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**International
Criminal
Court**

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TRIAL CHAMBER IX

Before: Judge Bertram Schmitt, Single Judge

SITUATION IN UGANDA

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

Public

Decision on Defence Request for Disclosure and Remedy for Late Disclosure

To be notified, in accordance with Regulation 31 of the *Regulations of the Court*, to:

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Judge Bertram Schmitt, acting as Single Judge on behalf of Trial Chamber IX ('Single Judge' and 'Chamber', respectively) of the International Criminal Court, in the case of *The Prosecutor v. Dominic Ongwen*, having regard to Articles 64(2), 67(1) and 67(2) of the Rome Statute ('Statute'), Rule 77 of the Rules of Procedure and Evidence ('Rules'), and Regulations 23 *bis* and 24(5) of the Regulations of the Court, issues the following 'Decision on Defence Request for Disclosure and Remedy for Late Disclosure'.

A. Procedural History

1. On 4 September 2018, the Defence for Mr Ongwen ('Defence') filed a submission for disclosure and a request for a remedy for untimely disclosure ('Request').¹ Therein, it requests that a number of materials be disclosed to it and makes submissions on remedies it considers necessary in light of what it considers to be untimely and late disclosure made by the Prosecution.
2. On 20 September 2018,² the Office of the Prosecutor ('Prosecution') filed its response, opposing the Request and providing information regarding some of the disclosed material and the relevant procedures currently in place in this case ('Response').³
3. On 24 September 2018, the Defence filed a request for leave to reply ('Request for Leave to Reply').⁴

¹ Defence Request for Disclosure Pursuant to Rule 77 and Article 67(2) and Request for a Remedy in Light of Late and Untimely Disclosure, 5 September 2018, ICC-02/04-01/15-1329-Conf, with confidential annex A. The Request was filed on 4 and registered on 5 September 2018. A corrected version was filed on 17 September 2018, ICC-02/04-01/15-1329-Conf-Corr.

² Upon request by the Prosecution, the response deadline was extended to 24 September 2018. E-mail of Trial Chamber IX Communications to the participants and parties, on 17 September 2018, at 10:33.

³ Prosecution's Response to Defence Request No. ICC-02/04-01/15-1329-Conf, ICC-02/04-01/15-1341-Conf.

⁴ Defence Request for Leave to Reply to ICC-02/04-01/15-1341-Conf, ICC-02/04-01/15-1345-Conf.

B. Submissions and Analysis

4. As a preliminary matter, the Single Judge notes that no public redacted version of the Request has been filed and instructs the Defence and the Prosecution to file public redacted versions of their submissions within ten days of notification of this decision. The Single Judge also notes that the Defence in its recent submissions has continuously failed to provide public redacted versions to its confidential requests and reiterates the Chamber's order to file public redacted versions of its future requests concurrently.⁵
5. The Single Judge also does not consider a reply necessary to rule on the Request and accordingly rejects the Request for Leave to Reply. However, in the leave request, the Defence is unsure whether the 54 page report which was provided with document UGA-OTP-0032-0036 is UGA-OTP-0032-0038-R01. In order to expedite matters on the issue, the Prosecution is instructed to confirm by email whether this is the report in question and, should it not be the case, provide the ERN of the report referenced in its response.
6. In order to rule on the Request, it is first necessary to define precisely the relief sought by the Defence. Regarding the requests for disclosure, the Defence requests in paragraph 81 a. of the Request for 'disclosure of the material described in paragraph 1, 12, 18, 40, 42, 44, 52, 53 and 57' and concludes with a global request for material 'described more generally in sections A through C'.⁶
7. The Single Judge considers that this is an insufficient formulation of relief sought. The Defence cannot cross-reference a series of paragraphs and then include a catch-all clause to its prior submissions. It is not for the Chamber to comb through a filing and identify the specific requests spread throughout a

⁵ Hearing of 23 May 2015, ICC-02/04-01/15-T-25-ENG, page 4, lines 5-10.

⁶ Request, ICC-02/04-01/15-1329-Conf-Corr, para. 81 a.

motion by a party.⁷ The Defence has to describe clearly and comprehensively what it requests from the Chamber when formulating its relief sought.⁸

8. For the purposes of this Request, considering the expeditiousness of the proceedings and in the aim to provide judicial guidance to the parties before the start of the Defence case, the Single Judge will rule on all relief sought he identified in the Request. However, in any future request, the Defence is expected to formulate the relief sought in a coherent and professional manner as described in the previous paragraph.
9. The Single Judge will first rule in separate steps on the disclosure requests regarding (i) material related to the investigations into the 13 other names⁹ contained in UGA-OTP-0032-0036 ('List of Commanders'), (ii) material related to investigations of individuals named as other co-perpetrators, contributors or parties of the crimes of which Mr Ongwen is accused; and (iii) material related to amnesties. Subsequently, (iv), he will address the requests related to the delayed disclosure.
10. At the outset, the Single Judge recalls the applicable jurisprudence regarding disclosure, as previously cited by the Chamber.¹⁰

(i) Disclosure request regarding materials related to the List of Commanders

⁷ Additionally, paragraph 81 does not match the body of the Request. For instance, in paragraph 4 of the Request, the Defence request that the Chamber make the names of the Commanders contained in UGA-OTP-0032-0036 public. This request is not mentioned in paragraph 81 of the Request. In paragraph 81 b. the Defence requests a finding that certain disclosure was delayed and constitutes a violation to a fair trial. However, this relief is not mentioned at all the in the body of the submission, especially not in section 'E' of the Request entitled 'Request for a remedy of untimely and late disclosure'.

⁸ See Regulation 23(1)(c) of the Regulations (relief sought should be set out 'as far as practicable').

⁹ Throughout the Request, the Defence refers to disclosure of material regarding all 14 commanders mentioned in the document. However, since one of the persons named is the accused, the Chamber interprets the request in the sense that the disclosure request is in regards to the other persons mentioned.

¹⁰ Decision on Disclosure Issues Arising Out of First Status Conference, 7 June 2016, ICC-02/04-01/15-457, para. 4.

11. The Defence requests that all material related to investigations into the 13 other persons on the List of Commanders ('13 Commanders') be disclosed.¹¹ It submits that it will call witnesses who were in the LRA or have knowledge of its senior members. Since the Defence intends to ask questions about the command structure of the LRA and decisions by its senior members during the charged period 'any and all material relating to the senior members of the LRA is relevant to understanding answers that may be provided and identifying follow-up questions'.¹²
12. Further it argues, that the material regarding other investigations will help to test the reliability of the procedure employed in collecting the evidence against Mr Ongwen, citing previous jurisprudence of the Chamber in support.¹³ Additionally, the Defence asserts that the framing of the charges by the Prosecution, which includes co-perpetration and a common plan with Joseph Kony and the Sinia brigade leadership, makes the disclosure necessary. According to the Defence '[f]ull disclosure will avoid trial by ambush and will promote the Defence's right to prepare pursuant to Article 67(1)(b) and present exculpatory evidence.'¹⁴
13. Moreover, according to the Defence, the mere disclosure of the List of Commanders concedes that material related to the 13 Commanders is relevant¹⁵ and provides disclosable 'background information'.¹⁶ Lastly, the Defence submits that the material is of an exonerating nature since its envisaged Article

¹¹ Request, ICC-02/04-01/15-1329-Conf-Corr, para. 18.

¹² Request, ICC-02/04-01/15-1329-Conf-Corr, para. 23.

¹³ Request, ICC-02/04-01/15-1329-Conf-Corr, para. 21.

¹⁴ Request, ICC-02/04-01/15-1329-Conf-Corr, paras 25-26.

¹⁵ Request, ICC-02/04-01/15-1329-Conf-Corr, para. 29.

¹⁶ Request, ICC-02/04-01/15-1329-Conf-Corr, paras 37-38.

31 defence of duress relies on the fact that, in the LRA, orders given by superiors were carried out automatically by the subordinates.¹⁷

14. The Prosecution submits that the List of Commanders was not created by the Prosecution and has never played a role in its charging decisions.¹⁸ Further, it states that, upon receiving the Request, it has again reviewed its evidence database for items related to the 13 Commanders, especially with regard to the Defence's intended defences, and did not identify any further document relevant for the preparation of the Defence.¹⁹
15. Since the Defence bases its disclosure request on both Rule 77 of the Rules and Article 67(2) of the Statute, the Single Judge will assess whether the requested material is disclosable under either of the provisions.
16. First, it is necessary to determine the scope of what the Defence is precisely requesting. The disclosure of 'material obtained during investigations and records of investigations'²⁰ related to the 13 Commanders would include, *inter alia*, items related to the current case as well as the entirety of the evidence collected in relation to case ICC-02/04-01/05.²¹
17. It is true that Dominic Ongwen was originally part of case ICC-02/04-01/05 before his case was severed.²² But the Single Judge notes that the Prosecution has already stated that it disclosed all documents related to the co-perpetration of the alleged crimes by other persons or more generally 'where a document is

¹⁷ Request, ICC-02/04-01/15-1329-Conf-Corr, paras 30-33.

¹⁸ Response, ICC-02/04-01/15-1341-Conf, para. 6.

¹⁹ Response, ICC-02/04-01/15-1341-Conf, para. 10.

²⁰ Request, ICC-02/04-01/15-1329-Conf-Corr, para. 1.

²¹ Case ICC-02/04-01/15 is currently against Joseph Kony and Vincent Otti and previously also included Okot Odiambo and Raska Lukwia, who are all included in the List of Commanders.

²² Pre-Trial Chamber II, *The Prosecutor v. Joseph Kony, Vincent Otti, Okot Odiambo and Dominic Ongwen*, Decision Severing the Case Against Dominic Ongwen, 6 February 2015, ICC-02/04-01/05-424.

connected in anyway with such crimes'.²³ Accordingly, the additional requested disclosure would contain only material which is not connected in any way to the alleged crimes.

18. The Single Judge notes the jurisprudence of the Appeals Chamber that material 'while not directly linked to exonerating or incriminating evidence, may otherwise be material to the preparation of the defence.'²⁴ However, this cannot be interpreted as abrogating the requirement to show the relevance of the material sought under Rule 77 of the Rules. As stated by the Appeals Chamber²⁵ - and repeated by this Chamber²⁶ - the right to disclosure is not unlimited.
19. The jurisprudence cited by the Defence in order to justify relevance under Rule 77 of the Rules is different from the case at hand. The first decision cited in support that 'material to the preparation of the defence' has to be interpreted broadly concerned the disclosure of a specific set of materials obtained by the Prosecution from one of its witnesses. This witness then testified during trial and part of his testimony was related to the material.²⁷ The second decision concerned the disclosure of material regarding one specific type of information²⁸ and not everything related to the investigation of 13 people, as sought in this Request.

²³ E-mail sent by the Prosecution to the Defence on 25 May 2018, quoted in Request, ICC-02/04-01/15-1329-Conf-Corr, para. 14.

²⁴ Appeals Chamber, *The Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the appeal of Mr. Lubanga Dyilo against the Oral Decision of Trial Chamber I of 18 January 2008, 11 July 2008, ICC-01/04-01/06-1433, para. 77.

²⁵ Appeals Chamber, *The Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, Judgment on the appeal of Mr Abdallah Banda Abakaer Nourain and Mr Saleh Mohammed Jerbo Jamus against the decision of Trial Chamber IV of 23 January 2013 entitled "Decision on the Defence's Request for Disclosure of Documents in the Possession of the Office of the Prosecutor", 28 August 2013, ICC-02/05-03/09-501, para. 39.

²⁶ Decision in Response to an Article 72(4) Intervention, 26 June 2018, ICC-02/04-01/15-1267-Corr2, para. 21.

²⁷ Trial Chamber III, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Decision on the "Defence Motion for Disclosure Pursuant to Rule 77", 29 July 2011, ICC-01/05-01/08-1594-Red.

²⁸ Appeals Chamber, *The Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the appeal of Mr. Lubanga Dyilo against the Oral Decision of Trial Chamber I of 18 January 2008, 11 July 2008, ICC-01/04-01/06-1433.

20. The Single Judge recalls its previous jurisprudence that:

The mere fact that the Informant had at some point in time after the charged period contact with Joseph Kony and possesses information about the LRA does not meet the low, *prima facie*, threshold of Rule 77 of the Rules. Finding otherwise would mean that any information relating to the LRA at any point in time, irrespective of any connection to the charges or the accused, would fall under Rule 77. This would expand the Prosecution's disclosure obligations to an unreasonable degree.²⁹

21. The Defence current request goes even further by seeking everything with regard not to one person and one incident but 13 persons and all material related to the investigations of these persons without any further limitations.

22. The Single Judge rejects the assertion that this material constitutes relevant background information. As stated in paragraph 19 above, the materials in the jurisprudence relied upon by the Defence are distinguishable.

23. The argument of the Defence that the material is relevant since it allows the Defence to test the evidence used against the accused is equally not convincing. The jurisprudence the Defence relies on³⁰ concerns requests for assistance or other communication which ultimately led to incriminating evidence against the accused. However, in the same paragraph cited by the Defence, the Single Judge dismissed the general disclosure of all requests for assistance in the Uganda

²⁹ Decision in Response to an Article 72(4) Intervention, 26 June 2018, ICC-02/04-01/15-1267-Corr2, para. 23 (footnotes omitted).

³⁰ Decision on Disclosure Issues Arising Out of First Status Conference, 7 June 2016, ICC-02/04-01/15-457. Trial Chamber VII, *The Prosecutor v. Bemba et al.*, Decision on the Bemba Defence Request for Disclosure of Communication with the Dutch Authorities, 12 January 2016, ICC-01/05-01/13-1542-Red. *But see* Appeals Chamber, *The Prosecutor v. Bemba et al.*, Public Redacted Judgment on the appeals of Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba, Mr Jean-Jacques Mangenda Kabongo, Mr Fidèle Babala Wandu and Mr Narcisse Arido against the decision of Trial Chamber VII entitled "Judgment pursuant to Article 74 of the Statute", 8 March 2018, ICC-01/05-01/13-2275-Red, paras 640-43.

situation.³¹ The current request is even broader as it concerns all the material in relation to investigations of an entire group of persons.

24. The fact that ‘the products of other investigations are part of the procedure and illustrate the procedure employed in collecting the evidence [...] against Mr Ongwen’³² is too remote and speculative to justify ‘relevance’ pursuant to Rule 77 of the Rules. Following this argument, any evidence collected by the Prosecution in any case would also be relevant since it would ‘illustrate the procedure’ by which evidence is collected.
25. The Single Judge also does not follow the Defence’s argument that the material is relevant for its intended defence of duress. The Defence explains that proof that orders by superior officers were automatically carried out by their subordinates ‘supports the duress argument’.³³ Noting that the Prosecution has assured the Defence that it reviewed its unrelated material in the case ‘with a view to updating our disclosure in this case, with special attention to possible defence lines such as duress’,³⁴ the Single Judge finds this argument unpersuasive. Seeking everything obtained during the investigation into 13 persons is not sufficiently connected to the defence of duress. For these same reasons, the requested material does not fall under Article 67(2) of the Statute as potentially exculpatory material.³⁵
26. As regards the Defence’s assertion that the material is relevant because the Prosecution alleges a common plan amongst ‘senior members’ for part of the charges,³⁶ the Single Judge notes, again, that the Prosecution indicated that it

³¹ Decision on Disclosure Issues Arising Out of First Status Conference, 7 June 2016, ICC-02/04-01/15-457, para. 13.

³² Request, ICC-02/04-01/15-1329-Conf-Corr, para. 21.

³³ Request, ICC-02/04-01/15-1329-Conf-Corr, para. 30.

³⁴ ³⁴ E-mail sent by the Prosecution to the Defence on 15 August 2018, quoted in Request, ICC-02/04-01/15-1329-Conf-Corr, para. 16. *See also*, Response, ICC-02/04-01/15-1341-Conf, para. 10.

³⁵ *See*, Request, ICC-02/04-01/15-1329-Conf-Corr, para. 34.

³⁶ Request, ICC-02/04-01/15-1329-Conf-Corr, para. 24.

disclosed all documents connected in any way with the alleged crimes, which includes everything connected to the 13 Commanders.³⁷ Similar to the reasoning in the previous paragraph, the Single Judge finds again that the argument is not sufficiently connected to the requested material in order to satisfy the ‘relevance’ requirement under Rule 77 of the Rules for all the material requested.

27. Finally, the Single Judge notes the Defence’s argument that ‘[t]he very disclosure of the List of Commanders by the Prosecution concedes the fact that material addressing other commander’s responsibility, and not directly related to the charges, is relevant for the Defence preparation.’³⁸ The Single Judge does not consider the Defence’s conclusion to necessarily follow from the fact of disclosure as the List of Commanders had to be disclosed because it contained the name of the accused. The further inference the Defence attempts to draw from this disclosure is untenable.
28. In sum, the Single Judge finds that the Defence fails to meet the low *prima facie* standard with respect to all material obtained during investigations into the 13 Commanders and records of those investigations. The Single Judge accordingly rejects this limb of the Request.
29. Lastly, the Single Judge notes that the Defence requests that the List of Commanders be made public.³⁹ Since the Prosecution does not object to this part of the request and there are no countervailing considerations this request is granted.

(ii) Request for disclosure of all materials regarding investigations of other co-perpetrators, contributors or parties of the crimes of which Mr Ongwen is accused

³⁷ See paragraph 17 above.

³⁸ Request, ICC-02/04-01/15-1329-Conf-Corr, para. 29.

³⁹ This request has not been expressly formulated in the relief sought, but is conveyed in paragraph four of the Request.

30. The second limb of the disclosure requests covers the same type of material stemming from investigation into other individuals named in the charges. The Defence cites to specific persons, such as Okwonga Alero,⁴⁰ Alex Caka and others, as well as more general entities such as Sinia leadership and 'other LRA commanders'.⁴¹
31. The Defence brings forward the same arguments as for the support the disclosure request regarding the 13 Commanders.⁴²
32. Again, also as stated by the Defence,⁴³ the Single judge takes note of the statement by the Prosecution that all documents that are connected in 'any way' to the crimes were disclosed. This means that, as was the case with the previous request related to the 13 Commanders, the Defence requests material which is in no way related to the charges against the accused.
33. The nature of the requested material is not fundamentally different from the request related to the 13 Commanders. The Single Judge dismisses this limb of the disclosure request for the same reasons as lined out in paragraphs 18 to 29. The fact that a person is somehow connected to the charges is not sufficient to justify disclosure of all material connected to investigations regarding this person. Accordingly, for the same reasons as explained above, the Single Judge finds that the requested material does not fulfil the low *prima facie* threshold for ordering disclosure.

(iii) Request for disclosure of all material related to amnesties

34. The Defence submits that 'there was a relationship between the Ugandan amnesty laws and the ICC investigations and bringing of charges to the conflict

⁴⁰ In the Request, the Defence makes reference to 'Akwongo Alero'. However, due to the references the Single Judge considers this to be a misspelling by the Defence and assumes that 'Okwonga Alero' is meant.

⁴¹ Request, ICC-02/04-01/15-1329-Conf-Corr, para. 40.

⁴² Request, ICC-02/04-01/15-1329-Conf-Corr, para. 42.

⁴³ Request, ICC-02/04-01/15-1329-Conf-Corr, para. 41.

in Northern Uganda.’⁴⁴ It argues that the material is relevant to the preparation of the defence for: (i) ‘[e]stablishing the truth of Mr Ongwen’s responsibility and impact on sentence if convicted’; (ii) the Article 31 defences; and (iii) ‘[u]ltimately, the proper exercise of Prosecutorial discretion and whether there is jurisdiction to try Mr Ongwen within the principles enunciated in the Rome Statute’.⁴⁵

35. With regard to the last argument, it elaborates that the Prosecution has the obligation to investigate the truth and that the disclosure of amnesty material regarding persons who were implicated in the alleged crimes charged is ‘necessary to demonstrate investigative failure raising doubts on Mr Ongwen’s responsibility in relation to any of the charges.’⁴⁶

36. During the opening statements of the Defence it further explained its position, stating that it seeks the amnesty material because ‘[w]ithout that evidence about those commanders, those individuals mentioned in the charge, your Honours will not be able to ascertain the extents of the contribution of Mr Ongwen.’⁴⁷ It further argues that the fact whether Mr Ongwen could have escaped during the charged period is important for the preparation for its defence.⁴⁸ The Single Judge repeats that the Prosecution has stated that it disclosed all documents connected in any way with the charges.⁴⁹ Further, specifically with regard to material containing information related to amnesties, the Prosecution submits that it disclosed this kind of material related to the 13 Commanders and the persons who were subject to the second limb of the disclosure request.⁵⁰

⁴⁴ Request, ICC-02/04-01/15-1329-Conf-Corr, para. 43.

⁴⁵ Request, ICC-02/04-01/15-1329-Conf-Corr, para. 51.

⁴⁶ Request, ICC-02/04-01/15-1329-Conf-Corr, para. 52.

⁴⁷ Hearing of 18 September 2018, ICC-02/04-01/15-T-179-CONF-ENG, page 52, lines 14 to 16.

⁴⁸ Request, ICC-02/04-01/15-1329-Conf-Corr, para. 55.

⁴⁹ See paragraph 17 and 26.

⁵⁰ Response, ICC-02/04-01/15-1341-Conf, para. 18.

37. Since all material concerning amnesties related to the 13 Commanders and the persons who were subject to the second limb of the disclosure request was disclosed,⁵¹ the Defence is already in possession of any amnesty material related to these LRA leaders (including the accused). Accordingly, the Defence is already in possession of the necessary items to ascertain the contribution of everyone in the alleged crimes. However, the Single Judge is not of the view that all further undisclosed material related to amnesty is relevant for this case.
38. Regarding the argument that the material is necessary since the ‘legitimacy of the prosecution’ of Dominic Ongwen might be brought into question because of ‘the intervention of the Government of Uganda or [...] ulterior considerations’,⁵² the Single Judge notes that this is entirely speculative. Additionally, the Single Judge notes that Article 53 of the Statute, which is cited in support of this argument, primarily concerns the initiation of an investigation on a situation level, not cases against specific persons.
39. Accordingly, the Single Judge does not find that all material related to any amnesty is of exculpatory nature or relevant pursuant to Rule 77 of the Rules and accordingly also rejects the last part of the disclosure request.

(iv) Requests related to alleged belated disclosure

40. The Defence cites to an array of incidents of perceived delayed disclosure. It requests that the Chamber declare that these items should have been disclosed earlier and that the belated disclosure violates the accused’s right to a fair trial. It further requests that the Prosecution be ordered to provide information about its disclosure system and review process. The Single Judge will address each request in turn.

⁵¹ See, again, Response, ICC-02/04-01/15-1341-Conf, para. 18.

⁵² Request, ICC-02/04-01/15-1329-Conf-Corr, para. 58 b.

41. The first item, UGA-OTP-0263-1716, is a note from a meeting which contains a statement regarding Joseph Kony. The Prosecution concedes that it is relevant for the Defence and states that it has been disclosed in its review after the end of the Prosecution and Legal Representatives of Victims' evidence presentations.⁵³ The Defence claims that it suffered prejudice from the fact that it was only disclosed in August 2018 since it 'lost the opportunity to ask Prosecution witnesses to comment on the contents of the meeting note', especially with regard to the statement that Joseph Kony 'is a cult leader – people believe in him and his spiritual powers'.⁵⁴ The Defence further submits that it lost the opportunity to question Prosecution witnesses about a certain UPDF officer mentioned to have been present during the meeting, with specific reference to the questioning of P-38 and P-189.⁵⁵
42. The Single Judge finds that the submissions made in support of any prejudice are wholly without basis. With regard to the lost opportunity to question Prosecution witnesses about Joseph Kony's role as a cult leader and his spiritual powers, the Single Judge notes that lead counsel asked the first Prosecution witness, P-422, about Kony's spiritual powers.⁵⁶ During the Prosecution case, multiple other Prosecution witnesses were asked by the Defence about the alleged spiritual powers of Mr Kony and whether people believed in them. Further, lead counsel also questioned PCV-3, the last witness to appear before this Chamber at this point in time, extensively on the matter of cult indoctrination.⁵⁷ This demonstrates that the Defence was aware of this issue from the very start of the case and posed questions throughout the trial on precisely the subject matter it alleges to not to have been able to ask questions on.

⁵³ Response, ICC-02/04-01/15-1341-Conf, para. 18.

⁵⁴ Request, ICC-02/04-01/15-1329-Conf-Corr, para. 61.

⁵⁵ Request, ICC-02/04-01/15-1329-Conf-Corr, para. 61.

⁵⁶ Hearing of 17 January 2017, ICC-02/04-01/15-T-29-Conf-ENG, page 35, lines 11-14. Counsel follows up with questions whether Mr Kony was omnipresent and all-knowing, pages 35, 15 to page 37, line 10.

⁵⁷ Hearing of 24 May 2018, ICC-02/04-01/15-T-178-ENG.

43. In respect to the second allegation, the Single Judge points out that both witnesses singled out by the Defence, P-38 and P-189, were in fact asked about the UPDF officer in question.⁵⁸ Accordingly, the Single Judge does not only find that the factual allegations made by the Defence were incorrect in this regard, but also that no prejudice arose from the disclosure of UGA-OTP-0263-1716 in August 2018 (since the Defence was able to ask about this individual without knowing the content of this document).
44. The second document in question is a meeting note with Prosecution witness P-27. P-27's prior recorded testimony was admitted pursuant to Rule 68(2)(b) of the Rules, and the Defence interviewed him in September 2017. The Single Judge finds that the document should have been disclosed earlier. However, the Single Judge also notes that the prejudice suffered by the Defence is minimal since the content of the meeting note is not related in any way to the content of P-27's prior recorded testimony.
45. During its opening statements, the Defence explained that – had it been in possession of this meeting note during the time it interviewed P-27 – it 'would have been able to ask questions dealing, for example, with LRA function, its infrastructure, how Joseph Kony maintained control, details of his internal spy network'.⁵⁹ The Single Judge fails to see how the content of this meeting note could have initiated questions about a 'spy-network'. Should any specific questions arise from this specific document which the Defence wishes to put to P-27, it can simply ask him for a second interview. Given this possibility, the Single Judge does not find that the prejudice suffered due to the late disclosure amounts to a violation of the right to a fair trial.

⁵⁸ Hearing on 2 October 2017, ICC-02/04-01/15-T-116-Red-ENG, page 23, lines 2-5 for P-38. P-38 affirmed that he knew him, no follow-up questions were asked. Hearing on 14 August 2017, ICC-02/04-01/15-T-95-Red-ENG, page 70, lines 4-5 for P-189 who stated that he does not remember him.

⁵⁹ Hearing of 18 September 2018, ICC-02/04-01/15-T-179-CONF-ENG, page 91, lines 9 to 11.

46. The last type of documents mentioned as having been disclosed in a delayed manner are excerpts of questionnaires of potential and actual witnesses created by the Prosecution. The Prosecution admits that this information should have been disclosed earlier and that, should information arise from this delayed disclosure which reasonably warrants the recalling of witnesses or addition of items on the Defence's list of evidence, it will not oppose such request.⁶⁰ The Single Judge agrees with the Prosecution that the disclosure in this case should have been conducted earlier, and has noted previously that recalling witnesses is possible if it is established that a significant new line of questioning has arisen.⁶¹
47. Indeed, the Defence itself foresees the possibility of such remedy and announces that it might intend to recall witnesses. It requests the Chamber to confirm that the Defence will be permitted to do so.⁶² The Single Judge notes the Defence can always make a fully reasoned request to recall specific witnesses, but he will not grant any request in this regard *in abstracto*.⁶³ Accordingly, he rejects this part of the Request.
48. The Single Judge also rejects the Defence's request to bar the usage of any of the material by one of the parties in an abstract manner.⁶⁴ Should such situation arise during the proceedings the Chamber will rule on the matter after a case-by-case assessment. Accordingly, the Single Judge also rejects this part of the Request.
49. Lastly, the Defence requests that the Prosecution be ordered to provide a report with the dates for its reviews of the undisclosed material.⁶⁵ The reason for

⁶⁰ Response, ICC-02/04-01/15-1341-Conf, para. 25.

⁶¹ *E.g.* Public Redacted Version of Decision on the Legal Representatives for Victims Requests to Present Evidence and Views and Concerns and related requests, 6 March 2018, ICC-02/04-01/15-1199-Red, para. 25.

⁶² Request, ICC-02/04-01/15-1329-Conf-Corr, paras 79, 81 e.

⁶³ Decision on Defence Requests Following Prosecution's Notice of Filing of an Item Received in Response to an RFA, 16 March 2018, ICC-02/04-01/15-1207, para. 14.

⁶⁴ *See*, Request, ICC-02/04-01/15-1329-Conf-Corr, para. 80 f.

⁶⁵ Request, ICC-02/04-01/15-1329-Conf-Corr, para. 80.

requesting the report with the review dates is that the Defence wants to 'coherently argue that a new review is necessary'.⁶⁶

50. In its response, the Prosecution details the disclosure it has undertaken until now, the procedure it put in place to comply with its obligations and provides an overview when it conducted reviews of its material.⁶⁷ The Chamber considers that the information provided *de facto* complies with the Defence request and enables it to make submissions on whether a new review is necessary. Accordingly, this part of the Request is dismissed as moot.

⁶⁶ Request, ICC-02/04-01/15-1329-Conf-Corr, para. 80.

⁶⁷ Response, ICC-02/04-01/15-1341-Conf, paras 8-10 and 26.

FOR THE FOREGOING REASONS, THE SINGLE JUDGE HEREBY

ORDERS the Defence and Prosecution to request re-classification or file public redacted versions of their respective submissions (ICC-02/04-01/15-1329-Conf-Corr, ICC-02/04-01/15-1341-Conf and ICC-02/04-01/15-1345-Conf) within ten days of the notification of this decision;

REJECTS the Request for Leave to Reply;

ORDERS the Prosecution to confirm the ERN of the report associated with UGA-OTP-0032-0036 in accordance with paragraph 5 above;

ORDERS that UGA-OTP-0032-0036 be made public;

DISMISSES the request to order the Prosecution to provide more information on its disclosure and disclosure reviews as moot; and

REJECTS the remainder of the Request.

Done in both English and French, the English version being authoritative.


Judge Bertram Schmitt, Single Judge

Dated 28 September 2018

At The Hague, The Netherlands