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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 with Confidential Annexes A-D

**Public Redacted Version of
‘Defence Request for Remedies in Light of Prosecution Disclosure Violations’
(ICC-02/04-01/15-1718-Conf), filed 12 February 2020**

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 Defence for Dominic Ongwen ('Defence') seeks remedies for the late disclosure of several databases by the Prosecution. Some of the material was referred to in the arrest warrant for Mr Ongwen and two of the three items in question have been in the possession of the Prosecution for approximately 16 years. The material covers the charged period and is relevant to the charges against Mr Ongwen, the modes of liability, and the contextual elements of the alleged crimes. The material may also shed light on alleged abductions by Sinia brigade which would have relevance to the sexual and gender based and child-soldier charges.
2. As detailed below, concrete prejudice has been caused by this late disclosure and given the nature of the material, there is also an intangible harm. The Defence is currently drafting its final brief and it is not within its capacity to unwind the entire Prosecution and Defence case and identify moments of prejudice. The Defence also has limited capacity to fully analyse this material in the available time before the final briefs are due. For this reason, the Defence requests concrete remedies, including a temporary stay of proceedings, but also requests the Trial Chamber to provide any remedies it considers appropriate under the circumstances.
3. The late disclosure has made a complete analysis of the material impossible. Due to this, the Defence reserves its rights to raise new prejudice or new results of analysis of the material in the final-brief, closing arguments, during deliberations, or during any future appeal should the Defence's ongoing analysis identify new relevant information or patterns.
4. To the Defence's knowledge, the Trial Chamber has not inspected the items. It follows then, that the only impressions that the Trial Chamber has comes from how the Defence and Prosecution have characterised the information through email communications on which the Trial Chamber is addressed. The Trial Chamber should see the material in question before deciding upon the remedies. However, despite explanation from the Prosecution, it is still not apparent to the Defence why the Prosecution continues to not formally disclose the items in contravention of a protocol adopted by the Trial Chamber. The Defence therefore requests the Trial Chamber to order the Prosecution to disclose the material through the usual eCourt mechanism.
5. Finally, the Defence seeks disclosure of 27 documents from which excerpts have been previously disclosed.

II. CONFIDENTIALITY

6. Pursuant to Regulation 23*bis*(1) of the Regulations of the Court ('RoC'), the Defence files this motion confidential because it refers to names¹ and information² contained in a confidential items. The filing also contains information concerning the interactions between the Prosecution and the Government of Uganda.³ Following notification of the present filing, the Defence will consult the Prosecution to identify what to make public.

III. BACKGROUND

7. In its 18 May 2005 request for an arrest warrant the Prosecution made reference to examining "records of statements made by admitted former members of the LRA who have applied for amnesty from national prosecution".⁴ The information was used to emphasise the quality of the evidence against the LRA and many figures were quoted and graphs annexed.⁵ The Prosecution characterised the information in the following way:

Records maintained by the Uganda Amnesty Commission provide *possibly the largest database* from which one can attempt to determine the common characteristics of LRA abductees and the crimes they commit, based on the *abductees' own descriptions*.⁶

8. On 20 September 2018, following a Defence filing requesting disclosure in relation to Ugandan Amnesty Commission materials, which were themselves a late disclosure, the Prosecution stated that: "every remaining undisclosed item in the Prosecution's evidence database had been reviewed at least twice by members of the Prosecution trial team"⁷ and stated this used the filing heading "The Prosecution Has Disclosed All Amnesty-Related Rule 77 Information".⁸
9. On 24 September 2018, the Defence requested leave to reply⁹ in respect to information provided by the Prosecution concerning the amount of undisclosed material and its review methodology for un-disclosed material in respect to the 20 September 2018 request. That

¹ See paras 25 and 46 *below*.

² See footnotes 31 and 36 *below*.

³ See paras 13-14 and 30-32 *below*.

⁴ ICC-02/04-01/15-3-Conf-Red3, para. 59.

⁵ *Ibid.*, paras 57 through 67.

⁶ *Ibid.*, para. 57 (emphasis added).

⁷ ICC-02/04-01/15-1341-Conf, 20 September 2018, para. 9.

⁸ *Ibid.*, p. 9, originally filed 20 September.

⁹ ICC-02/04-01/15-1345-Conf.

request for leave to reply was rejected by the Single Judge¹⁰ despite the fact that the request highlighted the importance of PRF forms¹¹ and that “PRF forms are important for Defence preparation” to the point that even that duplicates “should be disclosed”.¹²

10. Accepting the Prosecution claim that all amnesty material had been disclosed, on 28 September 2018, the Trial Chamber rejected the Defence request for disclosure. In relation to the amnesty related requests, the Trial Chamber reasoned that:

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, 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.*¹³

11. On 11 October 2018,¹⁴ the Defence requested the Prosecution for “information for which it is indicated in [the Prosecution] Ringtail/evidence system that items for which P-38 is the source or in the chain of custody. Can you therefore confirm that all material for which P-38 is explicitly indicated as the source or in the chain of custody has been disclosed?” (sic)
12. The Prosecution responded on 22 October 2018. It stated:

Approximately 50 items connected to P-0038 have not been disclosed (this number does not include duplicates, PRFs or photographs of DVDs). *We have reviewed all of them very recently* and determined them not to be disclosable under rule 77.¹⁵

13. On 26 September 2019, the Defence requested disclosure of materials from the Prosecution based upon indications that it found in previously disclosed items.¹⁶ The Defence requested provision of, *inter alia*, statements referred to in the warrant of arrest for Mr Ongwen, material referenced as “information forwarded”, “reporter applications” referred to in a

¹⁰ ICC-02/04-01/15-1351, para. 5.

¹¹ ICC-02/04-01/15-1345, para. 13.

¹² *Ibid.*, para. 17.

¹³ ICC-02/04-01/15-1351, para. 37 (emphasis added).

¹⁴ Email, 11 October 2018 at 16h53, subject ‘RE: Rule 77 Request for disclosure in relation to pack 93’, *see* Annex A, pp. 2-4.

¹⁵ Email, 22 October 2018 at 17h08, subject ‘RE: Rule 77 Request for disclosure in relation to pack 93’ (emphasis added), *see* Annex A, p. 2.

¹⁶ Email, 25 September 2019 at 15h23, subject ‘Rule 77 request for disclosure of Amnesty Commission related materials’ (sic), *see* Annex C, pp. 8-10.

request for assistance by the Prosecution from Ms Fernandez de Gurmendi,¹⁷ and “updates from the Chairman” of the Ugandan Amnesty Commission.

14. In response, on 4 October 2019, the Prosecution provided information.¹⁸ It indicated that:
 - a. It had received information from the Amnesty Commission in June 2004 via the UPDF. The information was in the form of a Microsoft Access database listing details of individuals who had applied for amnesty. That the information is reported to contain records up to before June 2004.¹⁹ The database had never been uploaded into Ringtail because Ringtail apparently did not support MS Access file format.
 - b. Further information was received from the Amnesty Commission in October 2004. This information again consisted of a Microsoft Access database listing details of individuals who had applied for amnesty. That information covers June 2004 to August 2004. It was again not uploaded into Ringtail for the same apparent formatting reason.
 - c. That Prosecution later collected information in February 2006 and September 2015 which cover the periods of September 2004 to January 2006²⁰ and March 2001 to August 2009²¹ respectively and which have been disclosed.
 - d. Save for the request made in 2018 concerning Defence witnesses, the Prosecution believes that this is the totality of the information which the Prosecution has received from the Amnesty Commission.
15. On 8 October 2019, following a technical issue with the initial disc, three databases were provided to the Defence on a DVD.²² Two databases related to the Amnesty Commission and were described by the Prosecution. A third database which was not mentioned by the Prosecution was labelled ‘CHARMS.mdb’.

¹⁷ Prior to her time as President of the ICC and Judge in the Appeals Chamber, Ms Fernandez de Gurmendi was a senior member of the Prosecution.

¹⁸ Email, 4 October 2019 at 18h41, subject ‘RE: Rule 77 request for disclosure of Amnesty Commission related materials’ (sic), *see* Annex C, p. 7-8.

¹⁹ The original date was indicated as May 2003, p. 7 Annex C. Following exchanges and provision of UGA-OTP-0012-0519: *see* p. 2, Annex C.

²⁰ UGA-OTP-0165-0124.

²¹ UGA-OTP-0244-0909.

²² Email, 8 October 2019 17h12, subject ‘RE: Rule 77 request for disclosure of Amnesty Commission related materials’ (sic), *see* Annex C, pp. 4-5.

16. On 5 December 2019,²³ the Defence wrote to the Trial Chamber in advance of the deadline for providing a declaration of the closure of its evidence. The Defence conveyed a caveat concerning its declaration of closure of evidence in light of a late disclosure of the three databases. This message was in part done due to the refusal of the Prosecution to disclose the material through the ordinary procedure which left the Defence unsure as to whether the Trial Chamber was even aware of the existence of this new extensive material which was provided on 8 October 2019.
17. On 6 December 2019, in response to the Defence caveat in respect to its declaration concerning the closure of evidence, the Prosecution provided two items²⁴ which it considered to fulfil the Defence request for meta-data.

IV. SUBMISSIONS

A. The failure to disclose the databases was a disclosure violation

i. *The Amnesty Commission databases*

18. Both the Defence and Prosecution agree that there was a disclosure violation. This was confirmed by email by the Prosecution on 4 October 2019.²⁵ It was stated that “The Prosecution accepts that, in preparation for this trial, it has failed to review and consider this information for disclosure.”²⁶ It also committed to immediate disclosure and acted upon this.
19. The Defence requests that the Trial Chamber confirm that there was a disclosure violation and provide remedies. The Defence submits however that in making such a finding, the Trial Chamber should appreciate and underscore the scale of the issue and provide a suitable remedy. The Prosecution accepts that the databases were “analysed by the OTP and referenced in the [arrest warrant] in 2005”.²⁷ Though obvious, this means that the various items had been in the Prosecution’s possession for about 15 years. It had those years to have everything prepared should one of those on the arrest warrant surrender or be arrested. Since Mr Ongwen arrived in The Hague in 2015, this also means that the items fell under a very concrete Prosecution obligation to review and disclose for four years.

²³ Email, 5 December 2019 16h25, subject ‘RE: Notice of information impacting upon closing of evidence’, see Annex D, pp. 3-4.

²⁴ UGA-OTP-0012-0519 and UGA-OTP-0012-0523 in ICC-02/04-01/15-1693-Conf-AnxA.

²⁵ Email, 4 October 2019 at 18h41, subject ‘RE: Rule 77 request for disclosure of Amnesty Commission related materials’ (sic), see Annex C, p. 7.

²⁶ *Ibid.*

²⁷ *Ibid.*

20. The Defence submits that it would be false to characterise the late disclosure as the result of a mere oversight. On several occasions the Defence made requests which either directly concerned material such as the databases or was closely enough related that it should have triggered a review of this material. The late disclosure is therefore a systemic failure.
21. This failure highlights the need for a disclosure order to the Prosecution. On 22 October 2018, the Defence wrote to the Prosecution stating: “[w]e ask you to confirm that there are no undisclosed items for which P-38 (Timothy Kanyagonya) is the source or in the chain of custody. If there are, we request you – pursuant to Rule 77 – to disclose them promptly.”²⁸ Following email exchanges, which included a request from the Defence to indicate the total number of items which the Prosecution had deemed not disclosable, two months later the Prosecution indicated that it had reviewed all related items – including Pre-Registration Forms (‘PRF’) – very recently and determined them not to be disclosable under rule 77.²⁹
22. As discussed above,³⁰ the Defence also sought leave to reply on the importance of PRF forms to its preparation but this was rejected by the Single Judge.
23. In the PRF and other chain of custody related document provided on 6 December 2019 in response to the Defence request for meta-data of the databases,³¹ P-38 is listed in the chain of custody and as the source. Therefore, the prior reviews of material from P-38 do not appear to have taken into account the cross-referencing of material described in any given document, or the person reviewing the rather extensive description of the amnesty database was not engaged enough with the proceedings to trigger the fact that the Defence had been requesting such material *inter partes* for several months and also through formal litigation. In other words, the Prosecution review procedure does not appear to include examining whether a document referenced in one document exists and/or has been disclosed.
24. The Defence therefore requests the Trial Chamber to order the Prosecution to review *all* undisclosed material and follow-up on any cross-references in undisclosed material to assess

²⁸ Email, 31 August 2018 at 16h56, subject: ‘Rule 77 Request for disclosure in relation to pack 93’, see Annex A, p. 5.

²⁹ See para. 12 *above*.

³⁰ See para. 9 *above*.

³¹ UGA-OTP-0012-0519 and UGA-OTP-0012-0523 – “2004-10-04 From: KANYOGONYA Timothy To: Peter Nicholson; 2004-11-08 From: Peter Nicholson To: OTP-IEU” and “2004-10-04 From: KANYOGONYA Timothy To: Peter Nicholson; 2004-11-08 From: Peter Nicholson To: OTP-IEU” respectively. He is also listed as the “Source Identity”.

whether the item (1) exists, (2) has been disclosed, and if not (3) assess whether in light of the cross-reference the material should be disclosed.

25. Additionally, P-38 is listed on the chain of custody for the PRF form³² provided by the Prosecution to show the chain of custody of the October 2004 collection; however, that form indicates that Akingbolahan Adeniran – according to other disclosed items: an investigator for the Prosecution – collected the materials from the Amnesty Commission and he is not in the chain of custody in eCourt. The Prosecution also indicates in its 4 October 2019 email that the June 2004 database collection comes via the UPDF yet the information it has provided³³ again suggests that Mr Adeniran was the person who collected it. The Prosecution has failed to show how it knows that it was the UPDF or P-38 which provided either items, and therefore the Defence requests disclosure of the underlying material for the chain of custody that led to these conclusions.
26. The disclosure violation also highlights another possible failure previously raised by the Defence. The information in the 6 December PRF is in hand-written text. The Defence has previously argued that the Prosecution's description of its review methodology would fail to identify many documents in response to Defence requests³⁴ because an electronic text search will not return matches for documents which contain scanned hand-written text. Given that this may be the reason that the Prosecution did not identify the amnesty databases earlier, the Defence requests the Trial Chamber to order the Prosecution to review *all* undisclosed documents individually in light of all Defence disclosure requests in this case.
27. The databases are not the first items from P-38 to be disclosed long after he testified. On 25 September 2019, the Prosecution disclosed to the Defence an item³⁵ and its translation into English for the cross-examination of a Defence witness. P-38 is indicated on the chain of custody.³⁶ It appears to have been provided to the Prosecution by P-38 about 15 years ago. Similarly, in August 2018, the Defence raised the same issue in relation to a map which had passed through P-38's hands.³⁷ Why the September 2019 document was not disclosed and other documents³⁸ from P-38 were is not at all obvious and raises questions about the methodology the Prosecution has been applying in its disclosure reviews. If an item that

³² UGA-OTP-0012-0519.

³³ UGA-OTP-0012-0523.

³⁴ ICC-02/04-01/15-1345, para. 18.

³⁵ UGA-OTP-0026-0066.

³⁶ "2004-11-22 From: KANYOGONYA Timothy To: Peter Nicholson".

³⁷ Email, 31 August 2018 16h56, subject 'Rule 77 Request for disclosure in relation to pack 93', *see* Annex A, p. 5.

³⁸ *Compare* UGA-OTP-0025-0162, for example, with UGA-OTP-0026-0066.

relates to Defence witnesses is not disclosed, yet material which is quite far removed from the charges has been, what standard is the Prosecution applying? Moreover, the document, which was used with a Defence witness, was disclosed in **September 2019** despite queries from the Defence to the Prosecution three times over a period between **June and October 2018**³⁹ to confirm that all material related to its witnesses had been disclosed.

28. The Trial Chamber's reason for requiring P-38's live testimony was because he "describes the kind of material that he provided to the Prosecution and mentions that a certain, limited, selection and review of relevance was made prior to certain material being transmitted to the Prosecution".⁴⁰ He was questioned by the Defence about this during testimony.⁴¹ What he provided to the Prosecution was relevant to the question of his selection and the Defence should have had access to all material which he provided for his cross-examination. The disclosure of material which passed through his hands should have been disclosed and is a disclosure violation.
29. Given the current Prosecution track-record, the Defence should have access to all material for which P-38 is listed on the chain of custody including all PRF forms on which he is listed so that the Defence can scrutinise this material itself for relevance beyond the inherent relevance that it had to P-38's cross-examination and submissions in the final brief. In any event, the Defence should have had all material which he provided to the Prosecution. The Defence therefore requests the Trial Chamber to order the Prosecution to disclose all material for which P-38 is listed on the chain of custody including all PRF forms on which he is listed and all material which he provided to the Prosecution.

ii. The CHARMS database

30. The CHARMS database is entirely new information and is also the most complex database to review. Analysis of it has therefore lagged behind the other. It suffices to say that it contains 1,281 records in a table called "Violations Committed" and while not all tables contain nearly as much information there are 45 tables contained in the database. Despite a Defence query

³⁹ Email, 25 October 2018 at 17h20, subject 'RE: Rule 77 request related to Defence witnesses'; Email, 13 September 2018 9h08, subject 'RE: Rule 77 request related to Defence witnesses'; and Email, 7 June 2018 at 17h32, subject 'RE: Rule 77 request related to Defence witnesses', *see* Annex B.

⁴⁰ ICC-02/04-01/15-596, para. 212.

⁴¹ *See* ICC-02/04-01/15-T-Conf, p. 10, lines 7-20 and p. 34, line 19 to 35.

to the Prosecution on 28 October 2019,⁴² the Prosecution has provided no further information about the item. Through examining material referred to in Ringtail, it appears that the CHARMS database is the information described in a 2003 Uganda Human Rights Commission report as such:

During the year, the Complaints Handling and Records Management System (CHARMS) became fully operational at the UHRC head-office. All complaints and lodgement data have been uploaded in to the system. As such, the Commission will be able to conveniently generate key statistical data for various analyses.⁴³

31. This CHARMS database should have been disclosed at a minimum pursuant to Rule 77 before the trial. The Defence made use of the Uganda Human Rights Commission material during cross-examination⁴⁴ and it has come up in testimony.⁴⁵ The Defence has also submitted Commission material to the Trial Chamber during the defence case including 42 items following the testimony of D-139 which was accepted by the Trial Chamber⁴⁶ and has used materials for examination of Defence witnesses.⁴⁷
32. Moreover, the Defence has sought information, by court filing in March 2017, concerning actions of the Ugandan government in respect to harms to civilians that may have been attributed to the LRA.⁴⁸ In principle, based on the 2003 Uganda Human Rights Commission report, the CHARMS database would potentially include such information. On 3 October 2016 the Defence sought⁴⁹ “material generated from” a Prosecution Request for Assistance⁵⁰ (‘RFA’). That RFA alongside another Prosecution RFA to the Ugandan Human Rights Commission⁵¹ appear to be the possible reasons that the Prosecution has the CHARMS database. A later Prosecution response to the Defence RFA request indicates that many searches were conducted following the Defence request.⁵² This appears then to show further failure in the review of material in response to a Defence request for disclosure and underscores the importance that the Trial Chamber grant the remedies the Defence has requested.

⁴² Email, 28 October 2019 at 17h46, subject ‘RE: Rule 77 request for disclosure of Amnesty Commission related materials’ (sic), *see* Annex C, p. 3.

⁴³ UGA-OTP-0132-0678 at 0744.

⁴⁴ ICC-02/04-01/15-T-110-Conf and ICC-02/04-01/15-T-145-Conf.

⁴⁵ ICC-02/04-01/15-T-174.

⁴⁶ Email, 19 July 2019 at 14h58, subject ‘Decision on Submitted Materials for D-139’.

⁴⁷ ICC-02/04-01/15-T-212-Conf, p. 26.

⁴⁸ *See* for example ICC-02/04-01/15-759 but also transcripts.

⁴⁹ *See* Prosecution filing annex ICC-02/04-01/15-1142-Conf-AnxA, p. 4.

⁵⁰ UGA-OTP-0206-0231.

⁵¹ UGA-OTP-0206-0228.

⁵² ICC-02/04-01/15-1142, paras 8-9.

B. The lack of timely disclosure has caused prejudice to Mr Ongwen's defence

33. Following prompting, the Prosecution has confirmed that the material was disclosed pursuant to Rule 77.⁵³ Notwithstanding any further dispute over characterisation, this confirms that the Amnesty Commission databases were material for the preparation of the Defence and means that the provision of the item shortly before the end of the trial is prejudicial. It is not the first time that there has been late disclosure in this case.⁵⁴
34. The late disclosure has placed the Defence in an impossible position. It has inadequate time to fully analyse the items before the closing brief is due. That alone is problematic yet the fact that the materials may contain exculpatory information but also material which could be wielded in an incriminatory way against the Defence means that it is placed in a bind which is attributable to the Prosecution.
35. A considerable number of Prosecution witnesses allegedly obtained amnesty. Disclosure prior to the commencement of trial, or at the moment that Defence requested this material and was denied based on inaccurate representations of the Prosecution, would have potentially permitted the Defence to ascertain the credibility and reliability of the witnesses testimony using their prior information in their amnesty records or other information from the database. A failure to promptly disclose these records despite repeated requests deprived the Defendant the right to confront his accusers pursuant to Article 67(1)(e) and also the right to adequate preparation pursuant to Article 67(1)(b) all of which caused prejudice.
36. Because of these violations fair trial rights, the Defence is requesting a temporary stay of proceedings for the Prosecution to disclose all the material in its possessions and allow adequate time for the Defence to review the late disclosed material with an option of recalling some Prosecution witness for cross-examination. A permanent stay of the proceedings, as a remedy for an abuse of process, is a *sui generis* remedy that is available before the ICC.⁵⁵ It is available where:

Where the breaches of the rights of the accused are such as to make it impossible for him/her to make his/her defence within the framework of his rights, no fair trial can take place and the proceedings can be stayed.⁵⁶

⁵³ Email, 15 November 2019 at 11h23, subject: 'FW: Proposed Response to defence FW: Rule 77 request for disclosure of Amnesty Commission related materials', see Annex C, p. 2.

⁵⁴ See, for example, ICC-02/04-01/15-1351, para. 46.

⁵⁵ ICC-01/04-01/06-772 OA4, para. 24.

⁵⁶ *Ibid.*, para. 39.

37. This involves consideration of two criteria; (1) have the rights of the defendant been violated, and (2), have these violations undermined the possibility of a fair and impartial process. The Trial Chamber should consider the cumulative impact of either separate or interlinking violations.⁵⁷ No demonstration of bad faith on the part of any organs of the Court is required,⁵⁸ although such conduct might in itself, be a factor that demonstrates why it would be repugnant or odious to the administration of justice to allow the case to continue.⁵⁹
38. At this stage, the Defence distinguishes that it is not currently seeking a permanent stay – only a temporary one. Therefore, it is submitted that the second criteria just described should be correspondingly lowered. As described, there is a violation of the fair-trial rights of Mr Ongwen and this has resulted in prejudice. Without a temporary stay which will provide time to examine records more thoroughly, the conditions for a permanent stay may arise. The Defence also requests in the alternative to a stay of proceedings that the Trial Chamber make the disclosure violation order and apply the appropriate remedy in the judgment or sentencing in the case of a conviction.
39. Given this disclosure violation and its prejudicial effects, the Prosecution should not be permitted to rely upon any of the information for any incriminating proposition to argue for conviction and the Defence requests the Trial Chamber to confirm this. Similarly, the Defence requests that the Trial Chamber refrain from relying upon the evidence for any incriminatory factual conclusions that it might draw. Given the stage of the proceedings in which the item was received, the prejudice to the Defence is very high if this occurs.
- i. *The material is not as duplicative as the Prosecution has argued and can be expected to argue in response*
40. *Inter partes*, the Prosecution has sought to characterise the database information as “largely repetitive of material previously disclosed”.⁶⁰ This is incorrect.
41. Firstly, the Prosecution’s own analysis shows that there are 197 LRA related records in the disclosed database which are not present in the previously disclosed excel tables from the

⁵⁷ *Jean-Bosco Barayagwiza v The Prosecutor*, Appeals Chamber, ‘Decision’, 3 November 1999, para. 73 (‘Barayagwiza AJ’). Available at:

http://www.worldcourts.com/ict/eng/decisions/1999.11.03_Barayagwiza_v_Prosecutor.pdf.

⁵⁸ ICC-01/04-01/06-1401, para. 91.

⁵⁹ Barayagwiza AJ, para. 77.

⁶⁰ Email, 6 December 2019 at 11h34, subject ‘RE: Notice of information impacting upon closing of evidence’. See Annex D, p. 2.

same source. If the information is as duplicative as it is purported to be, then why are there records in a database which are not present in the previously disclosed database which is purported to come from the same information set and cover the same and later time-frames? The Defence is still examining the material to see if there could be an explanation but this anomaly itself may be relevant. Additionally, the Prosecution focuses upon the comparatively lower number in respect to the prior thousands of records yet the number is still greater than the number of witnesses itself called and it is worth bearing in mind that the records come from the center of the temporal jurisdiction.

42. Even if the databases contain repetition of previously disclosed material, they also contain new material about those records which was not disclosed. For example, in one table there are 3,152 new records that are labelled “Dependents”. This contains new information not available in previously disclosed material.
43. There is also new information in relation to the previously disclosed records. For example, the previously disclosed material, in some cases, lacks necessary information to properly understand it whereas the disclosed database clarifies this and therefore provides new information. For example in the table of individuals already disclosed, there is a column of information called “ikpReferral” and it contains the information “11” and “14” for some individuals. The newly disclosed database contains a table called “tlkpReferralCenters” which suggests that “11” and “14” could correspond to “Rachele Rehabilitation Centre” and “CPA LIRA” respectively. The names of those two centers have appeared in previously disclosed evidence and in testimony. Potentially this may relate to the credibility or reliability of Prosecution witnesses where, for example, if the information suggests something different from what is contained in disclosures or their testimony.
44. While presenting a challenge for a Defence team to analyse, the format of the information in MS Access databases is also important. MS Access files are ‘relational databases’.⁶¹ In layperson’s terms this means that the stored information has many searchable cross-references. This form of database means that searches are in some cases significantly expedited when compared to material in an Excel file. Thus, in comparison to the disclosed material, information and patterns can be identified which could not be identified before. In other words, even where the information is duplicative, had the Defence had the database, it might have been able to obtain more useful information from it.

⁶¹ https://en.wikipedia.org/wiki/Relational_database.

ii. Defence preparation pursuant to Article 67(1)(b)

45. Given the complexity of the information within the database, the Defence cannot assert statements of relevance with certainty; however, examination of the material may lead to exculpatory information. As a simple example, following from the Prosecution's statement that Mr Ongwen is only listed as the commanding officer for one individual and that only 11 individuals are listed under Sinia in the new information, this may show that Mr Ongwen was not an important commander as alleged. This would impact upon many of the Prosecution assertions about Mr Ongwen's profile and the relevance it had to several modes of liability.
46. In the disclosed database, there appears to be information relating to a Prosecution witness who testified. There are three records for an individual with the same name as witness P-379 ([REDACTED]) who testified from 17 to 27 March 2017.⁶² Similarly, there is a seeming record for P-28 for whom the Defence has submitted a statement through Rule 68. The failure to have this information at the correct time is a violation of Article 67(1)(b) of the statute. The Defence was denied "adequate time and facilities for the preparation of the defence" because it lacked all the necessary information available to make decisions about how to conduct its defence.
47. The databases were disclosed three months prior to the deadline for filing the final brief and just prior to the testimony of two important Defence witnesses. Doing some the preliminary analysis of the disclosure discussed in this request took away from the preparation of both. Similarly, preparation of the current request also takes away from final brief preparation. It is difficult to quantify such prejudice but it could have been avoided had the Prosecution complied with its disclosure obligations.

iii. Misleading arrest warrant request

48. Although it would be problematic to decide without having access, the Trial Chamber is invited to consider whether the arrest warrant description of the database records as Amnesty Commission reportees describing "themselves and their conduct"⁶³ which "reflects the experiences"⁶⁴ of those who applied matches with the Prosecution current assertion that it does not understand "the application for arrest warrants to be asserting that the Prosecution is

⁶² ICC-02/04-01/15-T-56-CONF-ENG through ICC-02/04-01/15-T-59-CONF-ENG.

⁶³ ICC-02/04-01/15-3-Conf-Red3, para. 58.

⁶⁴ *Ibid.*

in possession of descriptive narrative statements derived from the Amnesty Commission.”⁶⁵ The Defence suggests that this strains the language used in 2005 and the Prosecution in 2005 were at best over-stating the evidence and at worst misleading the Pre-Trial Chamber.

49. The Prosecution has indicated that it does not believe “is in possession of descriptive narrative statements” but that still raises the question of whether it examined descriptive narrative statements. The Defence therefore requests the Trial Chamber to order the Prosecution to examine its records and confirm whether it is aware that narrative statements exist at the Amnesty Commission, whether it ever examined narrative statements at the Amnesty Commission, and if it did examine such statements, to request this material from the Amnesty Commission.

C. The Prosecution must disclose the database in the usual manner through eCourt

50. The Prosecution’s unwillingness to disclose the material in the usual manner through the eCourt’s system disregards the Trial Chamber’s disclosure regime and orders. The Defence requests the Trial Chamber to order the Prosecution to disclose the items through the usual mechanism and to issue a suitable comment upon the conduct that has led to this point.
51. On 4 October 2019, the Prosecution claimed that the reason for failing to review the item was because “[t]he database has never been uploaded into Ringtail because **Ringtail does not support MS Access file format**”(sic)⁶⁶ and stated “formal disclosure by means of eCourt cannot be achieved because of the formatting problem described above”.⁶⁷ This was an ill-informed or inaccurate statement.
52. The Defence wrote to the Prosecution providing an image demonstrating that, in contradiction to the Prosecution claim, it was indeed possible to upload the material onto Ringtail. There was no “formatting problem” and therefore the Defence requested that the Prosecution disclose the databases in accordance with the eCourt protocol adopted in the case which explicitly contemplated MS Access files being added to eCourt.⁶⁸ On 15 November 2019, the Prosecution responded. It explained that the “OTP’s Evidence and Information Unit did not [upload the MS Access files] in this case, and **that is its policy** with regard to all documents

⁶⁵ Email, 4 October 2019 at 18h41, subject ‘RE: Rule 77 request for disclosure of Amnesty Commission related materials’ (sic), see Annex C, p. 7.

⁶⁶ *Ibid.* (bold added)

⁶⁷ *Ibid.*

⁶⁸ ICC-02/04-01/15-203-Anx1, p. 22 in Annex 3, fourth row indicates that that MS Access files (e.g. files with an extension .mdb) could be disclosed and these “may be provided to the Registry in its original electronic form” (para. 16).

of this file type.”⁶⁹ The item was not disclosed.

53. Finally, at the point at which the Defence wrote to the Trial Chamber on 5 December 2019, the Prosecution responded having changed its position. Its claim now was that “[t]he format of the material made [disclosure by eCourt] **impractical**.”⁷⁰
54. The explanation for why the material was not disclosed changed several times over six weeks. To be clear, as demonstrated by the Defence to the Prosecution through *inter partes* communication, there is nothing more impractical about adding these items to eCourt and disclosing them than any other item which has been disclosed in this case.
55. By the Trial Chamber’s disclosure and eCourt regime, the Prosecution is required to provide the material and cannot object to this based on its own internal policy – it should have raised this when the protocol was adopted in February 2015.
56. Though the Defence does not concede that the evidence is incriminating, the Prosecution has used the very information to seek an arrest warrant which would suggest that it considers it such. It runs counter to fairness that the Defence should have to place this material into the record which is why the Prosecution must be the party to disclose it.
57. The rules set down by the Trial Chamber⁷¹ indicate that the databases should have been disclosed to the Trial Chamber, however the Defence is unsure whether the material has been provided to the Trial Chamber or participants at the time of this email. The eCourt protocol appears to require in paragraph 13 that the Prosecution provide the material to the Registry but there is not an indication that this has occurred. Finally, even if the Prosecution is correct that it is possible to disclose material in different forms, there has not been a communication filing as envisioned by paragraph 10 of decision 203.
58. In addition to ordering the Prosecution to disclose the item in the usual way, the Defence requests that the Trial Chamber take the Prosecution’s disregard for the trial protocols into account.

⁶⁹ Email, 15 November 2019 at 11h30, subject ‘RE: Rule 77 request for disclosure of Amnesty Commission related materials’ (sic) (bold added), *see* Annex C, p. 2.

⁷⁰ Email, sent 6 December 2019 at 11h34, subject ‘RE: Notice of information impacting upon closing of evidence’ (bold added). *See* Annex D, p. 2.

⁷¹ ICC-02/04-01/15-432, para. 4 cross-referencing ICC-02/04-01/15-203-Anx1 (“unless otherwise indicated, the procedures adopted by the Pre-Trial Chamber remain in place as regards: (i) the e-court protocol”). ICC-02/04-01/15-203, para. 11 requires that “all evidence disclosed [...] be communicated to the Pre-Trial Chamber” which has not been varied.

D. The Prosecution must disclose 27 Biographic Survey Questionnaires ('BSQ') and Individual Protection Assessments

59. The Defence requests the Trial Chamber to order disclosure of 27 items⁷² which are composed of BSQs and Individual Protection Assessments. As illustrated by *inter partes* communications, the Defence and Prosecution disagree on the requirement to disclose this material.⁷³ As shown, to justify its request, the Defence raised Trial Chamber IX's prior jurisprudence which related to an undisclosed BSQ. The failure to disclose the material is a disclosure violation for which a remedy should be granted.

60. The Trial Chamber based itself on Appeals Chamber and other Chamber's jurisprudence⁷⁴ which stated:

once it is established that a document is material to the preparation of the defence, pursuant to Rule 77 of the Rules, the disclosure obligation 'extends to the entire document and not only to the "relevant" portions of information contained within such a document',⁷⁵

61. The 27 items for which the Defence requests disclosure are the documents from which excerpts which were presented in investigation reports were drawn and disclosed to the Defence pursuant to Rule 77 in August 2018.⁷⁶ Therefore disclosure falls squarely within the above cited Trial Chamber and Appeal Chamber jurisprudence and the items must be disclosed. It is further relevant that some of the excerpts come from materials related to witnesses who have testified in the case. Therefore, the Trial Chamber is requested to order disclosure of the original 27 documents from which the excerpts originate.

⁷² 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.

⁷³ See, Annex A.

⁷⁴ Appeals Chamber, *Prosecutor v Thomas Lubanga Dyilo*, Decision on the Prosecutor's request for non-disclosure In relation to document "OTP/DRC/COD-190/JCCD-pt", 27 May 2013, ICC-01/04-01/06-3031, A5 A6, para. 12. See also Trial Chamber VII, *Prosecutor v Jean-Pierre Bemba Gombo et al.*, Decision on Bemba Defence Request for Disclosure and Lifting of Redactions Related to Collection of Telecommunication Evidence, 17 February 2016, ICC-01/05-01/13-1632, para. 20; Trial Chamber V(A), *Prosecutor v William Samoei Ruto and Joshua Arap Sang*, Decision on Response to Prosecution Application Regarding the Disclosure of the Identities of Certain Individuals Who Will not Appear as Trial Witnesses, 28 August 2013, ICC-01/09-01/11-886, para. 8.

⁷⁵ ICC-02/04-01/15-1335, paras 5 and 7.

⁷⁶ ICC-02/04-01/15-1319-Conf-AnxA.

E. Conclusion

62. In conclusion, the Defence submits that the disclosure violation described in the present request require remedies. As is shown above, the present issue is not of the Defence's making. It made requests at a number of instances, any of which could have led to identification or disclosure of the material by the Prosecution. The disclosure violation has led to violations of the fair-trial rights contained in Article 67(1)(e) and (b).
63. Though the present request contains many specific remedy requests, the Defence requests the Trial Chamber to grant any remedy that it deems appropriate.

V. RELIEF

64. For the reasons described above, the Defence respectfully requests Trial Chamber IX to:
 - a. CONFIRM that the late disclosure of the two databases and CHARMS database were disclosure violations;⁷⁷
 - b. ORDER the Prosecution to disclose the two Amnesty Commission databases and the CHARMS database through the usual eCourt mechanism;⁷⁸
 - c. CONFIRM that the Trial Chamber will only rely upon the late disclosed materials for exculpatory purposes and that it will not consider incriminatory factual propositions from the Prosecution in relation to the three items;⁷⁹
 - d. ORDER a stay of proceedings to enable the Prosecution to disclose all the material in its possessions and allow adequate time for the defence to review the material with an option of recalling some Prosecution witness for cross-examination.⁸⁰ OR IN THE ALTERNATIVE, make a finding of a disclosure violation and apply the appropriate remedy in the judgment or sentencing in the case of a conviction;⁸¹

⁷⁷ See paras 19 and 31 *above*.

⁷⁸ See paras 4, 50, and 58 *above*.

⁷⁹ See para. 39 *above*.

⁸⁰ See paras 2, and 36 to 38 *above*.

⁸¹ See para. 38 *above*.

- e. ORDER the Prosecution to re-review all un-disclosed material against all Defence requests and included in that review assessing – where any reference to another item exists – whether the item (1) exists or is in the possession of the Prosecution, (2) has been disclosed, and if not (3) assess whether in light of the cross-reference the material should be disclosed;⁸²
- f. ORDER the Prosecution to disclose the materials underlying the whole chain of custody for the collection of databases on June and October 2004;⁸³
- g. ORDER the Prosecution to disclose all PRF forms for which P-38 is named or is on the chain of custody;⁸⁴
- h. ORDER the Prosecution to disclose all material for which P-38 is the source or upon which P-38 is on the chain of custody;⁸⁵
- i. ORDER disclosure of the documents from which 27 excerpts described above originate and confirm that that it was a disclosure violation to withhold them;⁸⁶
- j. ORDER the Prosecution to examine its internal records and confirm whether it is aware that narrative statements exist at the Amnesty Commission, whether it examined narrative statements at the Ugandan Amnesty Commission, and confirm whether it asked for such statements;⁸⁷
- k. IF the Prosecution confirms that it examined narrative statements, ORDER the Prosecution to seek to obtain any such statements;⁸⁸ and
- l. ORDER such remedies it deems appropriate, including possible extensions of deadlines, taking into account the repetitive nature of the failure to identify the material, the length of the time involved, and the disregard by the Prosecution in respect to the eCourt protocol.⁸⁹

⁸² See paras 24 and 26 above.

⁸³ See para. 32 above.

⁸⁴ See paras 21 and 29 above.

⁸⁵ See para. 25 above.

⁸⁶ See para. 61, footnote 72 above.

⁸⁷ See para. 49 above.

⁸⁸ See para. 49 above.

⁸⁹ See paras 2, 19, 58, and 63 above.

Respectfully submitted,



Hon. Krispus Ayena Odongo
On behalf of Dominic Ongwen

Dated this 6th day of March, 2020

At Kampala, Uganda