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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 "Prosecution's Response to Defence Request No. ICC-02/04-01/15-1329-Conf", filed on 20 September 2018, ICC-02/04-01/15-1341-Conf

Source: **The Office of the Prosecutor**

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

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Introduction

1. The "Defence Request for Disclosure Pursuant to Rule 77 and Article 67(2) and Request for a Remedy in Light of Late and Untimely Disclosure" ("Request")[1] should be denied. The Request misconstrues rule 77 of the Rules of Procedure and Evidence ("Rules"), is premised upon fundamental misunderstandings of the Prosecution's work, and does not substantiate the Defence's demands for additional disclosure in any of the three areas identified in the Request. The Trial Chamber should also deny the other measures sought by the Defence.

Confidentiality

2. This response is filed confidentially pursuant to regulation 23*bis* of the Regulations of the Court because the Request was filed confidentially. When the Defence files a public redacted version of the Request, the Prosecution will file a public redacted version of this filing.

Submissions

A. The Defence Misconstrues Rule 77

3. Rule 77 of the Rules provides that the Prosecution must disclose to the Defence (or permit it to inspect) items in the Prosecution's possession or control that are, *inter alia*, "material to the preparation of the defence." As the Chamber has recognised, this disclosure obligation, while broad, is not unlimited.[2] The mere fact

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[1] ICC-02/04-01/15-1329-Conf-Corr.

[2] ICC-02/04-01/15-1267-Corr2, para. 21 (citing 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

that information relates to the LRA or to one of its senior members is insufficient to invoke rule 77.[3] In the Chamber's words, to interpret rule 77 as extending to "any information relating to the LRA at any point in time, irrespective of any connection to the charges or the accused … would expand the Prosecution's disclosure obligations to an unreasonable degree."[4]

4. The current Request ignores these common-sense limitations on the scope of rule 77, advocating instead for an all-encompassing disclosure obligation with no discernible limits. The Request seeks "disclosure of material obtained during investigations and records of investigations … into [particular LRA commanders]" and "disclosure of correspondence, exchanges, or communications related to the granting or withholding of amnesty" in relation to the same individuals.[5] The Request is not limited to information related to the charges in this case or to the material facts contained in the charging document, nor even to the charged period. To the contrary, the Request overtly seeks to compel disclosure of any information that might help the Defence understand "the overall circumstances of the conflict",[6] and at times appears to extend to "*any and all* material relating to the senior members of the LRA".[7] Rule 77 may be broad, but it is not that broad.

B. <u>The Prosecution Has Disclosed All Rule 77 Information Relating to the Names on UGA-OTP-0032-0036</u>

5. The Defence first requests all "material obtained during investigations and records of investigations within the Office of the Prosecution [*sic*] into 14 individuals listed on a document titled 'List of the Most Notorious LRA Commanders

"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).
[3] ICC-02/04-01/15-1267-Corr2, para. 23.
[4] ICC-02/04-01/15-1267-Corr2, para. 23.
[5] Request, para. 1.
[6] Request, para. 8, 37-38.
[7] Request, para. 23 (emphasis added).

Recommended for Trial by the ICC'", which has the ERN UGA-OTP-0032-0036.[8] The list in question was provided to the Prosecution by the Ugandan authorities in 2004. Based on its content, it appears to be a list compiled by Ugandan military intelligence. It was provided to the Prosecution along with 54 pages of information related to crimes allegedly committed by the LRA, including the named commanders. Both the list and the longer accompanying document were disclosed to the Defence among the first disclosure packages in this case, in June 2015.

6. The list of names in UGA-OTP-0032-0036 was not created by the Prosecution, and it has never played any role in the Prosecution's charging decisions. Also, as explained to the Defence *inter partes*,[9] the Prosecution does not arrange its storage of information according to particular individuals. The information gathered in the course of an investigation is organised by situation country, meaning that all information collected in the Uganda investigation is stored in one searchable electronic database, regardless of the date or location of the events described or the identities of alleged perpetrators. As information is collected, it is reviewed for leads and analysed for the purpose of forming and refining case hypotheses, which then serve as the basis for investigative plans, which lead to further collection and analysis, and so on until the Prosecution determines that it has amassed sufficient evidence to seek a warrant of arrest or summons to appear under article 58 of the Statute.

7. The Defence is therefore wrong in its assertion that "Mr Ongwen faces a collage of charges pieced together from investigations of others". The charges against the Accused are the result of an impartial investigation in which his name

[8] Request, para. 18. The Defence at paragraph 4 of the Request seeks leave to make the names on this list public "in the interests of justice". The Prosecution has no concerns with publicly connecting the list with the names of the Accused and the four others named in the 2005 ICC arrest warrants. However, the other names on the list [REDACTED]. The Prosecution does not see how making their names public in this context furthers the interests of justice.
[9] *See* Request, para. 14.

eventually stood out for the gravity of his conduct and the strength of the evidence against him. It is also misleading to suggest that he has been somehow singled out for prosecution. Mr Ongwen was one of five senior LRA commanders for whom the Prosecution sought and obtained warrants of arrest in 2005. Three of those five subsequently died, and one remains a fugitive.

8. The Request also reveals a fundamental misunderstanding of the Prosecution's disclosure review practices. The Prosecution has not limited its multiple disclosure reviews to any compartment within its evidence database, nor to any particular names or individuals. Instead, the Prosecution has reviewed every item in the entire Uganda situation evidence database (which contains over 38,000 items), and to date has disclosed to the Defence more than 25,000 items. Many of the remaining undisclosed items are purely administrative in nature. For example, over 4,500 of the undisclosed items are Pre-Registration Forms (PRFs) which Prosecution staff submit every time a new item or items is added to the database. Another 1,400 items are duplicates.

9. All of the undisclosed items in the Prosecution's evidence database have been periodically reviewed, sometimes in light of particular questions from the Defence and most recently in the form of a comprehensive mid-trial disclosure review. During the break between the victims' evidence and the start of the Defence case, every undisclosed item in the database was reviewed anew in light of the arguments raised by the Defence so far during the trial. By the end of August 2018, therefore, every remaining undisclosed item in the Prosecution's evidence database had been reviewed at least twice by members of the Prosecution trial team[10], in most cases three times or more, and reviewed at least once since the close of the Prosecution's evidence in April 2018.

[10] Every item registered in the evidence database is subject to primary and secondary disclosure review by the trial team.

10. Despite these extensive reviews, and notwithstanding its position that the Defence's proposed interpretation of rule 77 is overbroad, upon receiving the current Request the Prosecution conducted a fresh electronic search of its evidence database for any undisclosed item containing the name of any of the individuals listed in UGA-OTP-0032-0036 (other than the Accused). All 745 responsive items were re-reviewed by members of the Prosecution trial team, taking into consideration the Defence's assertions relating to duress and other potential defences. Most of the items were responsive only because another person with a similar name was mentioned in the item, because the item mentioned Joseph Kony (with no connection to the facts or charges of this case), or because the Prosecution (rather than a witness) named one of the persons on the list, for example in the context of updating potential witnesses regarding the progress of proceedings. Ultimately, none of the items was determined to be material to the preparation of the defence.

C. The Prosecution Has Disclosed All Rule 77 Information Relating to Co-Perpetrators or Other Participants in the Charged Crimes

11. The second aspect of the Request seeks "disclosure of material obtained during investigations and records of investigations within the Office of the Prosecution [*sic*] into individuals named as other co-perpetrators, contributors, or parties in the 70 charges against Mr Ongwen".[11] While the Prosecution accepts that its disclosure obligations extend to information relating to others whose conduct may be attributable to the Accused in connection with the charges in this case, all such information has been disclosed. As noted by the Defence,[12] the Prosecution has informed the Defence *inter partes* that it has already disclosed all information in its possession or control that relate to any of the crimes charged against Mr Ongwen. This includes any information regarding the participation of named or unnamed co-perpetrators or other individuals.

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[11] Request, para. 1.b, 40-42.
[12] Request, para. 41 and 14.

12. What the Prosecution does not accept is the Defence's suggestion that rule 77 goes further to cover *all* information relating to such individuals, even in contexts wholly unrelated to the charges in this case or to the Accused. As an illustration only, picking just one name from paragraph 40 of the Request, the Prosecution does not consider that information relating to Okello Kalalang's conduct in the Central African Republic in 2009 would be material to the preparation of Mr Ongwen's defence for crimes committed in Uganda in 2002-2005. To extend rule 77 so far beyond the contours of the case at hand would render its text meaningless and impose an unreasonable burden upon the Prosecution.

13. In the latter regard, the Prosecution submits that the further extension of rule 77, or any disclosure obligation, is not entirely without costs. Fortunately, in this case the security situation in Uganda is relatively stable, and consequently the Court has not faced particular challenges in balancing the Prosecution's disclosure obligations with its (and the Court's) equally sacrosanct obligation to protect witnesses and others at risk on account of their interactions with the Court. Other situation countries are less safe, and if rule 77 were extended beyond reasonable limits, one foreseeable consequence would be greater time and resources dedicated by the Prosecution, Chambers, and Registry to protecting witnesses and others when disclosure of irrelevant or marginally relevant information places them at risk. In addition, greater volumes of disclosure necessarily require more time and resources for processing by the Prosecution and review by the Defence. Already in this case the Defence has complained of strains on its resources.[13] Extending rule 77 to information that is of marginal or no relevance to the case would unnecessarily lengthen proceedings and further tax the Defence, with no countervailing benefit.

[13] *See, e.g.*, ICC-02/04-01/15-1098; ICC-02/04-01/15-1239.

14. When searching for the names of the men listed in UGA-OTP-0032-0036, the Prosecution also searched for the names listed in paragraph 40 of the Request. One hundred and three responsive items were re-reviewed by members of the Prosecution trial team, and it was determined that none of the items is material to the preparation of the defence.

D. The Prosecution Has Disclosed All Amnesty-Related Rule 77 Information

15. Third, the Request seeks disclosure of "correspondence, exchanges, or communications related to the granting or withholding of amnesty".[14] Although the Defence's *inter partes* request was initially limited to "the listed individuals" in UGA-OTP-0032-0036, the current Request also extends to the individuals identified in paragraph 40 of the Request.[15]

16. The Defence raises "questions concerning the impact that the granting or withholding of amnesty by the Government of Uganda had upon ICC prosecutions and which entity had what role".[16] To be clear, the Prosecution has never considered the granting or withholding of amnesty by the Ugandan authorities, in general or as it might apply to particular individuals, to be relevant to its charging decisions. Nor has the Prosecution ever decided to investigate or not investigate particular individuals because they had been granted or denied amnesty, as speculated by the Defence.[17] As explained above, investigative activity in this case was planned on the basis of information collected and case hypotheses developed therewith; specific investigative steps such as requests for amnesty-related information were pursued (or not) on the same basis. The Defence suggestion that a "failure" to request amnesty records of amnestied LRA commanders might constitute "institutional

[14] Request, para. 1.c.
[15] *See* Request, para. 52. The Prosecution notes that several of the individuals in question died while still in the LRA. The Defence knows this as well. It can be safely assumed that there are no Amnesty Commission records relating to those individuals.
[16] Request, para. 43; *see also id.* para. 52.
[17] Request, para. 52.

willful blindness and may be in contravention of the Statute"[18] misunderstands the Prosecution's obligations under article 54(1)(a) and the way in which its investigations are conducted. It also ignores the fact that the Prosecution has already (in 2015) disclosed to the Defence amnesty-related information for thousands of LRA returnees.[19]

17. The Defence suggests that the requested amnesty-related information is relevant to its proposed duress defence.[20] However, the Prosecution submits that the granting or withholding of amnesty under Ugandan law is irrelevant to a defence of duress under article 31(1)(d) of the Statute. Article 31(1)(d) requires, among other things, that the duress result from "a threat of imminent death or of continuing or imminent serious bodily harm". In other words, fear of *prosecution* can never relieve a person of criminal responsibility under article 31(1)(d). Furthermore, even if this variant of duress were theoretically sufficient under the Statute, it would not apply on the facts of this case, because most of the crimes were committed *before* any charges were brought against the Accused (in July 2005) or made public (in October 2005) and in some instances before Uganda had even referred the situation to the Court (in January 2004).[21]

18. The Prosecution accepts that lesser or different forms of pressure may be relevant to mitigation of guilt for sentencing purposes.[22] However, any amnesty-related information in the Prosecution's possession regarding the people listed in

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[18] Request, para. 52.
[19] *See, e.g.*, UGA-OTP-0165-0124, UGA-OTP-0244-0908, and UGA-OTP-0244-0909. Since receiving the Defence's list of witnesses, the Prosecution has submitted an additional Request for Assistance to the Ugandan authorities seeking, *inter alia*, amnesty-related information regarding 14 of those defence witnesses. If and when such information is received by the Prosecution, it will be promptly disclosed to the Defence.
[20] Request, para. 43, 47, 55-56, 58(a).
[21] The Defence's (mis)understanding of duress under article 31(1)(d) is further demonstrated by its apparent equation of duress with a functioning military chain of command. *See* Request, para. 30-32. The Defence appear to argue that any situation giving rise to a finding of indirect perpetration or co-perpetration must involve duress. That is mixing apples and oranges.
[22] Rule 145(2)(a)(i).

UGA-OTP-0032-0036 or in paragraph 40 of the Request has already been provided to the Defence. None of the items responsive to the searches described above, relating to the names in UGA-OTP-0032-0036 and paragraph 40 of the Request, relates to the granting or denying of amnesty to any of the listed individuals.

19. The allegation that the Prosecution intentionally misled the Defence about its disclosure compliance in an email dated 25 May 2018[23] is unfounded. First, as explained *inter partes* to the Defence,[24] the Prosecution's use of the word "received" in its 25 May 2018 email was incorrect, and the review in question covered all correspondence, exchanges or communications concerning the granting or withholding of amnesty, regardless of whether they were sent or received by the Prosecution. Second, the Defence's disclosure request of 23 May 2018 was specifically limited to information "related to the granting or withholding of amnesty in relation to the listed individuals [in UGA-OTP-0032-0036]".[25] The Prosecution invites the Trial Chamber to read the two items which the Defence portrays as having been concealed by the Prosecution;[26] neither one makes any mention of any of the individuals from UGA-OTP-0032-0036, nor indeed of the granting or withholding of amnesty to any individual. The June 2004 notes have nothing to do with amnesty at all; the paragraph which the Defence says "indirectly addresses amnesty"[27] actually refers only to Acholi views on "forgiveness",[28] which is obviously different to amnesty from criminal prosecution. In other words, these two documents were not responsive to the Defence's May 2018 disclosure request. Meanwhile, the amnesty-related item disclosed on 15 August 2018 was received from the Amnesty Commission only *after* the Prosecution's 25 May 2018 email was

[23] Request, para. 49.
[24] Annex A to the Request.
[25] Request, para. 44.
[26] The items are UGA-OTP-0263-1682 and UGA-OTP-0263-1716. Both items were disclosed as a result of the Prosecution's comprehensive mid-trial disclosure review, described elsewhere in this filing.
[27] Request, para. 47.
[28] UGA-OTP-0263-1716.

sent, on 1 June 2018. In short, the Prosecution's 25 May 2018 email was accurate in this respect.

E. The Other Relief Requested Should be Denied

20. Finally, the Request complains about a number of specific items which the Defence claims should have been disclosed earlier. The Defence also alerts the Trial Chamber that it may seek to recall some prosecution witnesses in the future, and asks the Trial Chamber to order the Prosecution to provide additional information regarding its disclosure reviews. None of these issues warrants action by the Trial Chamber at the moment, and the latter request in particular should be rejected.

21. The specific examples cited by the Defence as "late and untimely disclosure" demonstrate that most of the information disclosed recently to the Defence is of marginal relevance and could not have significantly assisted the Defence in its work. For example, the Request contends that UGA-OTP-0263-1682 contains "information relevant for the duress defences".[29] However, the only portion of that document quoted in the Request refers to a proposal by the Chairman of the Amnesty Commission in 2004 to modify the amnesty law, a proposal which was apparently rejected and came to nothing.[30] The Prosecution fails to see how that information is material to the preparation of a duress defence.

22. The Defence similarly complains about the timing of disclosure of UGA-OTP-0263-1716, alleging that it lost the opportunity to question prosecution witnesses about statements such as "[Joseph Kony] is a cult leader – people believe in him and his spiritual powers" and "[Odhiambo and others] have been praying to the 'god of

[29] Request, para. 47.
[30] Request, para. 55. The Defence added, in brackets, the word "if" to its quotation of this document in the Request. *See id*. The basis for that addition is unclear.

JK' before entering battle".[31] The Prosecution concedes that this information is generally supportive of Defence arguments regarding LRA spiritual practices and Kony's alleged supernatural powers, and that is why the document was disclosed after the mid-trial disclosure review. However, this information is neither new nor unique; the same issues have been extensively discussed during trial; and similar information has been included in other items previously disclosed by the Prosecution. It is difficult to imagine what line of questioning would have arisen from this document that has not already been explored by the Defence.

23. The Defence also suggests that the late disclosure of June 2004 meeting notes (UGA-OTP-0263-1716)[32] deprived the Defence of the opportunity to question two prosecution witnesses about the potential knowledge of a UPDF officer, citing statements by the Ugandan Government (not the Prosecution) which the Defence claims are contradicted by the notes. The Prosecution, however, does not see any contradiction between the representations of the Ugandan Government and the presence of that officer (if indeed it is the same person) at one meeting at which LRA structure was discussed. The 2004 meeting notes certainly do not suggest that the officer was formerly an LRA member, nor do they suggest that the structure information in the notes came from him.

24. The Defence next devotes 11 paragraphs to a chronology of events related to the Prosecution's rule 68(2)(b) Witness P-0027, whose evidence in this case relates solely to the ISO intercept program. The Defence complains about the recent disclosure of notes of an informational meeting with P-0027, in his official governmental capacity rather than as a witness, in April 2005.[33] No witness statement was taken at the meeting, nor was the subject of P-0027's evidence

[31] Request, para. 61.
[32] The Defence refers at paragraph 62 of the Request to the "March 2004 meeting note". However, the content appears to relate to these June 2004 notes.
[33] UGA-OTP-0263-1691.

discussed. The April 2005 meeting notes do not constitute a prior statement of P-0027, and nothing in the meeting notes could reasonably affect the credibility of P-0027's evidence relating to the ISO intercept program. There was therefore no reason to disclose it under article 67(2) of the Statute or rule 76. However, upon re-reviewing the item this summer, the Prosecution determined that its references to the Accused and other LRA leaders, and to the LRA structure "not working as it is supposed to" at the end of the charged period, although not closely related to the charges in this case, might be of interest to the Defence. Erring on the side of caution, the Prosecution disclosed the item.

25. The Prosecution recognises that some of the items disclosed after the mid-trial disclosure review should have been disclosed earlier, including in particular some information from Biographical and Security Questionnaires (BSQs) of witnesses and potential witnesses. When the Prosecution began searching its database for information related to names on the Defence's provisional witness list, the Prosecution realised that it had erroneously marked a number of BSQs for nondisclosure without adequately ensuring that any disclosable information contained in them had been provided to the Defence. The Prosecution immediately addressed this oversight by reviewing all BSQs in its evidence database, and preparing and disclosing the Investigation Reports referenced at paragraph 75 of the Request. The Prosecution accepts the theoretical possibility that the Defence may petition the Trial Chamber to recall particular witnesses, or add particular items to its list of evidence, as a result of this error. If such requests are made, and reasonably arise from the late disclosure of this information, the Prosecution will not oppose them.

26. In the meantime, the Prosecution has repeatedly and carefully reviewed every undisclosed item in its evidence database for potential disclosure to the Defence. In

doing so, the Prosecution has paid particular attention to potential lines of defence, including duress, as developed since the trial began. While a few items should have been disclosed sooner, they have been the exception rather than the rule. When dealing with tens of thousands of items, and an even greater number of pages, a small number of oversights and differences of opinion are inevitable. Consequently, mindful of the importance of its disclosure obligations, the Prosecution has designed its disclosure practices to ensure that when mistakes do happen, they are identified and corrected. So far, the Prosecution submits that this approach has worked as intended.

27. This filing attempts to explain several of the disclosure review steps taken by the Prosecution, and the Prosecution submits that no further information is necessary to assist the Trial Chamber (or the Defence) in assessing the Prosecution's compliance with its disclosure obligations under the Statute and Rules. In particular, the Prosecution submits that a "report with dates of comprehensive reviews of undisclosed materials" is unnecessary and unwarranted, as is "a breakdown of the number of items and the corresponding number of pages which are associated with the Ugandan Situation that have not been disclosed."[34] Such reports would provide no significant value to the Trial Chamber or the Defence beyond the explanations already provided, and would require significant time and resources by the Prosecution to produce, at a time when the Prosecution is busy preparing for the Defence case.

[34] Request, para. 81.

Conclusion

28. For the reasons set out above, the Request should be denied.

Fatou Bensouda, Prosecutor

Dated this 3rd day of October 2018
At The Hague, The Netherlands