

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: **8 October 2018**

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 with Confidential Annex A

**Public redacted version of
“Corrected version of ‘Defence Request for Disclosure
Pursuant to Rule 77 and Article 67(2) and Request for a Remedy in Light of Late
and Untimely Disclosure’, filed 4 September 2018”,
filed 17 September 2018 (ICC-02/04-01/15-1329-Conf-Corr)**

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. The present request ('Request') addresses three disclosure related issues arising out of Prosecution Rule 77 disclosure pack 93¹ and related *inter partes* communications. In brief the Defence
 - a. requests disclosure of material obtained during investigations and records of investigations within the Office of the Prosecution into 14 individuals listed on a document titled "List of the Most Notorious LRA Commanders Recommended for Trial by the ICC"² ('List of Commanders');
 - b. requests disclosure of material obtained during investigations and records of investigations within the Office of the Prosecution into individuals named as other co-perpetrators, contributors, or parties in the 70 charges against Mr Ongwen;
 - c. disclosure of correspondence, exchanges, or communications related to the granting or withholding of amnesty;
 - d. and remedies for late and untimely disclosure.
2. On 9 August 2018, the Prosecution disclosed 63 items in its Rule 77 package 93.³ The Defence is presently following-up on several issues *inter partes* in relation to that disclosure; however, the disclosure of various items relating to a range of meeting notes are late and untimely given the Prosecution's 6 September 2016 deadline⁴ and violate Mr Ongwen's fair-trial rights.
3. The present request addresses several Prosecution violations of disclosure obligations contained in the Rome Statute and in particular disclosure protocols adopted in this case. The Defence submits that these violations prejudice Mr Ongwen's fair-trial rights and impact the upcoming start of the Defence case. In light of the clearly untimely disclosure identified in this filing and the *prima facie* untimely disclosures in subsequent disclosures which the Defence is still analysing, the Defence requests that, in addition to ruling on the materiality of the disclosure request and the provision of other remedies, the Trial Chamber order the Prosecution to indicate the schedule of disclosure reviews undertaken so as to provide baseline against which the disclosure violations can be measured.

¹ ICC-02/04-01/15-1319.

² UGA-OTP-0032-0036.

³ ICC-02/04-01/15-1319-Conf-AnxA.

⁴ ICC-02/04-01/15-449, para. 7.

4. The Defence submits that the List of Commanders should be made public in the interests of justice. The Defence therefore requests leave of the Trial Chamber to make public the names of the List of Commanders described in the present filing.

II. CONFIDENTIALITY

5. Pursuant to Regulations 23bis of the Regulations of the Court ('RoC'), this request is submitted as confidential as it refers to the contents of confidential evidence.

III. APPLICABLE LAW

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

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

The Trial Chamber, not the Prosecution, has the final say on disputes as the provision continues "[i]n case of doubt as to the application of this paragraph, the Court shall decide."

7. Rule 77 of the Rules of Procedure and Evidence ('RPE') states that the Prosecution must permit the Defence to "inspect any books, documents, photographs or other tangible objects in the possession or control of the Prosecutor, which are material to the preparation of the Defence or are intended for use by the Prosecution as evidence for the purposes of the confirmation hearing or at trial". It is common practice at the International Criminal Court ('ICC') that material falling within the scope of Rule 77 is automatically disclosed to the Defence along with other disclosures.⁵
8. The ICC Appeals Chamber has held that the expression "material to the preparation of the defence" has to be interpreted broadly⁶ and that Rule 77 encompasses "all objects that are relevant for the preparation of the defence".⁷ It is noted in particular that certain objects, while not directly linked to exonerating or incriminating evidence, may otherwise be material to the preparation of the defence.⁸ This includes material not directly related to the case but tending

⁵ See e.g. ICC-01/05-01/13-291; ICC-01/05-01/13/333.

⁶ ICC-01/04-01/06-1433 OA, para. 77; see also ICC-01/05-01/08-1594-red, para. 19.

⁷ *Ibid.*

⁸ *Ibid.*

to explain the overall circumstances of the conflict.⁹

IV. SUBMISSIONS

A. Disclosure of investigations of ‘Most Notorious LRA Commanders Recommended for Trial by the ICC’

1. Background

9. The arrest warrant for Mr Ongwen issued on 12 July 2005 included 5 individuals.¹⁰ Beyond Mr Ongwen also included were: Joseph Kony, Vincent Otti, Raska Lukwiya, and Okot Odhiambo. Mr Ongwen was charged by the Prosecution with 70 charges on 21 December 2015.¹¹ These charges were confirmed by Pre-Trial Chamber II on 23 March 2016.¹² Thirty-three of the charges have an indirect co-perpetration mode of liability attached whereby it is alleged that Mr Ongwen made an essential contribution to a plan involving various other individuals. Fifty-nine charges have the residual Article 25(3)(d) mode, whereby it is alleged that Mr Ongwen “contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose”. All but 11 charges have a mode of liability alleged which comprises the acts of others.
10. On 7 June 2016, the Single Judge dismissed *in limine* a Defence request for “materials allegedly relating to all suspects, possible suspects and investigations into the UPDF, NRM and the Government of Uganda”.¹³ The Single Judge stated:

[he is] not persuaded that any judicial action is required at this time. The Defence asks for the Prosecution to disclose materials in a collection being actively reviewed for disclosure. The Single Judge has no reason to doubt the exercise of the Prosecution’s obligations, and the Defence gives no indication that it has unsuccessfully engaged in inter partes communications in relation to any particular part of the Uganda Collection.¹⁴
11. On 2 October 2017, witness Timothy Kanyogonya (P-38) discussed the existence of the Government of Uganda investigations into “over maybe 15 commanders”¹⁵ the results of which were conveyed to the Prosecution.
12. On 23 May 2018, the Defence wrote to the Prosecution requesting:

⁹ ICC-01/04-01/06-1433 OA, paras 76-82.

¹⁰ ICC-02/04-01/05-52.

¹¹ ICC-02/04-01/15-375-Conf-AnxA.

¹² ICC-02/04-01/15-422-Conf.

¹³ ICC-02/04-01/15-439-Red2, para. 4; Status Conference, ICC-02/04-01/15-T-25-ENG, page 8 lines 2-15.

¹⁴ ICC-02/04-01/15-457, para. 7.

¹⁵ ICC-02/04-01/15-T-116, p. 16, lines 13 to 25.

Records of investigations within the Office of the Prosecution into [...] 14 individuals [listed on a document title “List of the Most Notorious LRA Commanders Recommended for Trial by the ICC”] and the results of those investigations. This includes, but is not limited to, those in relation to LRA intercepts and intercepts themselves.¹⁶

13. The Defence mentioned the potentially exculpatory nature of this material and noted:
 - (1) Some names of other individuals either appeared in the original warrant of arrest, or the names of some of individuals on this list have been raised in testimony in respect of the various crimes with which Mr Ongwen is charged.
 - (2) There are two individuals (Bunia and Abudema) higher on the list than Dominic who were not charged by the ICC.
 - (3) There are also two individuals listed as being within Control Alter (#11 and #13). The Prosecution has alleged that participation in Control Alter is an indication of status, importance, and knowledge (see for example paras 26, 91, 111, and 248 of your Pre-Trial Brief).
 - (4) The Prosecution alleges indirect co-perpetration. The roles and acts of these individuals on this list, especially in light of trial-testimony, have a bearing on the alleged acts and conduct attributed to Mr Ongwen.¹⁷

14. The Prosecution responded on 25 May 2018 stating that:

We do not divide or categorise our investigative records in terms of particular individuals. It may be the case that there are some undisclosed documents in the possession of the Prosecution which contain the names of persons listed on UGA-OTP-0032-0036. All of those documents have been the subject of separate reviews by two different reviewers in order to identify items which may be material to the preparation of the defence. The Prosecution does not intend to repeat that process unless the Chamber orders it to.¹⁸

And:

It may be helpful to make a more general statement so that you understand the Prosecution’s position. The fact that the Ugandan government, back in 2004, considered that Dominic Ongwen was just one of the 14 LRA commanders most notorious for committing crimes, and that it categorised six of these commanders as ‘above’ Dominic Ongwen does not, in itself, amount to a reason why documents concerning the crimes committed by the other 13 are material to the preparation of his defence. Where a document in our possession suggests that these 13 other commanders (or indeed any other person) may have been involved in the co-perpetration of crimes of which Dominic Ongwen is accused, indeed where a document is connected in anyway with such crimes, then we have disclosed it to you.¹⁹

¹⁶ Email, sent 23 May 2018 18h29, subject line ‘Request for further disclosure related to UGA-OTP-0032-0036’, see Annex A to the present filing, p. 4.

¹⁷ *Ibid.*

¹⁸ Emphasis added.

¹⁹ Email, sent 25 May 2018 12h09, subject line ‘Request for further disclosure related to UGA-OTP-0032-0036’, see Annex A to the present filing, p. 3.

15. On 11 July 2018, the Defence responded noting that:

the Prosecution has alleged common purpose liability with unspecified other co-conspirators against Mr Ongwen as one of the alternative modes of liability. Some of these allegations cover a period of three years. The Defence considers that because of the lack of specificity and the extended time-period, any document that concerns senior LRA members, was created by senior members, or is about senior LRA members is potentially highly material to Defence preparation. The fact that the document does not immediately tie the individual to a crime does not mean that it does not assist the Defence in understanding the evidence or preparing for the direct examination of witnesses and exercising Mr Ongwen's rights under Article 67(1)(e).

This is particularly true when considered within the context of the defence of duress. The Prosecution has recently unilaterally stipulated that Joseph Kony was able to impose credible threats of violence. To the extent that others on the list could have implemented Kony's threats against Mr Ongwen, the information requested is relevant to the defence of duress.²⁰

16. Finally, on 15 August 2018, the Prosecution responded stating:

the Prosecution does not accept that all documents relating to senior LRA members are necessarily material to the preparation of Mr Ongwen's defence, in relation to duress or otherwise. As recently communicated, the Prosecution has concluded a review of all previously undisclosed items in its evidence database with a view to updating our disclosure in this case, with special attention to possible defence lines such as duress. We are confident that such review has captured any information relating to other senior LRA commanders that would satisfy the requirements of rule 77, and we do not intend to conduct any further review in response to request (6) of [...] 23 May 2018 email or [the] renewed request of 10 [...].²¹

2. Request

17. As the background above demonstrates, the Defence exhausted the *inter partes* negotiations as expected by the Trial Chamber. The Prosecution and the Defence disagree on the materiality of the items sought and *inter partes* discussions have not been productive. The Prosecution appears to take a very narrow view of what is necessary for preparation or what preparation entails. With the Prosecution indicating that it refuses to review the undisclosed material without an order from the Trial Chamber, the Defence respectfully requests the Trial Chamber to find the requested items material which must be disclosed pursuant to Rule 77 or Article 67(2).
18. The Defence respectfully requests the Trial Chamber to order the Prosecution to disclose all

²⁰ Email, sent 11 July 2018 16h10, subject line 'Request for further disclosure related to UGA-OTP-0032-0036', see Annex A to the present filing, p. 2.

²¹ Email, sent 15 August 2018 15h49, subject line 'Request for further disclosure related to UGA-OTP-0032-0036', see Annex A to the present filing, p. 1 (emphasis added).

material obtained during investigations and records of investigations within the Office of the Prosecution into 14 individuals listed on a document title “List of the Most Notorious LRA Commanders Recommended for Trial by the ICC”²².

19. The Appeals Chamber emphasised that the ICC Rule 77 disclosure regime is essential in “ensuring the fairness of the proceedings and that the rights of the defence are respected, in particular the principle of equality of arms. This must remain paramount in decisions that are taken in relation to disclosure”.²³
20. In order to establish the obligation to disclosure pursuant to Rule 77, the Defence needs to establish firstly, that the information requested is relevant to a particular aspect of defence preparation at that stage of the proceedings, and secondly, that there are no provisions in the Statute or Rules which restrict the requested disclosure.²⁴
21. It is clear that the requested material exists. The Prosecution has conceded that “[t]he 70 offences charged by the Prosecution represent a selection of crimes that were investigated and considered in the Situation in Uganda.”²⁵ In other words, Mr Ongwen faces a collage of charges pieced together from investigations of others. The Single Judge has previously stated: “that it is imperative that the Defence be able to test the reliability of the procedure employed in collecting the evidence against them”.²⁶ In addition to the material disclosed, the products of other investigations are part of the procedure and illustrate the procedure employed in collecting the evidence used to substantiate the case against Mr Ongwen.
22. In any case, Rule 77 creates a presumption of full disclosure of any materials which are relevant to defence preparation and which are not exempt from disclosure by an express provision in the Statute or Rules. The Appeals Chamber has repeatedly stated that exceptions to this presumption are themselves very exceptional.²⁷
23. In the forthcoming Defence case, the Defence is calling members of the LRA²⁸ and those with knowledge of its senior members.²⁹ Some of these witnesses will be asked about matters relating to the LRA command-structure and decisions taken by senior members during the

²² UGA-OTP-0032-0036.

²³ ICC-02/05-03/09-501 (OA4), para. 34, *cited* in ICC-02/04-01/15-251 (OA3), para. 40.

²⁴ ICC-02/04-01/15-457.

²⁵ ICC-02/04-01/15-1110, footnote 13.

²⁶ ICC-02/04-01/15-457, para. 13 *citing* ICC01/05-01/13-1542-Red, para. 11.

²⁷ ICC-01/04-01/06-3031, para. 10; ICC-01/04-01/07-475, para. 70.

²⁸ [REDACTED].

²⁹ [REDACTED].

charged period. Whether still alive or dead, 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 that may need to be asked.

24. As discussed in the background above,³⁰ the material is relevant because the Prosecution alleges a plan amongst “senior members” for many charges.³¹
25. Even where the charged plan is confined to “Sinia brigade leadership” and Joseph Kony,³² it is worth noting that the temporal jurisdiction³³ of those charges includes a period when Buk Abudema was the alleged Brigade Commander of Sinia. Mr Abudema is listed at position 5 on the List of Commanders – 2 above Mr Ongwen – on a document that appears to date from plausibly the middle of the temporal period in respects of the child-soldier charges.³⁴
26. In respect of these various plans, the Prosecution has not specified who the “senior members” or “Sinia brigade leadership” are or why, or on what basis, it believes that they are part of the various plans. As well, disclosure is necessary to better understand the alleged contribution of Mr Ongwen to the various charges and modes of liability. This is important because numerous charges are premised upon proof of different types of contributions. Full 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.
27. Other untimely disclosed meeting notes show the materiality of the present request. For example, in a meeting note from **21 June 2004**³⁵ – 13 days after Abok – the LRA “active groups” are “Bonia(sp?)”, plausibly Ocan Bunia – number 6 on the List of Commanders, “Abdema (sp?)”, presumably Abudema – number 5, and “Labong (sp?)”, plausibly George Labongo or Charles Labong Nono – numbers 8 and 9 respectively on the List of

³⁰ See paras 9 to 156 above.

³¹ See for example charges 1 to 10: ICC-02/04-01/15-422-Red, p. 73, para. 15: “On or about 10 October 2003, between 05:00-06:00 approximately, Dominic Ongwen together with *other senior members* of the LRA, including Vincent Otti, Raska Lukwiya, and Bogi Bosco [...] put into action a common plan to attack Pajule and Lapul IDP camps [...]. (emphasis added).

³² See charges 61 to 68, para. 137: “This evidence demonstrates that there was a common plan between Joseph Kony and *the senior leadership of the Sinia brigade*, including Dominic Ongwen, to abduct women and girls in order for them to serve as forced ‘wives’, domestic servants and sex slaves to male LRA fighters”. (emphasis added) and charges 69 to 70, ICC-02/04-01/15-422-Red, p. 102, para 126: “Between at least 1 July 2002 and 31 December 2005 Dominic Ongwen, Joseph Kony, and *the Sinia brigade leadership* (‘child soldiers co-perpetrators’) pursued a common plan to abduct children in the territory of northern Uganda and conscript them into the Sinia Brigade in order to ensure a constant supply of fighters (‘child soldiers common plan’).”.

³³ ICC-02/04-01/15-422-Red, p. 102, para 126: “Between at least 1 July 2002 and 31 December 2005”.

³⁴ The chain of custody indicates that the document was entered into the Prosecution system on 15 January 2005. The Prosecution has been unable to provide any further information about the context of this document.

³⁵ UGA-OTP-0263-1693 (bold added).

Commanders. No mention is made of Mr Ongwen leading an active group. During the Prosecution case, the Defence has highlighted the evidence that suggests Labongo's leading role in the charged attacks.

28. The Prosecution claims that:

The fact that the Ugandan government, back in 2004, considered that Dominic Ongwen was just one of the 14 LRA commanders most notorious for committing crimes, and that it categorised six of these commanders as 'above' Dominic Ongwen does not, in itself, amount to a reason why documents concerning the crimes committed by the other 13 are material to the preparation of his defence.³⁶

29. This does not withstand legal scrutiny. The 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 Defence preparation. The disclosure of the List of Commanders, and the present disclosure request, easily falls within the Appeals Chamber direction in the *Banda and Jerbo* case that emphasized that even if "information that is material to the preparation of the defence is ultimately not used as evidence at the trial or may not turn out to be relevant to it" the Defence is still entitled to disclosure of such information under Rule 77 of the RPE.³⁷

30. As noted above,³⁸ the information is also needed in relation to the Article 31 defences. The Prosecution theory of Mr Ongwen's individual responsibility with regards to many charges hinges heavily on the fact that it alleges that an "essential features of the [LRA]" was that "the orders of its superior officers are *automatically* carried out by their subordinates."³⁹ This theory supports the duress argument.

31. It is clear that everyone was subordinate to Joseph Kony. The Prosecution has not demonstrated that LRA members notwithstanding their rank or position were treated differently than the witnesses that the Prosecution has brought or former LRA escapees who have been granted amnesty by the Government of Uganda. In fact, in another untimely disclosed meeting note⁴⁰ can be found an example of this where a senior security official

³⁶ Email, sent 25 May 2018 12h09, subject line 'Request for further disclosure related to UGA-OTP-0032-0036', see Annex A to the present filing, p. 3.

³⁷ ICC-02/05/03/09-501, para. 42; see also *Prosecutor v. Karemera et al.*, 'Decision on the Prosecution's Interlocutory Appeal Concerning Disclosure Obligations', ICTR-98-44-AR73.11, 23 January 2008, para. 12, available at: <http://41.220.139.198/Portals/0/Case%5CEnglish%5CKaremera%5Cdecisions%5C080123.pdf>.

³⁸ See para. 15 second paragraph cited.

³⁹ ICC-02/04-01/15-533, para. 145 (emphasis added) and ICC-02/04-01/15-375-Conf-AnxC, para. 185, footnote 495.

⁴⁰ UGA-OTP-0263-1691.

states in relation to the Peace Process in 2005 “Abudema is tired he wants to come out but is scared of Kony.” Abudema is number 5 on the List of Commanders.

32. According to the Prosecution’s theory the LRA had a rigid hierarchy. Even if it was proven by the Prosecution that Mr Ongwen was in the top hierarchy of the LRA, those who were more senior to Mr Ongwen or at his level, according to the Government of Uganda, would be able to provide orders given to Mr Ongwen during the charged period. Information from other investigations concerning the ability of those on the List of Commanders to have their orders undertaken “automatically” is thus highly material to a duress defence.
33. With the requested material disclosed, particularly where individuals on the List of Commanders were not charged, the Defence will be in a position to assess it for elements of duress and demonstrate its exculpatory nature. It thus should be disclosed pursuant to Article 67(2).
34. Article 67(2) provides for the disclosure of material that would “mitigate the guilt of the accused”. Duress is one such factor pursuant to Rule 145(2)(a)(i) of the RPE that mitigates the guilt of the Accused. In such eventuality as a conviction, the presentation of mitigating factors at that stage would be limited without disclosure of the requested material. Thus beyond the exculpatory nature of the material, an additional basis for disclosure exists pursuant to Article 67(2). The urgency and necessity of this is not lessened, and is in fact heightened, by the complete affirmative defences that have been raised.
35. It is clear that the request falls squarely within Appeal Chamber *Lubanga* jurisprudence. The Prosecution is under an obligation to provide the requested material. Firstly, the Defence submits that the jurisprudence supports a low burden of proof for the Defence. The Appeals Chamber held that the phrase “relevant to defence preparation” must be interpreted broadly.⁴¹ ICTY jurisprudence, upon which the Appeals Chamber drew, requires that it is only necessary to establish that it is “likely” to assist defence preparation or that there is at least a good chance that it would.⁴²
36. Relevance has been understood as material that would “undermine the prosecution case or

⁴¹ ICC-01/04-01/06-1433 OA11, paras 77-78.

⁴² ICTY: *Popović et al.*, IT-05-88-T, 19 July 2007, p. 5, available at: <http://www.icty.org/x/cases/popovic/tdec/en/070719.pdf>; Djordjević, IT-05-87/1PT, 6 Feb 2008, para. 7, available at: <http://www.icty.org/x/cases/djordjevic/tdec/en/080206a.pdf>.

support a line of argument of the defence”⁴³ or “significantly assist the accused in understanding the incriminating and exculpatory evidence, and the issues in the case.”⁴⁴ The Defence made efforts to provide explanations of the relevance of the requested materials during the *inter partes* communications. The above arguments⁴⁵ demonstrate that such material will help the Defence.

37. Secondly, the *Lubanga* Appeals Chamber has found that material relating to the background to the conflict was material to the Defence because it is helpful to understand the charges and prepare a line of defence.⁴⁶
38. The results of the investigations into senior LRA commanders clearly illustrates the background to the conflict as they were the individuals around whom Mr Ongwen allegedly served. Especially with respect to certain charges and modes of liability, knowing this information would enable the Defence to more clearly set a line of defence. Thus the specific circumstances that Appeals Chamber jurisprudence was addressing – the background of the conflict – provide a further basis for disclosure.
39. The request is well defined and straight forward. The Prosecution tracks evidence in relation to situations and appears to organise the evidence by investigation, therefore the Prosecution has a clear idea of the scope and number of documents involved.

B. Disclosure of investigations of other individuals named in the charges

40. The charges brought against Mr Ongwen have named various individuals. Included are, *inter alia*, Akwongo Alero,⁴⁷ Sinia leadership,⁴⁸ “other LRA commanders”,⁴⁹ Olak Tulu,⁵⁰ Alex Ocaka,⁵¹ Okello Kalalang,⁵² Bogi Bosco,⁵³ and Ben Achellam.⁵⁴

⁴³ ICC-01/05-01/08-1594-Red, para. 21 *citing* ICC-01/04-01/06-1433, paragraph 77.

⁴⁴ ICC-01/05-01/08-1594-Red, para. 21 *citing* ICC-01/04-01/06-2624, paragraph 16.

⁴⁵ See 23 to 34 above.

⁴⁶ ICC-01/04-1/06-1433, *see inter alia*, paras 77 and 82. *See also* Kai Ambos’s interpretation of this decision. Kai Ambos, “Confidential Investigations (Article 54(3)(E) ICC Statute) vs. Disclosure Obligations: The Lubanga Case and National Law”, *New International Criminal Law Review*, vol. 12, no. 4, pp. 543-568, available at: <http://www.legal-tools.org/en/doc/c76c63/>, at p. 549: “The defense may be given access to all the prosecution material on the conflict situation that might assist the defense in understanding the background of the conflict and the charges and thus help prepare the line of defense.”

⁴⁷ ICC-02/04-01/15-422-Conf (‘Confirmation Decision’), p. 77, para 27; ICC-02/04-01/15-375-Conf-AnxA (‘DCC’), para. 27.

⁴⁸ Confirmation Decision, para. 137.

⁴⁹ DCC, paras 131 and 132.

⁵⁰ ICC-02/04-01/15-533 (‘PTB’), paras 421-422.

⁵¹ *Ibid.*

⁵² PTB, paras 492-493; ICC-02/04-01/15-375-Conf-AnxC, paras 420-421.

41. Though the Prosecution has indicated that they consider material disclosable which shows involvement in the co-perpetration of crimes of which Dominic Ongwen is accused or is connected in any way,⁵⁵ the Defence notes that the Prosecution's rationale for dismissing the Defence request in relation to the List of Commanders would apply equally to investigations into these individuals for other crimes.
42. The Defence submits that the relevance and exculpatory nature⁵⁶ of such investigations are the same for the individuals named in the charges as they are for the List of Commanders. The Defence therefore requests the Trial Chamber to order the disclosure of the material obtained during investigations and records of investigations within the Office of the Prosecution into individuals named as other co-perpetrators, contributors, or parties in the 70 charges against Mr Ongwen.

C. Amnesty related material

43. From evidence disclosed shows there was a relationship between the Ugandan amnesty laws and the ICC investigations and bringing of charges with regards to the conflict in Northern Uganda. Prosecution witnesses have discussed the Joseph Kony's propaganda regarding return and amnesty.⁵⁷ The question of amnesty was also raised during peace talks.⁵⁸ Evidence has shown that members of the LRA were afraid to escape because the Government of Uganda would not guarantee their amnesty.⁵⁹ There are 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.
44. On 23 May 2018, the Defence requested
- Any correspondence, exchanges, or communications related to the granting or withholding of amnesty in relation to the listed individuals. This request includes but is not limited to communications between the Prosecution and the government of Uganda in reference to amnesty.⁶⁰
45. The 25 May Prosecution response suggested that the Prosecution had only reviewed items

⁵³ Confirmation Decision, p. 73, para. 15; DCC, para. 15.

⁵⁴ PTB, para. 118 and 652.

⁵⁵ See para. 14 above.

⁵⁶ See paras 21, 24-26, 31-34, and 38.

⁵⁷ *Inter alia*, [REDACTED]; ICC-02/04-01/15-T-118-Conf, p. 39, lines 1-10.

⁵⁸ *Inter alia* [REDACTED].

⁵⁹ [REDACTED].

⁶⁰ Email, sent 23 May 2018 18h29, subject line 'Request for further disclosure related to UGA-OTP-0032-0036', see Annex A to the present filing, p. 4.

“received” by the office and indicated that: “[w]here [the items] meet the tests under Rule 77 and Article 67(2) **we have disclosed them.**”⁶¹

46. The Defence email response of 10 July 2018 clarified that the Defence was also interested in correspondence, exchanges, or communications originating from the Office of the Prosecution.
47. On 9 August 2018, the Prosecution disclosed two meeting notes originating from March⁶² and June⁶³ 2004. The March meeting note originates from a meeting with the Chairman of the Amnesty Commission and contains information relevant for the duress defenses. The June meeting indirectly addresses amnesty in the second-last paragraph of its first page.
48. Without acknowledging the late disclosure of these two documents which addressed the 23 May Defence request, on 15 August 2018, the Prosecution asserted simply that it had disclosed “**all items** covered by our disclosure obligations”.⁶⁴
49. The 25 May representation to the Defence was not accurate. On 15 August 2018, the Prosecution disclosed another document⁶⁵ originating from the Amnesty Commission which was not mentioned in the Prosecution response. The 15 August failure to acknowledge that items had just been disclosed late pursuant to the Defence request lends weight to argument that the 25 May representation was misleading.
50. The Prosecution emails of 25 May and 15 August 2018 also implicitly conceded that further correspondences exist between the Prosecution, Amnesty Commission, and Government of Uganda on the subject of amnesty granting or with-holding. If this were not so, the Prosecution would not have qualified its statements with the caveats those “covered by our disclosure obligations”⁶⁶ and “[w]here they meet the tests under Rule 77 and Article 67(2) we have disclosed them.”⁶⁷

⁶¹ Email, sent 25 May 2018 12h09, subject line ‘Request for further disclosure related to UGA-OTP-0032-0036’, see Annex A to the present filing, p. 3 (bold added).

⁶² UGA-OTP-0263-1682.

⁶³ UGA-OTP-0263-1716.

⁶⁴ Email, sent 15 August 2018 15h49, subject line ‘Request for further disclosure related to UGA-OTP-0032-0036’, see Annex A to the present filing, p. 1.

⁶⁵ UGA-OTP-0283-1564.

⁶⁶ Email, sent 15 August 2018 15h49, subject line ‘Request for further disclosure related to UGA-OTP-0032-0036’, see Annex A to the present filing, p. 1,

⁶⁷ Email, sent 25 May 2018 12h09, subject line ‘Request for further disclosure related to UGA-OTP-0032-0036’, see Annex A to the present filing, p. 3.

51. The correspondences that have arisen out of the Defence request indicate that the Prosecution and Defence disagree on the Prosecution's disclosure obligations in respect to this matter and the Defence requests the Trial Chamber to resolve the impasse and provide guidance. The Defence considers the material relevant for *inter alia* the following themes:
-) Establishing the truth of Mr Ongwen's responsibility and impact on sentence if convicted;
 -) Adding further evidence to Article 31 defenses;
 -) Ultimately, the proper exercise of Prosecutorial discretion and whether there is jurisdiction to try Mr Ongwen within the principles enunciated in the Rome Statute.
52. The Prosecution has a mandate to pursue the truth pursuant to Article 54(1)(a) and an obligation to disclose exculpatory evidence. The investigation of the amnestied LRA officers whose alleged crimes are charged against Mr Ongwen and disclosure of their amnesty records falls within these obligations. If the Prosecution failed to investigate individuals due to their being granted amnesty or failed to, for example, obtain records of answers given to the amnesty commission, then the Prosecution has not presented the full truth through institutional willful blindness and may be in contravention of the Statute. Provision of the material requested is necessary to demonstrate investigative failures raising doubts on Mr Ongwen's responsibility in relation to any of the charges.
53. The individuals who had amnesty granted or withheld are undoubtedly some of the individuals who form part of the common plans Mr Ongwen is alleged to have realized and common purposes to which he is alleged to have contributed. For example, according to the confirmation of charges decision, the charges relating to indirect co-perpetration of sexual and gender based violence cover the period of 1 July 2002 to 31 December 2005.⁶⁸ The Article 25(3)(a) charged plan concerns the "senior leadership of the Sinia Brigade"⁶⁹ and the common purpose under Article 25(3)(d) to which Mr Ongwen is said to have contributed was amongst "other senior LRA leaders".⁷⁰
54. It appears that the List of Commanders was created within the charged period. Thus the granting or withholding of amnesty during the charged period covered individuals who allegedly part of the charged plans and purposes and is relevant to the preparation of the

⁶⁸ ICC-02/04-01/15-422-Conf ('Confirmation Decision'), para. 137.

⁶⁹ *Ibid.*

⁷⁰ *Ibid.*, para. 140.

Defence.

55. Whether Mr Ongwen could have escaped during the charged period is an important issue in the case. The evidence disclosed suggests that the possibility of a granting amnesty was a relevant factor in relation to escape for more members of the LRA.⁷¹ This was not withstanding the Kony propaganda regarding return and the spying network. The March 2004 meeting note states:

[REDACTED].⁷²

56. This can be contrasted with a meeting note from a witness who testified – P-70 – who apparently stated in 2007 that “when the peace talks were agreed upon, amnesty was granted”⁷³ and that in the bush it is known that if peace talks succeeded then the ICC case will be removed from them.⁷⁴ In this context it has to be recalled that the Prosecution concedes that Mr Ongwen was arrested by Mr Kony for interacting with a senior Ugandan Government Official in 2003.⁷⁵ The Defence has previously argued the coercive environment present during the peace talks that culminated into the execution of Vincent Otti, Kony’s second in command.⁷⁶ P-0027’s just disclosed meeting note⁷⁷ hints at this when it states that “Kony re-evaluates the loyalty of his commanders every day.”⁷⁸
57. A major aspect of the question of the impact of the granting or withholding of amnesty upon the case against Mr Ongwen appears in the List of Commanders. That one page document includes a sentence that clearly calls for an explanation. Recalling that the title refers to “commanders **recommended for trial by the ICC**”⁷⁹ it goes on to state: “[b]elow is a list of the 14 most notorious LRA Commanders in descending order, according to MI records, **who should not be granted Amnesty**”.⁸⁰ It does not matter whether the document is directed to another branch of the Ugandan Government or the Prosecution the issues discussed above still arise.

58. From what can be gleaned and, depending upon the nature and contents of the

⁷¹ Compare *inter alia* ICC-02/04-01/15-T-97-Conf-Eng, p. 16, lines 1 to 13, p. 86, lines 4 to 19, and p. 87, line 19 to p. 88, line 6.

⁷² UGA-OTP-0263-1682 at 1683.

⁷³ UGA-OTP-0284-0743.

⁷⁴ *Ibid.*

⁷⁵ ICC-02/04-01/15-533, para. 110.

⁷⁶ ICC-02/04-01/15-1197-Conf.

⁷⁷ See 1 below.

⁷⁸ UGA-OTP-0263-1691.

⁷⁹ Bold added.

⁸⁰ Bold added.

correspondences currently withheld by the Prosecution, one can come to various conclusions:

- a. The items may lead to exculpatory doubts about Mr Ongwen's responsibility for charged crimes or the level of duress under which he lived.
- b. The items may bring into question the legitimacy of the prosecution brought forward against Mr Ongwen. If Mr Ongwen was investigated, not because he was identified as the most responsible but rather because of either the intervention of the Government of Uganda or because of ulterior considerations, such as a breakdown in peace-talks for example, then serious questions are raised as to whether the Prosecution has properly exercised its discretion to prosecute pursuant to Article 53.
- c. If there are serious gaps in the evidence due to choices previously, this raises questions as to whether in fact the jurisdictional requirements for prosecuting Mr Ongwen are present.

59. At the very least, if any of this is the case, given the disclosure of the materials now, the Ongwen Defence is entitled to review the materials in advance of the Defence case to inform the defence strategy.

D. Late and untimely disclosure

60. The Prosecution has disclosed many items in an untimely manner which is prejudicial to Mr Ongwen's trial. The items come 2 years after to the day that the Defence indicated its notice that it may raise the Article 31 defences⁸¹ and three years into the case.

1. Disclosure of note from meeting from 'Regional Command, N. Uganda'

61. The Defence lost the opportunity to ask Prosecution witnesses to comment on the contents of a meeting note from 'Regional Command, N. Uganda'.⁸² Particularly noteworthy are exculpatory statements that "JK is a cult leader – people believe in him and his spiritual powers" and "[Odiambo and the others] have been praying to the 'god of JK' before entering battle".

62. In addition, and with respect to the requested remedy below,⁸³ the Defence lost the opportunity to question Prosecution witnesses in particular Mr Kanyogonya⁸⁴ (P-38) and Mr

⁸¹ ICC-02/04-01/15-517; ICC-02/04-01/15-518 – notified 9 August 2016.

⁸² UGA-OTP-0263-1716.

⁸³ See paras 78 to 81.d below.

⁸⁴ ICC-02/04-01/15-T-116, p. 23, line 2 to p. 25, line 6.

Tingira⁸⁵ (P-189) about Col. Paddy Ankunda. The March 2004 meeting note indicates that a “Lt. Anukunda” is present in a meeting with a “chief intelligence officer”⁸⁶ – [REDACTED] – in which the command structure of the LRA appears to have been discussed extensively. This is in direct contradiction to a claim of the Government of Uganda that:

[...] [Lt. Col. Paddy Ankunda] has never been a member of the Lord’s Resistance Army (LRA). Accordingly, there is no basis for the belief of the Defence that he has valuable information relating to the command structure of the LRA or any other matter concerning the internal workings of the organization [...].⁸⁷

2. *Disclosure of a Meeting Report with P-0027*

63. The chronology below illustrates that the Prosecution has had knowledge of the importance of the contents of the meeting note in question since 2005.
64. On 23 February 2005, the Prosecution took a statement⁸⁸ from witness P-0027 in relation to interceptions of the Lord’s Resistance Army (‘LRA’) by the Internal Security Organisation (‘ISO’) of Uganda. On 11 April 2005, a member of the Prosecution met with P-27 to discuss the peace process, Sudan, the capacity of the LRA, and LRA views of the ICC. A report on this meeting was created (‘Meeting Report’).⁸⁹
65. On 27 February 2015, the Single Judge of Pre-Trial Chamber II directed that “the reference to the phrase ‘as soon as practicable’ [in Article 67(2)] must be understood as [requiring disclosing the material at] the earliest opportunity after the evidence comes into the Prosecutor’s possession”.⁹⁰
66. On 18 November 2015, the Prosecution took a second statement⁹¹ from witness P-27 related to the intercepts, the staff present at the interception station during the charged period, and seeking to establish the chain of custody of various intercept related materials.
67. In submissions filed 18 January 2016 in advance of the confirmation of charges hearings, the Defence argued that “the LRA was [u]nstructured”.⁹²
68. At the trial status conference on 23 May 2016, the Trial Chamber indicated its expectation

⁸⁵ ICC-02/04-01/15-T-95, p. 70, lines 3-6.

⁸⁶ ICC-02/04-01/15-T-99-Conf-Eng, p. 26, line 22 to p. 27, line 3.

⁸⁷ UGA-D26-0017-0002.

⁸⁸ UGA-OTP-0207-0256-R01.

⁸⁹ UGA-OTP-0263-1691.

⁹⁰ ICC-02/04-01/15-203, para. 18.

⁹¹ UGA-OTP-0249-0444-R01.

⁹² ICC-02/04-01/15-404-Conf, paras 26-35.

that the parties would seek to solve problems between themselves *inter partes* before seizing the Chamber for relief.⁹³ On 30 May 2016, the Chamber, *inter alia*, set a deadline of 6 September 2016 for the Prosecution to have reviewed all materials in its possession and disclose all materials falling under its disclosure obligations.⁹⁴

69. On 14 June 2016, the Prosecution requested the submission of the two statements of P-27 pursuant to Rule 68(2)(b).⁹⁵ On 22 July 2016, the Defence responded to the Prosecution request and noted P-27's relatively high position which gave him a "more informed position."⁹⁶ The Defence sought his testimony to clarify the basis for his knowledge of that the LRA used satellite phones⁹⁷ and that the LRA command structure was more informal after 1995.⁹⁸ On 18 November 2016, the Trial Chamber, accepted the submission of the two statements.⁹⁹
70. On 29 June 2017, the Defence wrote to the Prosecution by email¹⁰⁰ requesting an interview with P-27 pursuant to paragraph 29 of the protocol established by the Trial Chamber.¹⁰¹ At that time the Defence requested that "the Defence asks that P-27 bring with him placements of the mobile field stations for the directional finding material from November 2002 through July 2004, if it is available of course".
71. After follow-ups and logistical issues were resolved, on 11 September 2017, the Defence interviewed P-27. Although a member of the Prosecution was present for the interview, these interview transcripts¹⁰² were formally disclosed on 2 October 2017.¹⁰³ On 4 June 2018, the Defence included the interview transcripts on its list of evidence.¹⁰⁴
72. On 9 August 2018, the 2005 Meeting Report was disclosed by the Prosecution.¹⁰⁵ The report was disclosed pursuant to Rule 77 as opposed to Article 67(2).
73. The prejudice suffered by the defence is manifold. The Defence response to the Prosecution's

⁹³ ICC-02/04-01/15-T-25-ENG, p. 3, lines 22-25.

⁹⁴ ICC-02/04-01/15-449, para. 7.

⁹⁵ ICC-02/04-01/15-465-Conf-Corr.

⁹⁶ ICC-02/04-01/15-509-Conf-Corr, para. 105.

⁹⁷ *Ibid.*

⁹⁸ *Ibid.*, para. 106.

⁹⁹ ICC-02/04-01/15-596-Conf.

¹⁰⁰ Email, sent 14h25, subject: 'Request for meeting with P-27'.

¹⁰¹ ICC-02/04-01/15-339-Anx.

¹⁰² UGA-D26-0011-0490; UGA-D26-0011-0508.

¹⁰³ ICC-02/04-01/15-1012-Conf-AnxA.

¹⁰⁴ ICC-02/04-01/15-1272-Conf-AnxB, p. 3, rows 41 and 42.

¹⁰⁵ ICC-02/04-01/15-1319-Conf-AnxA.

Rule 68(2)(b) request would have been informed by the contents of the meeting note. The Defence pre-confirmation arguments would have been strengthened. Additionally, when the Defence met with the witness, this information would have been critical to the questions prepared and would informed the subject matter of the interview.

3. *Disclosure of duress extracts*

74. On 9 August 2016, the Defence gave notice of intention to an affirmative defence of duress pursuant to Articles 31(1)(d) and 31(3) at trial¹⁰⁶ and an Article 31(1)(a) affirmative defence.¹⁰⁷ Through the Prosecution case, the Defence has questioned witnesses in relation these defences.
75. Two years later to the day, on 9 August 2018, the Prosecution disclosed 26 extracts from questionnaires in the form of Investigation Reports.¹⁰⁸ These reports broadly speaking describe fears of retribution for leaving the LRA, the network of collaborators and informants that informed upon escapees, that that Mr Odhiambo and Mr Ongwen are “mere tools”¹⁰⁹ of Joseph Kony, and examples of attempted personal and actual collective punishment being visited upon individual’s families and villages for escaping from the LRA. In short, they are highly material to the live and essential issue of duress.
76. The importance of this material to the Defence case is obvious. The materials relate to Defence witnesses whom the Prosecution has been aware of for 9 months¹¹⁰ and Prosecution dropped witnesses,¹¹¹ as well as witnesses who have testified¹¹² or had their statements

¹⁰⁶ ICC-02/04-01/15-517.

¹⁰⁷ ICC-02/04-01/15-518.

¹⁰⁸ UGA-OTP-0284-0681, UGA-OTP-0284-0684, UGA-OTP-0284-0685, UGA-OTP-0284-0686, UGA-OTP-0284-0687, UGA-OTP-0284-0689, UGA-OTP-0284-0694, UGA-OTP-0284-0698, UGA-OTP-0284-0699, UGA-OTP-0284-0701, UGA-OTP-0284-0703, UGA-OTP-0284-0704, UGA-OTP-0284-0712, UGA-OTP-0284-0714, UGA-OTP-0284-0715, UGA-OTP-0284-0716, UGA-OTP-0284-0717, UGA-OTP-0284-0719, UGA-OTP-0284-0720, UGA-OTP-0284-0721, UGA-OTP-0284-0723, UGA-OTP-0284-0724, UGA-OTP-0284-0730, UGA-OTP-0284-0732, UGA-OTP-0284-0734, UGA-OTP-0284-0735, and UGA-OTP-0284-0738.

¹⁰⁹ UGA-OTP-0284-0689.

¹¹⁰ In relation to Defence witness D-36, compare UGA-OTP-0284-0703 which contains an extract from an item created 9 July 2015 and the provisional Defence list of witnesses line 14 ICC-02/04-01/15-1107-Conf-Exp-AnxA. The Prosecution was also present for a Defence interview with this witness on 17 March 2016: UGA-D26-0011-0030, UGA-D26-0011-0529, UGA-D26-0011-0548, UGA-D26-0011-0555, UGA-D26-0011-0569, UGA-D26-0011-0579, and UGA-D26-0011-0593. See also UGA-OTP-0284-0688 relating to dropped Defence witness D-71. See also in relation to UGA-OTP-0284-0687.

¹¹¹ P-48: ICC-02/04-01/15-532-Conf-AnxC, p. 40. See also P-37: UGA-OTP-0284-0686 originating from 21 July 2005 which relates to a witness whose statements the Prosecution had on its list of evidence at the pre-trial phase see ICC-02/04-01/15-378-Conf-AnxA p. 5, lines 163 to 173.

¹¹² P-70: UGA-OTP-0284-0735, P-144: UGA-OTP-0284-0689, P-16: UGA-OTP-0284-0719, P-440: UGA-OTP-0284-0720 and UGA-OTP-0284-0727, P-101: UGA-OTP-0284-0729.

submitted through Rule 68(2)(b)¹¹³. The Defence has suffered prejudice because, for example, of the late disclosure of items that relate to Defence lines of questioning such as a report¹¹⁴ of Ben Achellam using Mr Ongwen's radio. This, particularly in light of the charges against Mr Ongwen in relation to Odek and material elicited in cross-examination is exculpatory.¹¹⁵

77. The Prosecution continues to disclose material whose review and analysis demonstrates a pattern of late and untimely disclosures. This filing is only a sample and is not able to fully catalogue all the prejudice suffered. Apart from the lost opportunities exemplified above, the time to conduct investigations is shrinking and the deadline for disclosure of evidence has passed. Moreover, analyzing, processing, and seeking remedies for these late disclosure, and others, is taking away from defence preparation in advance of the start of the Defence case.

E. Request for a remedy for untimely and late disclosures

78. As noted above, the Defence has further concerns about the timeliness of material disclosed in Rule 77 package 93 and subsequent packages also have *prima facie* late disclosures as well. Thinly stretched Defence staff are seeking to piece together the timelines and the impact of the material. For example pack 94 contains two items¹¹⁶ from P-38 and pack 95 contains 17 transcripts¹¹⁷ of a witness for whom the Prosecution has been on notice of their importance for the duress defence since 9 August 2016.¹¹⁸ The present filing seeks to raise the issue as promptly as possible so that any corrective measures can be undertaken and notice is given to the Trial Chamber of issues that may impact upon the fairness.
79. The Defence will review the material in combination with the transcripts to identify whether opportunities were missed. Additional investigations may also have to be undertaken, where trial preparation permits, to identify further information. The Defence hereby notifies the Trial Chamber of its intention, should these initiatives bear fruit, to request the recall of witnesses or disclose and submit material after the 4 June 2018 deadline.
80. The Defence requests the Trial Chamber to order the Prosecution to provide a report with

¹¹³ P-40: UGA-OTP-0284-0715.

¹¹⁴ UGA-OTP-0284-0738.

¹¹⁵ ICC-02/04-01/15-T-136-CONF-ENG, p. 17.

¹¹⁶ UGA-OTP-0026-0404 and UGA-OTP-0026-0405.

¹¹⁷ UGA-OTP-0284-0148-R01, UGA-OTP-0284-0164-R01, UGA-OTP-0284-0177-R01, UGA-OTP-0284-0212-R01, UGA-OTP-0284-0248-R01, UGA-OTP-0284-0282-R01, UGA-OTP-0284-0308-R01, UGA-OTP-0284-0321-R01, UGA-OTP-0284-0352-R01, UGA-OTP-0284-0378-R01, UGA-OTP-0284-0412-R01, UGA-OTP-, 0284-0450-R01, UGA-OTP-0284-0491-R01, UGA-OTP-0284-0526, UGA-OTP-0284-0568, UGA-OTP-0284-0598, and UGA-OTP-0284-0630.

¹¹⁸ ICC-02/04-01/15-517-Conf-AnxA, line 5.

dates of comprehensive reviews of undisclosed material. Where new information comes to light or the Defence provides an explanation of relevance that may not have been available to the Prosecution at the time of last comprehensive review a new evaluation of the undisclosed material is merited. As illustrated in the correspondence in Annex A, without such a table of review dates the Defence is unable to cogently argue that a new review is necessary.

V. RELIEF

81. In light of the above, the Defence respectfully requests the Trial Chamber to:

- a. Order the disclosure of the material described in paragraph 1, 12, 18, 40, 42, 44, 52, 53, and 57 and described more generally in sections A through C;
- b. Make a finding that the material identified in the paragraphs 61 to 77 of this filing should have been disclosed earlier and the disclosure at this stage is a violation of the right to a fair trial;
- c. Order the Prosecution to provide the dates of comprehensive reviews of undisclosed material;
- d. Order the Prosecution to provide 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;
- e. Confirm that the Defence will be permitted to recall witnesses; and
- f. Bar the Prosecution from using this lately disclosed material to the prejudice of Mr Ongwen.

Respectfully submitted,



Hon. Krispus Ayena Odongo
On behalf of Dominic Ongwen

Dated this 8th day of October, 2018

At The Hague, The Netherlands