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**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***

**PUBLIC**

**Public Redacted Version of “Defence Response and Disclosure Request, in light of the  
“Prosecution’s Notice of Filing of an Item Received in Response to an RFA””, filed on 5  
March 2018**

**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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## I. INTRODUCTION

1. In light of the “Prosecution’s Notice of Filing of an Item received in Response to an RFA” (‘Prosecution’s Notice’)<sup>1</sup> and new information about the Prosecution’s (re)discovery of undisclosed items, the Defence for Dominic Ongwen (‘Defence’) hereby requests the Trial Chamber IX (‘Trial Chamber’) to make a finding that the Prosecution has violated its disclosure obligations under Article 67(2) of the Rome Statute (‘Statute’).<sup>2</sup>
2. Based on the Prosecution’s revised assertions,<sup>3</sup> and its commitment to disclose any disclosable material in its evidence database as soon as possible,<sup>4</sup> as well as the Trial Chamber’s holding in relation to disclosure of Article 67(2) of the Statute material,<sup>5</sup> the Defence requests the Trial Chamber to order the Prosecution:
  - a) [REDACTED];<sup>6</sup>
  - b) [REDACTED];<sup>7</sup>
  - c) To disclose the Prosecution’s Request for Assistance ‘RFA/UGA/0024’ which led to [REDACTED];<sup>8</sup>
3. In addition, the Defence also requests the Trial Chamber:
  - a) To order the Prosecution to disclose all the available information about [REDACTED];
  - b) To reprimand the Prosecution for its alleged deficient internal review procedure;
  - c) To order the Prosecution to conduct a complete review of its evidence database;
  - d) To order the Prosecution to certify before this Trial Chamber that it has conducted such complete review of its evidence database; and

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<sup>1</sup> ICC-02/04-01/15-1189-Conf-Exp (‘Prosecution’s Notice’).

<sup>2</sup> [REDACTED]. This item ([REDACTED]) was never formally disclosed to the Defence. [REDACTED].

<sup>3</sup> Prosecution’s Notice, paras 1, 5 and 6.

<sup>4</sup> Prosecution’s Notice, para. 9(c).

<sup>5</sup> ICC-02/04-01/15-1179, paras 12, 17 and footnote 16; ICC-02/04-01/15-1161, para. 8.

<sup>6</sup> See Prosecution’s Notice, para. 7, and footnote 6.

<sup>7</sup> See *ex parte* Annex A attached to the Prosecution’s Notice.

<sup>8</sup> Prosecution’s Notice, paras 1, 5 and 6.

- e) To grant that the Defence, if it considers it necessary, the right to recall some of the Prosecution witnesses for further cross-examination based on the (re)discovered materials.

## II. CONFIDENTIALITY

4. Pursuant to Regulation 23*bis*(1) of the Regulations of the Court ('RoC'), the Defence files this response confidentially, because it is in response to a confidential filing and because it discusses a confidential and/or [REDACTED]. The Defence will file a public redacted version in due course.

## III. PROCEDURAL HISTORY

5. On 30 May 2016, the Trial Chamber set a deadline of 6 September 2016 for the Prosecution to have reviewed all materials in its possession and disclosed all materials falling under its disclosure obligations.<sup>9</sup>
6. On 7 June 2016, in his "Decision on Disclosure Issues Arising Out of First Status Conference" ('Disclosure Decision'),<sup>10</sup> the Single Judge directed the Prosecution to disclose its requests for assistance ('RFAs'), holding that "a case-by-case assessment in the present case requires that, at least to the extent that RFAs in the Uganda situation investigation led to information which the Prosecution relies upon as incriminating evidence against Mr Ongwen, they must be disclosed as being material to the preparation of the defence."<sup>11</sup>
7. On 16 January 2018, in its "Defence Request for a Rule 77 Disclosure Order Concerning the Requests for Assistance and Other Related Items", the Defence requested that the Trial Chamber order the Prosecution to disclose RFAs and other associated communications related to cooperation between the Prosecution and the Ugandan authorities, which led to collection of evidence used against Mr Ongwen. It included, *inter alia*, information about the death of Vincent Otti.<sup>12</sup>
8. On 18 January 2018, in its Prosecution response to "Defence Request for a Rule 77 Disclosure Order Concerning the Requests for Assistance and Other Related Items" (ICC-02/04-01/15-

<sup>9</sup> ICC-02/04-01/15-449, para. 7.

<sup>10</sup> ICC-02/04-01/15-457 ('Disclosure Decision').

<sup>11</sup> Disclosure Decision, para. 14; *see also* ICC-02/04-01/15-468.

<sup>12</sup> ICC-02/04-01/15-1137-Red (with three annexes) (a confidential version was filed on the same day).

1137)”, the Prosecution requested the Trial Chamber to reject the Defence Request.<sup>13</sup> With respect to RFA 24 which is related to the killing of Vincent Otti, the Prosecution stated that “[t]o this day, the Prosecution has never received a final response from the Ugandan authorities. For that reason alone – that RFA 24 resulted in the collection of no information whatsoever, much less “information which the prosecution relies upon as incriminating evidence against Mr Ongwen” – it falls outside the terms of ICC-02/04-01/15-457.”<sup>14</sup> Moreover, the Prosecution has assured the Trial Chamber and the Defence that throughout the review of its evidence database it “has adopted an expansive approach to disclosure, erring on the side of greater disclosure in close cases and sometimes double- or triple-checking to make sure that new or previously unidentified information was disclosed to the Defence.”<sup>15</sup>

9. On 1 February 2018, the Single Judge issued his “Decision on Defence Request for Disclosure of Certain Requests for Assistance and Related Items”<sup>16</sup> and rejected the Defence request. In particular, the Single Judge held that “[i]f any evidence may affect the credibility of a Prosecution witness’s account of Mr Otti’s death, then this evidence – and any RFA used to acquire it – would become disclosable. However, there is nothing to suggest that the Prosecution is in possession of any such undisclosed evidence” (‘Decision on Disclosure Request’).<sup>17</sup>
10. On 7 February 2018, the Defence filed its “Defence Request for Leave to Appeal the “Decision on Defence Request for Disclosure of Certain Requests for Assistance and Related Items”<sup>18</sup> and raised the appealable issue “[w]hether the Impugned Decision’s position that material requested for challenging the reliability of impugned evidence in respect to, *inter alia*, [REDACTED], is unnecessary to challenge the reliability of their evidence is consistent with a) the provisions of Article 67(2) of the Statute in respect to the Prosecution’s disclosure obligations of material “which may affect the credibility of prosecution evidence”; and b) the provisions of Article 67(1)(e) of the Statute, which entitles an accused to raise defences”<sup>19</sup>.

<sup>13</sup> ICC-02/04-01/15-1142-Conf (with one annex).

<sup>14</sup> ICC-02/04-01/15-1142-Conf, para. 4.

<sup>15</sup> ICC-02/04-01/15-1142-Conf, para. 7.

<sup>16</sup> ICC-02/04-01/15-1161.

<sup>17</sup> ICC-02/04-01/15-1161, para. 8.

<sup>18</sup> ICC-02/04-01/15-1174-Conf.

<sup>19</sup> ICC-02/04-01/15-1174-Conf, p. 9 (Issue 2).

11. On 12 February 2018, the Prosecution, in its “Response to Defence Request for Leave to Appeal Decision ICC-02/04-01/15-1161”<sup>20</sup>, submitted that “[t]he Prosecution again emphasises that it has received no response to the RFA at issue, and thus it has received no evidence, about the circumstances of Otti’s death or other matters, in response. Therefore, the Prosecution is not withholding any evidence.”<sup>21</sup>
12. On 14 February 2018, in his “Decision on Request for Leave to Appeal the Decision on Defence Request for Disclosure of Certain RFAs and Related Items”<sup>22</sup>, the Single Judge rejected the Defence request for leave to appeal the decision of the Single Judge and held that “[w]hen deciding whether the leave to appeal criteria are met, the marginal nature of the materials sought must be emphasised. The only materials at issue in the Impugned Decision which the Prosecution actually possessed or controlled – and thus could disclose – are RFAs related to confirming Vincent Otti’s death. This event is not of consequence in this case, for reasons set out in the Impugned Decision. Although RFAs are disclosable in certain contexts, it must be acknowledged that RFAs are only Prosecution correspondence asking for evidence – the subsequent evidence acquired is not at issue in the Impugned Decision. At least in the contexts of RFAs leading to any incriminating or potentially exculpatory evidence in this case, the Single Judge already determined such RFAs to be material to the preparation of the defence” (‘Decision on Defence Leave to Appeal’).<sup>23</sup>
13. On 22 February 2018, the Prosecution filed its Prosecution Notice and disclosed new information about [REDACTED]<sup>24</sup> in the interest of rectifying errors in its former filings ICC-02/04-01/15-1142 and ICC-02/04-01/15-1177.<sup>25</sup>

#### IV. APPLICABLE LAW

14. Article 67(2) of the Statute places an obligation upon the Prosecution to disclose evidence in its possession that “tends to show the innocence of the accused, or mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence.” The Appeals Chamber in the *Lubanga* case and the Trial Chamber V in the *Kenyatta* case found that the disclosure of

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<sup>20</sup> ICC-02/04-01/15-1177.

<sup>21</sup> ICC-02/04-01/15-1177, para. 3.

<sup>22</sup> ICC-02/04-01/15-1179.

<sup>23</sup> ICC-02/04-01/15-1179, para. 12.

<sup>24</sup> See *Ex parte* Annex A, attached to the Prosecution’s Notice.

<sup>25</sup> Prosecution’s Notice, para. 1.

potentially exculpatory material is a fundamental aspect of the accused's right to a fair trial under Article 67(2) of the Statute.<sup>26</sup>

15. Rule 81(1) of the Rules of Procedure and Evidence ('RPE') stipulates that "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." In this regard, the Single Judge held that "[i]t is also incorrect to say that RFAs are internal work product – they are Prosecution requests for information to States and other third parties, and external correspondence does not qualify under Rule 81(1) of the Rules."<sup>27</sup>
16. Pursuant to Rule 81(4) of the RPE "the Chamber dealing with the matter shall, on its own motion or at the request of the Prosecutor, the accused or any State, take the necessary steps to ensure the confidentiality of information, in accordance with articles 54, 72 and 93, and, in accordance with article 68, to protect the safety of witnesses and victims and members of their families, including by authorizing the non-disclosure of their identity prior to the commencement of the trial."
17. In relation to the applications of Rule 81(4) of the RPE, the Appeals Chamber in the *Katanga* case found that: "persons other than witnesses, victims and members of their families, may, at this stage of the proceedings, be protected through the non-disclosure of their identities by analogy with other provisions of the Statute and the Rules. [...] Thus, by necessary implications, rule 81(4) should be read to include the words "persons at risk on account of the activities of the Court".<sup>28</sup>
18. In this regard, the Appeals Chamber in the *Katanga* case also found that "permitting redactions to be made on this basis pursuant to rule 81(4) in principle necessarily does not mean that they will be granted wherever sought. [...] a careful assessment will need to be made, in each case, to ensure that any measures restricting the rights of the Defence that are taken to protect individuals at risk are strictly necessary and sufficiently counterbalanced [...]."<sup>29</sup>

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<sup>26</sup> ICC-01/04-01/06-1401, paras 77 and 92; ICC-01/09-02/11-728, para. 95; ICC-02/05-03/09-258, para. 14.

<sup>27</sup> Disclosure Decision, para. 13; *see also* ICC-01/05-01/13-1632, para. 19.

<sup>28</sup> ICC-01/04-01/07-475, para. 56.

<sup>29</sup> ICC-01/04-01/07-475, para. 59.

## V. SUBMISSIONS

### A. The Defence requests that the Trial Chamber make a finding that the late or delayed disclosure of the newly (re)discovered items<sup>30</sup> has prejudiced the right of Mr Ongwen to a fair trial

19. The Defence takes the position that the Prosecution – like the Defence – are officers of this Court whose assertions are presumed to be accurate and made in good faith. The Defence also understands that internal systems and personnel can fail or go awry.
20. However, considering that during the Court proceedings, the Defence at a certain point offered an explanation to the Court about what it thought was common knowledge regarding the issue of Vincent Otti's killing on the 2<sup>nd</sup> October 2007. Additionally, given the testimony of some of the Prosecution witnesses about what they knew about Vincent Otti's death, the Defence would be disinclined to agree with the Prosecution's assertion on 18 January 2018 "[t]o this day, the Prosecution has never received a final response from the Ugandan authorities."<sup>31</sup> The Prosecution has not offered any explanation about how it finally came around to discover that they had after all received the material, which they finally notified on 22 February 2018 and disclosed as new information about [REDACTED].<sup>32</sup>
21. The Defence does not treat kindly the Prosecution's representations of the errors which occurred within its office in respect to the (re)discovery of evidence items received on 23 November 2007. The killing of Vincent Otti was such an important event that attracted interest and inquiry from the Trial Chamber itself.<sup>33</sup> It would be hard to believe that the Prosecution would just push such an important matter in which the Trial Chamber showed keen interest under the carpet. If ever the Prosecution had forgotten about it, as soon as the subject was canvassed in the courtroom by the Presiding Judge and talked about by its own witnesses, the Prosecution cannot be heard to say that it could not have triggered its memory to remember whether or not the Government of Uganda had responded and accordingly searched for it. It is the position of the Defence that the omission to disclose was deliberate, resulting to prejudice to Mr Ongwen. In terms of fair trial, this cannot be ruled out.
22. Nevertheless, this explanation does not change the objective fact that the Prosecution, by its own admission, has been in 'possession or control' of these two potentially exculpatory

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<sup>30</sup> [REDACTED].

<sup>31</sup> ICC-02/04-01/15-1142-Conf, para. 4.

<sup>32</sup> ICC-02/04-01/15-1189-Conf, paras 1, 6.

<sup>33</sup> [REDACTED].

(re)discovered items for more than a decade. This mistake, which allegedly occurred as a result of a deficient review system in place within the Prosecution, and thus resulted in late or delayed disclosure, violating the ‘as soon as practicable’ standard under Article 67(2) of the Statute and causing prejudice to Mr Ongwen,<sup>34</sup> cannot and should not be treated lightly.

23. The Defence avers that the disclosure duty imposed by the first sentence of Article 67(2) of the Statute applies to all materials within the Prosecution’s possession or control that it believes it shows or tends to show the innocence of Mr Ongwen, or mitigates his guilt, or may affect the credibility of the Prosecution’s evidence. In this regard, the Trial Chamber in the *Lubanga* case found that limitations on the obligation of disclosure of exculpatory evidence are permitted when the Prosecution has withdrawn the factual allegations or charges that are related to the relevant materials.<sup>35</sup> This is not the case here.
24. In particular, the *ex parte* Annex A provides information, *inter alia*, as to the pattern of control and threat imposed by Joseph Kony against his LRA commanders.<sup>36</sup> [REDACTED],<sup>37</sup> [REDACTED],<sup>38</sup> [REDACTED].<sup>39</sup>
25. The above-mentioned points that arise from the newly (re)discovered [REDACTED] are potentially exculpatory material for Mr Ongwen’s defence in relation to the following positions:
  - a) Vincent Otti’s execution and Joseph Kony’s reasons for it are not an isolated peripheral issue in this case. The position of the Defence is that Joseph Kony alone bears the responsibility for the alleged crimes. He ‘owned’ the alleged crimes and instituted a regime of terror that spared no one, including his deputy commanders.<sup>40</sup> Therefore, the information about the execution of Vincent Otti along with other executions for various

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<sup>34</sup> See Decision on Disclosure Request, para. 14: (The Defence would like to emphasize that this is the second time the Prosecution’s deficient internal review procedure resulted into a failure to communicate a correspondence that it used during the course of its investigations). Moreover, the Defence notes that the Prosecution’s errors appear to have remained unnoticed until the Defence requested the Prosecution to disclose certain RFAs and associated materials and initiated the (re)review of the Prosecution’s evidence databases.

<sup>35</sup> ICC-01/04-01/06-1401, para. 6: (“The Chamber further indicated that the prosecution would be under an obligation to withdraw any charges where non-disclosed exculpatory material has a material impact on the Chamber’s determination of the guilt or innocence of the accused. If the prosecution were in doubt as to whether or not any material falls into this category, the Chamber directed that it should be put before the Trial Chamber for its determination”).

<sup>36</sup> *Ex parte* Annex A, paras 14-16.

<sup>37</sup> *Ex parte* Annex A, paras 6, 15, 16.

<sup>38</sup> *Ex parte* Annex A, para. 9.

<sup>39</sup> *Ex parte* Annex A, para. 6.

<sup>40</sup> See e.g. [REDACTED].

reasons alleged is of exculpatory nature for the Defence as it establishes a consistent pattern of conduct by Joseph Kony to instil the imminent fear of death and to control the actions of Mr Ongwen under duress.<sup>41</sup> In addition, the Prosecution witnesses have provided evidence to demonstrate other examples of Joseph Kony's consistent control and brutality – for example by caning – especially against those LRA members who opposed him and/or tried to escape,<sup>42</sup> including Mr Ongwen.<sup>43</sup>

b) Mr Ongwen is charged under Article 25(3)(a) of the Statute as an indirect co-perpetrator in a number of charges with Joseph Kony, Vincent Otti and others.<sup>44</sup> Therefore, any information concerning the involvement and actions of Joseph Kony and Vincent Otti is of a potentially exculpatory nature and should be disclosed to the Defence in order to be able to refute the Prosecution's allegations of Mr Ongwen's involvement in an alleged common plan. Or, in the alternative, and in light of the abovementioned Trial Chamber's holding in the *Lubanga* case,<sup>45</sup> the Prosecution should withdraw the factual allegations or charges related to the impugned items under Article 25(3)(a) of the Statute against Mr Ongwen.<sup>46</sup>

c) The Prosecution has led evidence concerning the presence of Mr Ongwen during the peace-talks. From the reading of the *ex parte* Annex A, [REDACTED].<sup>47</sup>

26. Additionally, the fact that the newly (re)discovered items were not disclosed to the Defence to review for the purposes of cross-examination of the Prosecution witnesses, and to raise the defence of duress throughout the trial, prejudices Mr Ongwen's fair trial rights under Article 67(1)(e) of the Statute.

27. When the right to cross-examination is violated by the Prosecution's failure to disclose evidence "which may affect the credibility of prosecution evidence",<sup>48</sup> the result is prejudice to the accused. In the *Ndindiliyimana et al.* case ('Military II'), the Trial Chamber recognized that

<sup>41</sup> ICC-02/04-01/15-1174-Conf, para. 22; Prosecution's Notice, para. 9(c).

<sup>42</sup> See e.g., ICC-02/04-01/15-T-49-CONF-ENG ET, pp. 30-31; ICC-02/04-01/15-T-72-CONF-ENG ET, p. 46; ICC-02/04-01/15-T-123-CONF-ENG ET, p. 11-13.

<sup>43</sup> See e.g., ICC-02/04-01/15-T-112-CONF-ENG ET, p. 49, lines 6-16; ICC-02/04-01/15-T-34-CONF-ENG ET, pp. 82-83.

<sup>44</sup> See e.g., ICC-02/04-01/15-422-Red, Decision on the Confirmation of Charges against Dominic Ongwen, p. 73 (para. 15), p. 77 (para. 27), p. 99 (para. 119), and p. 102 (para. 126); ICC-02/04-01/15-533, Prosecution's Pre-Trial Brief, para. 139.

<sup>45</sup> ICC-01/04-01/06-1401, para. 6.

<sup>46</sup> *Supra*, paras 23, 24.

<sup>47</sup> See [REDACTED].

<sup>48</sup> Article 67(2) of the Statute.

denial of the right of cross-examination violated Rule 68 and prejudiced the defendant.<sup>49</sup> The Trial Chamber found that the “Prosecution has shown a lack of diligence in the disclosure of exculpatory material and its violations have prejudiced all the Defence teams in the preparation of their defences.”<sup>50</sup> The Trial Chamber also made a finding that the Prosecution has violated its obligations under rule 68 in respect to several documents and ordered, *inter alia*, the immediate disclosure of un-redacted documents listed in the Decision, and issued a reprimand to the Prosecution in respect to lack of diligence in the disclosure of exculpatory material.<sup>51</sup>

28. In sum, in respect to the case at bar, the Defence requests that the Trial Chamber make a finding that the late or delayed disclosure of newly (re)discovered items caused prejudice to Mr Ongwen, and was a fair trial violation.<sup>52</sup>

**B. Based on the Prosecution’s Notice containing new information about the (re)discovery of items collected in response to the RFA 24, the Defence requests that the Trial Chamber order further disclosure**

29. The Defence avers that the Prosecution’s Notice recognizes a) the “potential relevance of the circumstances of Otti’s death to a proposed defence of duress,”<sup>53</sup> and that the Prosecution b) is undertaking a review of its evidence database “to ensure that it has disclosed to the Defence all information that may be material to the preparation of Mr Ongwen’s defence, including any information potentially affecting the credibility of a prosecution witness’s account of Otti’s death.”<sup>54</sup>
30. Thus, the Prosecution has implicitly acknowledged that items concerning Vincent Otti’s killing ([REDACTED]) are potentially material to the preparation of the defence pursuant to Rule 77 of the RPE, and disclosable to the Defence under Article 67(2) of the Statute.

<sup>49</sup> Prosecutor v. *Ndindiliyimana et al.*, Case No. ICTR-00-56-T, Decision on Defence Motions Alleging Violations of the Prosecutor’s Disclosure Obligations Pursuant to Rule 68, 22 September 2008 (‘Military II Decision’), para. 47 (“The Chamber finds that the statements [dated 1996, 12 years prior to disclosure] contain information that could have been useful to the cross-examination of Prosecution witnesses who gave evidence on these issues and therefore should have been disclosed pursuant to Rule 68. This recent disclosure, over three years after the trial has started, clearly violates the requirement that the Prosecution disclose exculpatory material ‘as soon as practicable’”); *see also* para. 49 (failure to disclose material which could have been used in cross-examination prejudiced the Defence); *see also* paras 61 and 63 (TC holds that recall of a witnesses for further cross-examination is one of the remedies for violation of Article 68); *see also* paras 42, 59.

<sup>50</sup> Military II Decision, para. 59.

<sup>51</sup> Military II Decision, paras 42 and 59.

<sup>52</sup> Military II Decision, para. 59.

<sup>53</sup> Prosecution’s Notice, para. 9(c).

<sup>54</sup> Prosecution’s Notice, para. 9(c).

31. The Single Judge's Decision on Disclosure Request<sup>55</sup> and Decision on Defence Leave to Appeal<sup>56</sup> rejected the Defence argument that the RFAs related to Vincent Otti's execution should be disclosed, on the grounds that they were not material to the preparation of the defence. However, it also held that "if any evidence may affect the credibility of a Prosecution witness's account of Mr Otti's death, then this evidence – and any RFA used to acquire it – would become disclosable"<sup>57</sup> and that "there is nothing to suggest that the Prosecution is in possession of any such undisclosed evidence."<sup>58</sup>
32. The information available to the Trial Chamber when the Single Judge issued his decisions has changed. In its Notice, the Prosecution corrected its assertions and submitted that "[c]ontrary to the assertion in those filings that the Prosecution had received no substantive information in response to its Request for Assistance #24 to the Ugandan authorities ("RFA 24"), the information in Annex A to the present filing was received by the Prosecution in response to RFA 24 on 23 November 2007."<sup>59</sup>
33. Therefore, in light of the Prosecution's revised assertions,<sup>60</sup> and its commitment to disclose any disclosable material in its evidence database as soon as possible,<sup>61</sup> as well as the Trial Chamber's holding in relation to disclosure of Article 67(2) of the Statute material,<sup>62</sup> the Defence requests the Trial Chamber to order the Prosecution to disclose the following material:

1. [REDACTED]

34. [REDACTED].<sup>63</sup> [REDACTED].<sup>64</sup> [REDACTED].
35. [REDACTED];<sup>65</sup> [REDACTED].<sup>66</sup> [REDACTED].

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<sup>55</sup> Decision on Disclosure Request, para. 7.

<sup>56</sup> Decision on Defence Leave to Appeal, para. 6.

<sup>57</sup> Decision on Disclosure Request, para. 8; Decision on Defence Leave to Appeal, para. 15 (footnote 18).

<sup>58</sup> Decision on Disclosure Request, para. 8; *see also* ICC-02/04-01/15-1142-Conf, para. 4.

<sup>59</sup> Prosecution's Notice, para. 1.

<sup>60</sup> Prosecution's Notice, paras 1, 5 and 6.

<sup>61</sup> Prosecution's Notice, para. 9(c).

<sup>62</sup> ICC-02/04-01/15-1179, paras 12, 17 and footnote 16; ICC-02/04-01/15-1161, para. 8.

<sup>63</sup> Prosecution's Notice, para. 5.

<sup>64</sup> [REDACTED].

<sup>65</sup> Prosecution's Notice, footnote 6.

<sup>66</sup> Prosecution's Notice, para. 7.

36. In this regard, the Trial Chamber in *Lubanga* and *Katanga* cases held that substitutes for disclosure, such as provision of summaries of the materials or disclosure of analogous materials are not adequate.<sup>67</sup>

37. [REDACTED].

## 2. [REDACTED]

38. [REDACTED].<sup>68</sup> [REDACTED].

39. [REDACTED].<sup>69</sup>

40. The restrictions on disclosure set out in Rule 81 of the RPE are linked to the need to preserve the security of prosecution investigations, or the need to protect the safety of victims, witnesses or other persons.<sup>70</sup> 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.<sup>71</sup> [REDACTED].

41. The Appeals Chamber in the *Katanga* case held that “[t]he overriding principle is that full disclosure should be made. It must always be borne in mind that the authorisation of non-disclosure of information is the exception to this general rule.”<sup>72</sup>

42. [REDACTED], the Defence refers to the *Katanga* case, in which the Appeals Chamber summarised the relevant factors as encompassing:

[A] thorough consideration of the danger that the disclosure of the identity of the person may cause; the necessity of the protective measure, including whether it is the least intrusive measure necessary to protect the person concerned; and the fact that any protective measures taken shall not be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial potentially exculpatory material and material which may affect the credibility of Prosecution evidence.<sup>73</sup>

<sup>67</sup> ICC-01/04-01/06-1401, para. 86; *see also* ECtHR, *V. v Finland*, 40412/98, Judgment, 24 July 2007, para. 78.

<sup>68</sup> Prosecution’s Notice, para. 6.

<sup>69</sup> Prosecution’s Notice, para. 8.

<sup>70</sup> ICC-01/04-01/07-475, para. 56;

<sup>71</sup> ICC-01/04-01/07-475, para. 54; *see also* ICC-01/04-01/06-1644, paras 41-47.

<sup>72</sup> ICC-01/04-01/07-475, para. 70; *see also* Disclosure Decision, para. 4; *see also* ICC-02/04-01/15-224.

<sup>73</sup> ICC-01/04-01/07-475, para. 67.

43. According to the Appeals Chamber, assessing the danger should involve consideration of the following factors:
- a) The alleged danger must involve an objectively justifiable risk to the safety of the person concerned;
  - b) The risk must arise from disclosing the particular information to the Defence, as opposed to disclosing the information to the public at large.<sup>74</sup>
44. [REDACTED]<sup>75</sup> [REDACTED].

### 3. RFA 24

45. In its Notice, the Prosecution confirmed that it did in fact receive two related items from the Ugandan authorities in response to RFA 24, on 23 November 2007. [REDACTED].<sup>76</sup>
46. The Defence requests<sup>77</sup> for disclosure of RFA 24 were rejected by the Single Judge, whereby concluded that the Defence had failed to establish that this RFAs related to the death of Vincent Otti are material to the preparation of the defence.<sup>78</sup> In this regard, the Single Judge also held that “if any evidence may affect the credibility of a Prosecution witness’s account of Mr Otti’s death, then this evidence – and any RFA used to acquire it – would become disclosable”<sup>79</sup> and that “[...] there is nothing to suggest that the Prosecution is in possession of any such undisclosed evidence.”<sup>80</sup>
47. [REDACTED] – received in response to RFA 24 – suggest that the evidence contains potentially exculpatory information, and thus may, *inter alia*, affect the credibility of prosecution evidence.<sup>81</sup> Therefore, RFA 24 should be disclosed along with [REDACTED] under Article 67(2) of the Statute.

<sup>74</sup> ICC-01/04-01/07-475, para. 71.

<sup>75</sup> Prosecution’s Notice, para. 8.

<sup>76</sup> Prosecution’s Notice, paras 6, 7.

<sup>77</sup> ICC-02/04-01/15-1137-Red; ICC-02/04-01/15-1174.

<sup>78</sup> Decision on Disclosure Request, para. 7.

<sup>79</sup> Decision on Disclosure Request, para. 8; Decision on Defence Leave to Appeal, para. 15 (footnote 18);

<sup>80</sup> Decision on Disclosure Request, para. 8; *see also* ICC-02/04-01/15-1142-Conf, para. 4.

<sup>81</sup> *Supra*, paras 24, 25 (a)(b)(c).

4. [REDACTED]

48. [REDACTED].

49. [REDACTED].

50. [REDACTED].

5. *Complete Review of the Prosecution's Evidence Binder*

51. Having regard to the Prosecution's information about the newly accessible evidence database for the Uganda situation,<sup>82</sup> and a relevant Trial Chamber V's holding from the *Kenyatta* case,<sup>83</sup> the Defence further requests the Trial Chamber to a) reprimand the Prosecution for its deficient internal review procedure; b) order the Prosecution to conduct a complete review of its evidence database; and c) certify before this Trial Chamber that it has done so in order to ensure that there are no other items in its possession that ought to have been disclosed to the Defence.

## VI. REMEDY SOUGHT

52. In light of the reasons stated above, the Defence respectfully requests the Trial Chamber to make a finding that the late or delayed, and incomplete disclosure caused prejudice to Mr Ongwen, which is a fair trial violation under Article 67 of the Statute.

53. Furthermore, the Defence also requests the Trial Chamber to:

- a) **ORDER** the Prosecution to disclose [REDACTED];
- b) **ORDER** the Prosecution to disclose [REDACTED];
- c) **ORDER** the Prosecution to disclose the RFA 24;
- d) **ORDER** the Prosecution to disclose all the available information about [REDACTED] that assisted the Prosecution with a collection of evidence used against Mr Ongwen;
- e) **REPRIMAND** the Prosecution for its alleged deficient internal review procedure;

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<sup>82</sup> Prosecution's Notice, para. 9(b).

<sup>83</sup> ICC-01/09-02/11-728, para. 97 and p. 57.

- f) **ORDER** the Prosecution to conduct a complete review of its evidence database;
- g) **ORDER** the Prosecution to certify before this Trial Chamber that it has conducted such complete review of its evidence database; and
- h) **GRANT** the Defence, if it considers it necessary, the right to recall some of the Prosecution witnesses for further cross-examination based on the (re)discovered materials.

54. In addition to the sought remedies listed above, the Defence reserves the right to request additional remedies based on a review of yet undisclosed and/or un-redacted materials.

Respectfully submitted,



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Hon. Krispus Ayena Odongo  
On behalf of Dominic Ongwen

Dated this 16<sup>th</sup> day of March, 2018  
At Kampala, Uganda