(2)(e)(xii) does not make explicit reference to proportionality, the International Committee of the Red Cross considers the rule of proportionality to be applicable in non-international armed conflict following customary international law, Chapter 4, Rule 14, available at: https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_cha_chapter4_rule14#Fn_66_23, accessed 8 March 2017. Of relevance cited see ICTY, *The Prosecutor v. Kupreškić et al.*, IT-95-16-T, Judgment, 14 January 2000 (‘*Kupreškić case*’), paras 513 and 524, available at: <http://www.legal-tools.org/doc/5c6a53/pdf/>.

⁴⁰ ICC-01/04-01/07-3436-tENG, para. 895.

2. *LDUs as civilians taking Direct-Part in Hostilities*

31. Should the Trial Chamber find that the LDUs were not members of the UPDF, other legal issues persist concerning the status of the individuals at the times of their deaths and attendant conditions of their deaths. As is explicit in the Rome Statute, the killing of civilians taking “direct part in hostilities” (‘DPH’) does not lead to criminal liability. The issue of what constitutes DPH is still developing and there is acceptance of the notion that those who exercise a “continuous combat function”⁴¹ may be understood to be taking direct-part in hostilities – and thus targeted – despite the absence of manifest hostilities.
32. In other words, even if the Trial Chamber does not conclude that the LDUs were members of the Ugandan armed forces, it will still be potentially faced with questions of law and fact concerning whether at the time of the death a given individual was taking DPH, whether an individual was killed incidental to a proportionate attack directed at individuals taking DPH, whether a civilian object (i.e. building) has temporarily attained a status of military object, and so on.

B. The relevance of the Defence requests

33. The present Defence requests for disclosure are necessary to be able to pursue lines of defence – particularly through cross-examination – related to these legal distinctions just discussed. Defence Requests A, B, C, and D are particularly relevant to being able to explore, in an informed manner, whether alleged deaths were those of legally targetable combatants or individuals collaterally killed in cross-fire.
34. The relevance is not fanciful; evidence submitted by the Prosecution points to the existence of fire-fights at the charged sites such as Abok – where the transcripts of radio intercepts describe a firefight involving heavy artillery shelling from a distance to what may have been near the IDP camp⁴² – and Pajule where log-books provide a conflicting account of whether the military appears to have laid an ambush⁴³ or whether the soldiers (and thus plausibly LDUs) were hiding amongst the civilians.⁴⁴ Statement’s such as P-0138’s discuss casualties

⁴¹ See Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law, p. 33 and more generally, pp. 27 to 36, available at: <https://www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf>.

⁴² UGA-OTP-0248-0106 lines 456 to 479.

⁴³ UGA-OTP-0232-0234 at 0549.

⁴⁴ UGA-OTP-0254-0725 at 1072.

due to cross-fire and/or receiving fire from members of the UPDF stationed within an IDP camp.⁴⁵

35. Also, as highlighted in the Defence response to the second Prosecution bar-table motion, though it is unclear whether this was intentional or the result of conflict, the evidence also contains suggestions that UPDF burnt civilian buildings⁴⁶ and where deaths are attributed to periods around the attacks limited analysis has been made as to the party that caused the death.
36. Request I also goes to the question of whether some of the buildings purportedly destroyed by the LRA were in fact caused by external factors – namely the unfortunate result of accidents occurring due to the high concentration of humans within a small geographic area.
37. Similarly, as addressed by Defence Requests E, F, and G, regardless of whether LDUs were members of the UPDF or not, information concerning their numbers, training, location of training, deployment, and behaviour may impact upon determinations concerning the status of certain structures within the IDP camps.
38. In particular, information related to Request E, which concerns whether LDUs and the UPDF attacked LRA positions – or even individuals affiliated with the LRA but not taking direct part in hostilities – prior to the charged attacks, may lead to the conclusion that parts of the IDP camps were in fact military targets. This is irrespective of whether the Trial Chamber ultimately decides whether an attack could be considered disproportionate.
39. Request F is similar to Request E, but addresses the request from a wider contextual viewpoint, as do Requests B and D. The Appeals Chamber has considered contextual information disclosable⁴⁷ where the Defence demonstrated that “[b]efore setting a defence line, it’s necessary to understand the situation”,⁴⁸ and “the requested material might be relevant [...] to understand the phenomenon of the use of child soldiers and their demobilisation”.⁴⁹ The Defence is interested in understanding the prevalence, method, and patterns of such violence as this may be material to the defence to provide context to evidence that may be elicited as regards the charged IDP camp attacks and may impact upon investigative decisions.

⁴⁵ UGA-OTP-0228-6503-R01 at 6509, line 205 to at 6510 line 236.

⁴⁶ See ICC-02/04-01/15-701, para. 36, *citing* UGA-OTP-0150-0118.

⁴⁷ ICC-01/04-01/06-1433 (OA11) para. 82.

⁴⁸ ICC-01/04-01/06-1433 (OA11) para. 82.

⁴⁹ ICC-01/04-01/06-1433 (OA11) para. 82.

40. Finally, Request J is relevant because any of this material will shed light on the ways in which attacks occurred, whether LDUs participated and what manner, and more generally the military nature of the hostilities.
41. While Annex B attached to the present submission contains emails that already make the argument,⁵⁰ it is worth restating that the Defence is not pursuing this material to support a *tu quoque* defence. It is important to state that the Defence **does not** seek this material to show that “breaches of international humanitarian law, being committed by a belligerent, justify similar breaches by another belligerent”.⁵¹ Though the placing of military installations or combatants amongst civilian objects could amount to a war crime under some circumstances,⁵² the material is not being sought to demonstrate this, but rather to be able to raise doubts concerning the nature, legal characterisation, or targets of the attacks or certain elements of the attacks. This is a subtle yet very important distinction.
42. Further, the request will enable the Defence to pursue issues in a more informed manner and perhaps demonstrate that essential elements of the offences against Mr Ongwen are not present. The issues raised here concern ordinary IHL legal questions.
43. In addition to being simply exculpatory, the relevance of any information in the possession of the Prosecution that matches the present request is that, without it, the Defence will be unfairly disadvantaged in pursuing effective and expeditious cross-examination during the Prosecution case.

C. The Prosecution is under an obligation to provide the requested information

44. The Prosecution has not indicated that the material that is the object of the request does not exist. Rather, it has indicated that it does not consider itself under an obligation to *search for* and *disclose* the information.⁵³ This undermines the overriding principle of full disclosure,⁵⁴ and therefore fairness to the Accused.
45. This is a legal issue which the Defence now brings before the Trial Chamber. Despite the Defence having elaborated its position to the Prosecution, the Prosecution appears to not accept that the relevance of the potential material – further described above in section A

⁵⁰ See Annex B, p. 6.

⁵¹ *Kupreškić case*, para. 515.

⁵² Article 8(2)(b)(xxiii).

⁵³ See para. 12 above.

⁵⁴ ICC-01/04-01/06-3031, p. 10.

paragraphs 20 to 32 – is in fact exculpatory, or at a minimum, relevant and material for the preparation of the Defence.

46. The potential issues outlined above are questions of fact and law and the Prosecution's determination of whether the evidence crosses certain IHL thresholds is not the final word on the matter. The Trial Chamber will not be in a position to decide upon whether the evidence crosses these thresholds until it has the information, and testimony cannot be elicited cogently by the Defence without full disclosure.

1. *Article 67(2) of the Statute*

47. Pursuant to Article 67(2) of the Statute, material that “tends to show the innocence of the accused” must be disclosed. As discussed above, the information has the potential by itself or further elaborated through testimony to disprove the existence of key legal elements of several charges – it is thus exculpatory.
48. Article 67(2) also provides for the disclosure of material that would “mitigate the guilt of the accused”. Trial Chambers have a considerable degree of discretion, in light of the particular circumstances of a case, in determining what constitutes a mitigating circumstance and the weight, if any, to be accorded thereto.⁵⁵ A Trial Chamber may also consider certain factors as being relevant to its assessment of the gravity of the crime.⁵⁶ Some of the IHL standards/principles mentioned here are not black and white but rather exist along a spectrum. For example, how disproportionate an attack was expected to be *could* impact upon a sentence. Furthermore, the purpose of any given criminalised act by the Accused is highly relevant to sentencing judgements.
49. The Appeals Chamber in the *Lubanga* case has appeared to approve of advance disclosure for the purpose of preparing for sentencing well before any conviction.⁵⁷ The requested material if explored in cross-examination would potentially mitigate guilt even in the event of a conviction, and should be disclosed to the Defence so that it can be developed in testimony

⁵⁵ ICC-01/12-01/15-171, para. 74; ICC-01/05-01/08-3399, para. 19; see also *Prosecutor v. Tolimir*, IT-05-88/2-A, Judgment, 8 April 2015, para. 644, available at: http://www.icty.org/x/cases/tolimir/acjug/en/150408_judgement.pdf; *Prosecutor v. Fofana and Kondewa*, SCSL-04-14A, Judgment, 28 May 2008 (‘CDF Appeals Judgment’), para. 499, available at: <http://www.rscsl.org/Documents/Decisions/CDF/Appeal/829/SCSL-04-14-A-829.pdf>.

⁵⁶ ICC-01/12-01/15-171, para. 74; ICC-01/05-01/08-3399, para. 19 and footnotes; ICC-01/04-01/07-3484-tENG, paras. 32 and 34; ICC-01/04-01/06-2901, para. 34.

⁵⁷ ICC-01/04-01/06-1433 (OA11) para. 82.

with witnesses. The presentation of mitigating factors at a sentencing stage would be limited without disclosure of the requested material now as some factors may not be possible to establish in sentencing without establishing facts through multiple witnesses at trial who may not be available for recall in several years' time.

2. Rule 77 of the Rules of Procedure and Evidence

50. Rule 77 creates a presumption of full disclosure of any materials which are relevant to defence preparation, and which are not exempted from disclosure by an express provision in the Statute or Rules. The Appeals Chamber has repeatedly stated that exceptions to this presumption are themselves very exceptional.⁵⁸
51. The Appeals Chamber emphasised that the ICC Rule 77 disclosure regime is essential in “ensuring the fairness of the proceedings and that the rights of the defence are respected, in particular the principle of equality of arms. This must remain paramount in decisions that are taken in relation to disclosure”.⁵⁹
52. Therefore, in order to establish the obligation to disclosure pursuant to Rule 77, the Defence needs to establish firstly, that the information requested is relevant to a particular aspect of defence preparation at that stage of the proceedings, and secondly, that there are no provisions in the Statute or Rules which **restrict** the requested disclosure.
53. Relevance has been understood as material that would “undermine the prosecution case or support a line of argument of the defence”⁶⁰ or “significantly assist the accused in understanding the incriminating and exculpatory evidence, and the issues in the case.”⁶¹ As has been described above, if it is in the possession of the Prosecution, the material would significantly assist the Defence in pursuing the lines of defence outlined above.
54. With respect to the burden placed on Defence to demonstrate that the requested information is relevant and/or material and would in fact assist with its defence preparation, the Defence refers to the *Lubanga* case. The Appeals Chamber held that the phrase “relevant to defence preparation” must be interpreted broadly.⁶² It is submitted that this places a low burden of

⁵⁸ ICC-01/04-01/06-3031, para. 10; ICC-01/04-01/07-475, para. 70.

⁵⁹ ICC-02/05-03/09-501 (OA4), para. 34, *cited in* ICC-02/04-01/15-251 (OA3), para. 40.

⁶⁰ ICC-01/05-01/08-1594-Red, para. 21 *citing* ICC-01/04-01/06-1433, paragraph 77.

⁶¹ ICC-01/05-01/08-1594-Red, para. 21 *citing* ICC-01/04-01/06-2624, paragraph 16.

⁶² ICC-01/04-01/06-1433 OA11, paras 77-78.

proof on the Defence. Moreover, the Appeals Chamber in the *Banda and Jerbo* case emphasized that even if “information that is material to the preparation of the defence is ultimately not used as evidence at the trial or may not turn out to be relevant to it” the Defence is still entitled to disclosure of such information under Rule 77 of the RPE.⁶³

55. The Prosecution cannot validly contend that disclosing the material outlined above is not in fact useful for the preparation of defence under Rule 77 of the RPE as it will *inter alia* assist in prioritising cross-examination questions and planning further investigations.

3. *Relevance at the present stage of the proceedings*

56. As the Prosecution case is now underway, the material is imminently relevant for cross-examination.
57. Pursuant to Article 54(1)(a), the Prosecution has an obligation to “investigate incriminating and exonerating circumstances equally” in its pursuit of the truth. Material from the Prosecution’s early investigations appears to show that the Prosecution was investigating both parties to the conflict was articulated.⁶⁴ Given the information already un-earthed in testimony that seemingly shows less than robust compliance with IHL rules – namely the possible use of a soldier under the age of 15 by the UPDF⁶⁵ prior to the temporal jurisdiction of the ICC, as well as a possible misuse of the International Red Cross emblem for intelligence purposes,⁶⁶ it would be surprising if the Prosecution came across nothing related to the present request during its extensive investigations in Uganda.
58. It must be re-emphasised that the Prosecution had 13 years to investigate the case against Mr Ongwen. The Defence was constituted in 2015 and has resources for a limited number of individuals to make investigations. In investigative resource terms, realistically, the Defence will simply not achieve parity – or equality of arms – with regards to the Prosecution. Granting disclosure will partially remedy this imbalance.
59. In contrast to the experience of the Prosecution, the Defence has not received cooperation from Uganda. Of 3 requests for assistance sent, 2 have been answered in the negative and 1

⁶³ ICC-02/05/03/09-501, para. 42; see also *Prosecutor v. Karemera et al.*, ‘Decision on the Prosecution’s Interlocutory Appeal Concerning Disclosure Obligations’, ICTR-98-44-AR73.11, 23 January 2008, para. 12, available at: <http://41.220.139.198/Portals/0/Case%5CEnglish%5CKaremera%5Cdecisions%5C080123.pdf>.

⁶⁴ See for example the transcript of witness P-0138: UGA-OTP-0228-0467-R01, at 0472, line 174.

⁶⁵ ICC-02/04-01/15-T-44-CONF-ENG, p. 30, lines 17-20.

⁶⁶ ICC-02/04-01/15-T-44-CONF-ENG, p. 82, line 22 to p. 8, line 3.

remains outstanding.⁶⁷ If Witness P-0003's attitude was any indication, the Defence may not be able to expect full assistance from some members of the Ugandan Government. Thus, disclosure is an important means by which to receive information about the military conflict.

4. *Restrictions on disclosure*

60. The Prosecution has not raised any restrictions permitted under the rules with regards to the material referred to in the present request. However, the Defence takes this opportunity to submit that none of the restrictions on disclosure provided for in the Rules 81 and 82 of the RPE would in fact prevent the Prosecution from providing the Defence with the requested material.
61. Firstly, the restrictions on disclosure set out in Rule 81 are linked to the need to preserve the security of Prosecution investigations, or the need to protect the safety of victims and witnesses. In this case, the burden falls on the Prosecution to establish the existence of concrete risks, and to demonstrate that such restrictions are both necessary and proportionate.⁶⁸
62. Secondly, with regards to the application of Rule 82, the Pre-Trial Chamber has held that the Prosecution has to raise such restrictions with the Chamber as soon as possible so that appropriate measures to safeguard the rights of the Defence are taken.⁶⁹ Given that the Prosecution has not brought such matters to the attention of the Chambers yet, it must be presumed that the restrictions under Rule 82 are not applicable.

⁶⁷ The most recent RFA was sent on 12 December 2016 at 10h49 CET. The Defence asked during the week beginning 6 March 2017 about the progress, and it was verbally stated that External Relations has not heard back from the Government of Uganda yet.

⁶⁸ ICC-01/04-01/07-475.

⁶⁹ ICC-01/04-01/07-646.

VI. RELIEF

63. In light of the above, the Defence respectfully requests the Trial Chamber to order the Prosecution to disclose the material indicated in sub-items to paragraph 2 and 4 to the Defence.

Respectfully submitted,



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Hon. Krispus Ayena Odongo

On behalf of Dominic Ongwen

Dated this 15th day of March, 2017

At The Hague, Netherlands