

**Cour
Pénale
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**International
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Court**

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

Date: **9 May 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

Public Redacted Version of “Defence Response to the Letter from the Ugandan Government”, filed on 7 May 2018

Source: Defence for Dominic Ongwen

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

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I. INTRODUCTION

1. The Defence for Dominic Ongwen ('Defence') opposes the Ugandan Government's intervention under Article 72 of the Rome Statute ('Statute')¹ requesting that the Trial Chamber IX ('Trial Chamber') relieve the Prosecution of its obligation to disclose the identity of the UPDF informant, as ordered by Judge Bertram Schmitt, acting as Single Judge on behalf of the Trial Chamber ('Single Judge');² or that the Trial Chamber make such inference as to the existence or non-existence of any facts as may be appropriate in the circumstances.
2. For the reasons discussed in detail below,³ the Defence respectfully requests the Trial Chamber to dismiss the Ugandan Government's letter as meritless and in challenge with the principle of judicial finality. The Defence also requests the Trial Chamber to find that both the Prosecution's⁴ and Ugandan Government's interventions impede the *Ongwen* trial process, hinder the preparation of defence, and violate Mr Ongwen's fair trial rights as enshrined in Articles 67(2), 67(1)(e), 64(2), 21 of the Statute.
3. The Trial Chamber should, accordingly, order the Prosecution to comply with the Single Judge's pre-existing order to disclose the identity of the UPDF informant and lift all corresponding redactions in the report from the UPDF informant and the sound recording on which part of the report is made.⁵

II. CONFIDENTIALITY

4. Pursuant to Regulation 23 *bis*(2) of the Regulations of the Court ('RoC'), the Defence files this response confidentially, because it discusses confidential items related to evidence gathering by the Prosecution and the Ugandan authorities.

¹ ICC-02/04-01/15-1240 (with a confidential Annex A).

² ICC-02/04-01/15-1234, pp. 5-6.

³ *Infra* 'IV. Submissions', paras 15-56.

⁴ *Infra*, paras 45-49; *see also infra*, para. 54, inferences 14-15.

⁵ ICC-02/04-01/15-1234, p. 6: (The Single Judge also ordered the Prosecution to disclose RFA 24, the UPDF report, the sound recording, and any transcripts of the sound recording *via* E-Court).

III. PROCEDURAL HISTORY

5. On 8 November 2007, the Prosecution transmitted a request for assistance ('RFA') relating to the death of Vincent Otti ('RFA 24')⁶ under Articles 54(3)(d), 87(3) and 93 of the Statute and [REDACTED] of the Agreement on Cooperation and Assistance between the Government of the Republic of Uganda and the Office of the Prosecutor of the International Criminal Court ('Cooperation Agreement') to the Ugandan Government.⁷ In particular, the Prosecution requested the Ugandan Government to provide [REDACTED] [REDACTED]⁸ in order [REDACTED]⁹ [REDACTED]¹⁰.
6. On 23 November 2007, the Prosecution collected the UPDF report and the sound recording from the Ugandan authorities in response to RFA 24.¹¹
7. On 30 November 2007, the Ugandan authorities acknowledged receipt of RFA 24, stating that it would provide information to the Prosecution once its investigation of the matter were concluded.¹²
8. On 22 February 2018, the Prosecution filed the "Prosecution's Notice of Filing of an Item Received in Response to an RFA",¹³ indicating its discovery that, contrary to its previous submissions,¹⁴ it had received the UPDF report and the sound recording from the Ugandan authorities in response to RFA 24. The Prosecution noted that the UPDF Report and the sound recording were placed in the Prosecution evidence database and that an accompanying pre-registration form was assigned to them and RFA 24.¹⁵

⁶ RFA 24 (UGA-OTP-0209-0042): (Even if RFA 24 does not contain any lead to the UPDF informant's identity, the Prosecution still did not disclose RFA 24 to the Defence *via* E-Court); *see also* ICC-02/04-01/15-1234, p. 6: (The Trial Chamber ordered the Prosecution to disclose to the Defence, *inter alia*, RFA 24 *via* E-Court); *see also* UGA-OTP-0209-0038: ([REDACTED]).

UGA-OTP-0206-0255.

⁸ RFA 24 (UGA-OTP-0209-0042), paras 5-6; *see also* UGA-OTP-0209-0038.

⁹ RFA 24 (UGA-OTP-0209-0042), para. 2; *see also* UGA-OTP-0209-0038.

¹⁰ RFA 24 (UGA-OTP-0209-0042), paras 4-5; *see also* UGA-OTP-0209-0038.

¹¹ ICC-02/04-01/15-1189-Red, para. 6.

¹² ICC-02/04-01/15-1142, fn. 2.

¹³ ICC-02/04-01/15-1189-Red.

¹⁴ ICC-02/04-01/15-1142 and ICC-02/04-01/15-1177.

¹⁵ ICC-02/04-01/15-1189-Red, para. 6.

9. On 16 March 2018, in response to a request by the Defence,¹⁶ the Single Judge issued “Decision on Defence Requests Following Prosecution’s of Filing of an Item Received in Response to an RFA”¹⁷ and ordered the Prosecution to provide RFA 24, the sound recording, and the identity of the UPDF informant, but allowed the Prosecution five days within which to file a substantiated request for non-disclosure.¹⁸ The Single Judge has already made a determination that the Prosecution is obliged to provide the identity of the UPDF informant to the Defence, only subject to any restrictions on disclosure.¹⁹
10. On 4 April 2018, the Prosecution submitted a request to withhold the disclosure of the UPDF informant’s identity from the Defence under Article 68 of the Statute. The Prosecution attached the Ugandan Government’s letter to its request and highlighted the Ugandan Government’s concerns that such disclosure could risk “revenge attacks and stigmatisation against the informant as well as against the informant’s family members”.²⁰
11. On 16 April 2018, the Defence filed its opposition to the Prosecution and Ugandan Government’s request and submitted that their request does not meet the relevant legal standard, *i.e.* an objectively justifiable risk of danger to the safety of the person concerned.²¹ The Defence also submitted that withholding the UPDF informant’s identity is prejudicial to Mr Ongwen’s right to a fair and impartial trial.²²
12. On 20 April 2018, the Single Judge rejected the Prosecution request and ordered the Prosecution to disclose to the Defence the items sought, including the UPDF informant’s identity.²³
13. On 24 April 2018, the Trial Chamber suspended the Single Judge’s decision ordering the Prosecution to disclose the identity of the UPDF informant to the Defence.²⁴
14. Finally, on 25 April 2018, the Ugandan Government transmitted its letter to the Trial Chamber and requested the Trial Chamber to relieve the Prosecution of its obligation to disclose the

¹⁶ ICC-02/04-01/15-1197.

¹⁷ ICC-02/04-01/15-1207.

¹⁸ ICC-02/04-01/15-1207, para. 9.

¹⁹ ICC-02/04-01/15-1207, para. 9; *see also* ICC-02/04-01/15-1217, para. 1.

²⁰ ICC-02/04-01/15-1217, para. 10 (with confidential Annex A).

²¹ ICC-02/04-01/15-1229, paras 5-15.

²² ICC-02/04-01/15-1229, paras 16-24.

²³ ICC-02/04-01/15-1234.

²⁴ E-mail communication from Trial Chamber IX Communications to parties and participants, 24 April 2018.

UPDF informant's identity to the Defence; or make such inference as to the existence or non-existence of any facts as may be appropriate in the circumstances.²⁵

IV. SUBMISSIONS

15. This is the third time²⁶ in a little more than two months that the Defence must substantiate the disclosure of UPDF informant's identity to the Defence. The UPDF informant's identity has been in the Prosecution's control since 23 November 2007 and, as the information in associated items suggests,²⁷ this evidence is potentially exculpatory and relevant to the defence of duress, and thus disclosable to the Defence under Articles 67(2), 67(1)(e), 64(2), 21 of the Statute.
16. Following the first two Defence requests for disclosure, the Single Judge ordered the Prosecution to disclose the UPDF informant's identity, the UPDF report, RFA 24, the sound recording and any transcripts of the sound recording to the Defence.²⁸ In order to support the disclosure of these items to the Defence, the Single Judge ruled that:

*[T]he Single Judge agrees with the Defence to the extent that providing it with the affected information it identifies would best ensure the fair and expeditious conduct of the proceedings.*²⁹

17. Additionally:

*Despite being given ample opportunity to do so, the Prosecution has failed to demonstrate why disclosure only to the Defence poses a risk to the informant and his family in this particular instance.*³⁰

18. And also that:

*The concerns of the Ugandan Government, annexed to the Request, are set out in generic terms based primarily upon the circumstances in which the informant came to provide information to the Ugandan authorities.*³¹

19. Nevertheless, the Single Judge's disclosure order has been suspended because of both the Prosecution's³² and Ugandan Government's intervention under Article 72 of the Statute, recurrently requesting to withhold the UPDF informant's identity from the Defence.³³

²⁵ ICC-02/04-01/15-1240-Conf-Anx.

²⁶ See relevant Defence submissions: ICC-02/04-01/15-1197 and ICC-02/04-01/15-1229.

²⁷ UPDF report (UGA-OTP-0208-0016); English transcript of the sound recording (UGA-OTP-0283-1502).

²⁸ ICC-02/04-01/15-1207: (The Prosecution was ordered to provide the identity of UPDF informant to the Defence, subject to any restrictions on disclosure); ICC-02/04-01/15-1234.

²⁹ ICC-02/04-01/15-1207, para. 8.

³⁰ ICC-02/04-01/15-1234, para. 8.

³¹ ICC-02/04-01/15-1234, para. 8.

20. Firstly, the Defence avers that the Prosecution had two prior opportunities³⁴ and the Ugandan Government had one prior opportunity³⁵ to substantiate their requests for non-disclosure of the UPDF informant's identity to the Defence. Both failed to substantiate the requests on each occasion.
21. For this reason, the Defence submits that the Ugandan Government's current re-litigation and complementation of some of its past arguments³⁶ after an adverse ruling³⁷ challenges the principle of judicial finality regarding the present matter. The same must apply in respect to the Prosecution's anticipated submissions on the Ugandan Government's intervention.
22. As a second preliminary matter, the Defence deems it necessary to note its concerns regarding the Ugandan Government's use of syntax that appears to put constraints on the Trial Chamber's independent exercise of its powers and functions in the *Ongwen* case proceedings. In particular, the Ugandan Government's use of phrases such as [REDACTED]
[REDACTED],³⁸ and [REDACTED]
[REDACTED],³⁹ or [REDACTED]
[REDACTED]
[REDACTED]⁴⁰ is disquieting.
23. That said, the Defence submits that the Ugandan Government's request should be dismissed, as meritless, and the Prosecution be ordered to comply with the Single Judge's pre-existing order to disclose the identity of the UPDF informant to the Defence for the following reasons.

A. The Ugandan Government's intervention under Article 72 of the Statute is without merit and should be dismissed

24. Article 72 of the Statute serves as a basis for a State to prevent the disclosure of evidence if in the opinion of that State the disclosure of such material would prejudice its national security

³² *Infra*, paras 45-49; *see also infra*, para. 54, inferences 14-15.

³³ ICC-02/04-01/15-1240-Conf-Anx; E-mail communication from Mr Benjamin Gumpert to the Trial Chamber IX and parties and participants, sent on 24 April 2018: ([REDACTED]
[REDACTED]).

ICC-02/04-01/15-1234, para. 8; *see also* ICC-02/04-01/15-1189-Red; ICC-02/04-01/15-1217.

³⁵ ICC-02/04-01/15-1217-Conf-Anx.

³⁶ The submission of risk to the safety of UPDF informant: ICC-02/04-01/15-1217-Conf-Anx; ICC-02/04-01/15-1240-Conf-Anx, paras 1, 3, 4, 5.

³⁷ ICC-02/04-01/15-1234.

³⁸ ICC-02/04-01/15-1240-Conf-Anx, p. 1. (Bold added).

³⁹ ICC-02/04-01/15-1240-Conf-Anx, para. 8. (Bold added).

⁴⁰ ICC-02/04-01/15-1240-Conf-Anx, para. 9. (Bold added).

interests. In the present case, the Ugandan Government speculates that the disclosure of the UPDF informant's identity to the Defence and Mr Ongwen would prejudice "the national security interests of the Republic of Uganda".⁴¹

25. The Ugandan Government further conjectures that [REDACTED] [REDACTED] [REDACTED] [REDACTED],⁴² and that [REDACTED] [REDACTED] [REDACTED],⁴³ and also that [REDACTED] [REDACTED] [REDACTED].⁴⁴
26. The Defence avers that these are ill-informed and ambiguous claims that disregard the relevant provisions and applicable procedures of this Court. The Ugandan Government failed to raise its reservations regarding any threats to national security of Uganda,⁴⁵ a risk of danger to the safety to the UPDF informant,⁴⁶ or a privileged nature of the UPDF's informant identity when disclosing this evidence to the Prosecution on 23 November 2007.
27. Based on prior pleadings⁴⁷ and information available to the Defence,⁴⁸ both the Prosecution and Ugandan Government have not raised any of the available procedures for a non-disclosure of the impugned evidence, *i.e.* the provision of Article 54(3)(e) of the Statute and [REDACTED] of the Cooperation Agreement,⁴⁹ or a non-disclosure application to the Pre-Trial Chamber II or this Trial Chamber.⁵⁰

⁴¹ ICC-02/04-01/15-1240-Conf-Anx, para. 5.

⁴² ICC-02/04-01/15-1240-Conf-Anx, para. 2. (Bold added).

⁴³ ICC-02/04-01/15-1240-Conf-Anx, para. 3. (Bold added).

⁴⁴ ICC-02/04-01/15-1240-Conf-Anx, para. 3. (Bold added).

⁴⁵ ICC-02/04-01/15-1240-Conf-Anx, paras 1, 5.

⁴⁶ ICC-02/04-01/15-1217-Conf-Anx; ICC-02/04-01/15-1240-Conf-Anx, paras 1, 3, 4, 5.

⁴⁷ ICC-02/04-01/15-1189-Red; ICC-02/04-01/15-1217.

⁴⁸ RFA 24 (UGA-OTP-0209-0042); Cooperation Agreement (UGA-OTP-0206-0255); *see also* ICC-02/04-01/15-1137-Conf (with confidential annexes A, B, and C): Despite the fact that the Defence requested the disclosure of any response related to RFA 24, it has not received any such document from the Prosecution. Had the Defence received such document, if any, it would have enhanced the overall judicial efficiency and this line of filings may not have been necessary.

⁴⁹ Cooperation Agreement (UGA-OTP-0206-0255), at 0258, [REDACTED].

⁵⁰ ICC-02/04-01/15-409: The Prosecution requested the Pre-Trial Chamber II under Article 54(3)(f) of the Statute to authorize redactions to 43 documents obtained under Article 54(3)(e) of the Statute. The documents containing the UPDF informant's identity are not among these 43 documents.

28. Rather, the Ugandan Government disclosed the impugned evidence – through an ordinary disclosure procedure – to the Prosecution pursuant to Articles 54(3)(d),⁵¹ 87(3) and 93 of the Statute and [REDACTED] of the Cooperation Agreement.⁵² In particular, the Prosecution requested the Ugandan Government to provide [REDACTED] [REDACTED]⁵³ in order [REDACTED]⁵⁴ [REDACTED]⁵⁵.
29. Article 54(1)(a) of the Statute makes clear that the Prosecution must “investigate incriminating and exonerating circumstances equally”. A corollary of this principle is the obligation to “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”.⁵⁶
30. The exception to the above rule is Article 54(3)(e) of the Statute. This provision creates an exception by which the Prosecution may promise evidence providers that their evidence is given on a confidential basis and cannot be produced or used in the Court.⁵⁷ In cases of collecting the evidence pursuant to Article 54(3)(e) of the Statute, the Appeals Chamber in the *Lubanga* case set out the methodology for dealing with conflicts between Articles 67(2) and 54(3)(e) of the Statute. It held that if disclosure to the Defence of the evidence is deemed necessary, the Chamber would have to determine “whether and, if so, which counter-balancing measures can be taken to ensure that the rights of the accused are protected and that the trial is fair, in spite of the nondisclosure of the information”.⁵⁸
31. Nevertheless, from the information available, the Prosecution and the Ugandan Government did not entertain the exception under Article 54(3)(e) of the Statute. Instead, the Ugandan Government disclosed the UPDF informant’s identity to the Prosecution pursuant to its

⁵¹ Article 54(3)(d) of the Statute stipulates that the Prosecution may “[e]nter into such arrangements or agreements, not inconsistent with this Statute, as may be necessary to facilitate the cooperation of a State, intergovernmental organization or person”.

⁵² UGA-OTP-0206-0255.

⁵³ RFA 24 (UGA-OTP-0209-0042), paras 5-6; UGA-OTP-0209-0038.

⁵⁴ RFA 24 (UGA-OTP-0209-0042), para. 2; UGA-OTP-0209-0038.

⁵⁵ RFA 24 (UGA-OTP-0209-0042), paras 4-5; UGA-OTP-0209-0038.

⁵⁶ Article 67(2) of the Statute; *see also* Rules 76-84 of the RPE.

⁵⁷ Article 54(3)(e) of the Statute stipulates that the Prosecution may “[a]gree not to disclose, at any stage of the proceedings, documents or information that the Prosecutor obtains on the condition of confidentiality and solely for the purpose of generating new evidence, unless the provider of the information consents”.

⁵⁸ ICC-01/04-01/06-1486, para. 48; *see also* ICC-02/04-02/06-229.

ordinary cooperation obligations knowing that the information sought will be relied on in the investigations and judicial proceedings against, *inter alia*, Mr Ongwen,⁵⁹ and thus become relevant, necessary and disclosable to the Defence.

32. Additionally, there is a plethora of other Prosecution RFAs, corresponding responses from the Ugandan authorities and evidence gathered, based on identical legal provisions of this Court and sections of the Cooperation Agreement, *i.e.* Article 54(3)(d) of the Statute and Sections [REDACTED] of the Cooperation Agreement.⁶⁰ All of these were disclosed to the Defence without the necessity of intervening under Articles 68 and 72 of the Statute. Whether because of the Prosecution's lack of diligence or not, there is no indication that makes the collection of the UPDF informant's identity and associated materials exceptional, implicitly secret, or informational.⁶¹
33. For the reasons above, the Defence requests the Trial Chamber to dismiss the Ugandan Government's intervention under Article 72 of the Statute as ill-founded, and order the Prosecution to comply with the order to disclose of UPDF informant's identity.

B. The disclosure of UPDF informant's identity to the Defence does not present any threat to the national security of Uganda

34. The Defence avers that the Ugandan Government puts forth two speculative points in order to substantiate its national security interests' assertions and Article 72 of the Statute intervention.
35. First, it refers back to its internal matters of law enforcement and states that [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]⁶² and also adds that the disclosure to the Defence and Mr Ongwen [REDACTED]
[REDACTED]⁶³.

⁵⁹ RFA 24 (UGA-OTP-0209-0042): (The Prosecution transmitted this RFA [REDACTED]); *see also* UGA-OTP-0209-0038: ([REDACTED]).

See e.g. UGA-OTP-0206-0025, UGA-OTP-0206-0051, UGA-OTP-0206-0059, UGA-OTP-0206-0070, UGA-OTP-0206-0079, UGA-OTP-0206-0100, UGA-OTP-0206-0096, UGA-OTP-0206-0093, UGA-OTP-0206-0104, UGA-OTP-0206-0109, UGA-OTP-0206-0113, etc.

⁶¹ ICC-02/04-01/15-1240-Conf-Anx, paras 2-3.

⁶² ICC-02/04-01/15-1240-Conf-Anx, para. 4.

⁶³ ICC-02/04-01/15-1240-Conf-Anx, para. 5.

36. The Defence submits that it is speculative and irrelevant to contemplate whether the Ugandan authorities will be able to encourage Ugandan citizens to join their intelligence forces, or not; and also whether it maintains efficient conduct of law enforcement, or not. These are internal matters and they should not interfere with this Court's proceedings and Mr Ongwen's fair trial rights under Articles 67(2), 67(1)(e), 64(2) and 21 of this Statute.
37. Second, the Ugandan Government presents one link between the supposed prejudice to its national security interests and disclosure to the Defence and Mr Ongwen. It speculates that



38. This argument is flawed and cannot stand for a simple reason. The claim that Mr Ongwen may pass information relating to the UPDF informant's identity ignores the secured communication protocol applied by the Registry at the ICC Detention Centre. Mr Ongwen's unprivileged calls and visits, if any, are actively monitored and recorded on the spot. In other words, it is not possible that any such information would be released to public without a prior knowledge and scrutiny of this Court.
39. In fact, the Single Judge already dismissed similar allegations from the Prosecution and the Ugandan Government. It ruled that

[O]ther individuals with a similar background have provided testimony in the present case following disclosure of their identities to the Defence. The Defence is well aware of its professional obligations in relation to the handling of confidential information".⁶⁵

40. For the reasons above, the Ugandan Government failed to demonstrate why and how the disclosure of the UPDF informant's identity to the Defence and Mr Ongwen would prejudice the national security interests of Uganda. Therefore, the arguments presented and the relief sought by the Ugandan Government must fail and the request must be dismissed.

⁶⁴ ICC-02/04-01/15-1240, para. 5. (Bold added).

⁶⁵ ICC-02/04-01/15-1234, para. 8; *see also* ICC-02/04-01/15-1229, para. 11.

C. The UPDF informant's identity is relevant and necessary to the defence of duress and establishment of Mr Ongwen's innocence

41. During the course of its pleadings, the Defence has and continues to assert its position on the relevance and necessity of being granted the access to the UPDF informant's identity.⁶⁶
42. This is because the UPDF informant's identity, together with the UPDF report, the sound recording and corresponding transcripts may be relied upon as evidence during the presentation of Defence case. The Defence reiterates that the UPDF informant's identity and activities are relevant to the defence of duress, and may show the innocence of Mr Ongwen, or mitigate his guilt.⁶⁷ The UPDF informant's [REDACTED],⁶⁸ [REDACTED]
[REDACTED],⁶⁹ and [REDACTED]
[REDACTED]⁷⁰ are all highly relevant to the preparation of the defence and necessitate the disclosure.
43. In addition, as held by the Single Judge, the provision of the affected information "would be best to ensure the fair and expeditious conduct of the proceedings".⁷¹
44. The Defence avers that the relevance and necessity of the UPDF informant's identity to the Defence is further proven in the following part of this motion "D. Available procedures under Article 72(7)(a) and (b) of the Statute".⁷²

D. Available procedures under Article 72(7)(a) and (b) of the Statute

1. Application of Articles 72(7)(a)(i),(ii) and (iii) of the Statute

45. Article 72 of the Statute can be triggered by a State or by a person.⁷³ Here, it is triggered by a person.
46. In the present circumstances, the Lead Prosecutor in the *Ongwen* case, Mr Benjamin Gumpert, referred the matter⁷⁴ to the Ugandan Government.⁷⁵ Subsequently, the Ugandan Government

⁶⁶ ICC-02/04-01/15-1197; ICC-02/04-01/15-1229, paras 16-24.

⁶⁷ ICC-02/04-01/15-1229.

⁶⁸ English transcript of the Sound Recording, UGA-OTP-0283-1502, at 1502, lines 7-14.

⁶⁹ English transcript of the Sound Recording, UGA-OTP-0283-1502, at 1503, lines 72-86.

⁷⁰ ICC-02/04-01/15-1189-Conf-Exp-AnxA, paras 9, 15-16.

⁷¹ ICC-02/04-01/15-1207, para. 8.

⁷² *Infra*, paras 45-54.

⁷³ Articles 72(7)(a) and 72(2) of the Statute.

⁷⁴ E-mail communication from Mr Benjamin Gumpert to the Trial Chamber IX and parties and participants, sent on 24 April 2018: ([REDACTED])

asserted its national security interests pursuant to Article 72(4) of the Statute. Therefore, the procedures pursuant to Article 72(7)(a) of the Statute are now available to the Trial Chamber.

47. Articles 72(7)(a)(i), (ii) and (iii) of the Statute are sequential and dependent on each other. First, the Trial Chamber “may, before making any conclusion referred to in subparagraph 7 (a) (ii), request further consultations for the purpose of considering the State’s representations, which may include, as appropriate, hearings in camera and *ex parte*.”⁷⁶ Based on the consultations, if the Trial Chamber “concludes that, by invoking the ground for refusal under article 93, paragraph 5, in the circumstances of the case, the requested State is not acting in accordance with its obligations under this Statute, the Court may refer the matter in accordance with article 87, paragraph 7, specifying the reasons for its conclusion; **and**,”⁷⁷ finally, after the Trial Chamber exhausts Article 72(7)(a)(i) and (ii) of the Statute, it “may make such inference in the trial of the accused as to the existence or nonexistence of a fact, as may be appropriate in the circumstances”.⁷⁸ (Bold added).
48. Therefore, the Defence objects to the Trial Chamber’s interpretation of Article 72(7)(a) of the Statute, and avers that the subsequent invitation to the parties and participants to also make inferences pursuant to Article 72(7)(a)(iii) of the Statute⁷⁹ is incorrect, because 7(a)(i) and (ii) have not been fulfilled.
49. Rather, given that the Ugandan Government opposes the disclosure of evidence that is potentially exculpatory and relevant to the defence of duress, and thus impedes the trial process, hinders the preparation of defence, and violates Mr Ongwen’s fair trial rights under Articles 67(2), 67(1)(e), 64(2) and 21 of the Statute, the Trial Chamber should
 - 1) Request further consultations for the purpose of considering Uganda’s representations;⁸⁰
 - 2) Based on the consultations, conclude whether to refer the matter in accordance with Article 87(7) of the Statute, if Uganda is not acting in accordance with its obligations under this Statute; and⁸¹

_____).

Infra, para. 54, inferences 14-15.

⁷⁶ Article 72(7)(a)(i) of the Statute.

⁷⁷ Article 72(7)(a)(ii) of the Statute.

⁷⁸ Article 72(7)(a)(iii) of the Statute.

⁷⁹ E-mail Communication from Trial Chamber IX Communications to parties and participants, 25 April 2018.

⁸⁰ Article 72(7)(a)(i) of the Statute.

- 3) Make such inference in the present trial, as to the existence or non-existence of a fact, as may be appropriate in the circumstances.⁸²

2. Inferences under Articles 72(7)(a)(iii) and 72(7)(b)(ii) of the Statute

50. Without waiving the Defence objection to the Trial Chamber's incorrect interpretation of Article 72(7)(a) of the Statute, the Defence makes the following submissions regarding inferences, as requested by the Trial Chamber in its e-mail.⁸³
51. In its letter, the Ugandan Government invites the Trial Chamber to draw inferences pursuant to Article 72(7)(b)(ii) of the Statute.⁸⁴ Articles 72(7)(a)(iii) and (b)(ii) of the Statute permit the Trial Chamber to "make such inference in the trial of the accused as to the existence or non-existence of a fact, as may be appropriate in the circumstances". As the provision makes clear, inferences are conclusions that are drawn from facts or circumstantial evidence.
52. At first, the Defence reserves its right to make submissions on further inferences. The Defence also submits that an exhaustive list of inferences that can be drawn from the present circumstances is not possible for at least two reasons: a) drawing inferences in the present circumstances is premature and perilous as not all the facts that may be revealed from the present litigation are known; b) the trial is on-going and not all evidence – including a possible Defence case – is before this Trial Chamber.
53. Even so, the Defence avers that its inference is that the information sought exculpates Mr Ongwen. The Defence notes that there are several reasons why this information could be exculpatory and why the Prosecution and Ugandan Government make every effort to withhold the UPDF informant's identity from the Defence.⁸⁵
54. There are also other inferences that can be drawn
 - 1) The UPDF informant had a military or intelligence training. This follows from references in [REDACTED].⁸⁶ Given, as the Ugandan Government specifies that the UPDF informant [REDACTED]

⁸¹ Article 72(7)(a)(ii) of the Statute.

⁸² Article 72(7)(a)(iii) of the Statute.

⁸³ E-mail Communication from Trial Chamber IX Communications to parties and participants, 25 April 2018.

⁸⁴ ICC-02/04-01/15-1240-Conf-Anx, para. 9.

⁸⁵ ICC-02/04-01/15-1229-Corr-Red, para. 21.

⁸⁶ UGA-OTP-0283-1502, at 1503, lines 84-88.

[REDACTED],⁸⁷ the individual may have received some level of intelligence training;

- 2) The UPDF informant is not someone who was a minor player in the conflict. This follows from the fact that [REDACTED]
[REDACTED].⁸⁸ This also follows from the fact that the individual had/has [REDACTED]
[REDACTED]
[REDACTED].⁸⁹
- 3) Given that the Ugandan Government disclosed the UPDF informant's identity to the Prosecution without any reservations in 2007, and that the reservations are being made now – after more than 10 years – with regard to disclosure to Mr Ongwen, it can be inferred that the activities of the UPDF informant and [REDACTED]
[REDACTED] enhanced the capacity and ability to exercise control and command over Mr Ongwen during the charged period;
- 4) The UPDF informant's intelligence provided to the UPDF enhanced the UPDF operations against the LRA, including against Mr Ongwen during the charged period;
- 5) The UPDF informant may have been present [REDACTED]. This follows from the fact that he/she refers to [REDACTED].⁹⁰
- 6) The UPDF informant may have interacted with Mr Ongwen [REDACTED]. Mr Ongwen is alleged to have participated [REDACTED]. If that is the case, then the individual may know Mr Ongwen personally or have interacted with him during that period;⁹¹
- 7) As someone with [REDACTED] and connections to Ugandan military and intelligence services, the UPDF informant may know of the threats and surveillance of Mr Ongwen during the charged period;⁹²

⁸⁷ ICC-02/04-01/15-1217-Conf-AnxA; ICC-02/04-01/15-1229-Conf-Exp-Corr, para. 18.

⁸⁸ ICC-02/04-01/15-1189-Conf-Exp-AnxA, para. 9; UGA-OTP-0283-1502, at 1503, lines 72-86.

⁸⁹ ICC-02/04-01/15-1189-Conf-Exp-AnxA, para. 3; UGA-OTP-0283-1502, at 1503, lines 55-56.

⁹⁰ ICC-02/04-01/15-1189-Conf-Exp-AnxA, paras 9; UGA-OTP-0283-1502, at 1503, lines 72-86.

⁹¹ ICC-02/04-01/15-1189-Conf-Exp-AnxA, paras 9; UGA-OTP-0283-1502, at 1503, lines 72-86.

⁹² ICC-02/04-01/15-1189-Conf-Exp-AnxA; UGA-OTP-0283-1502.

- 8) The UPDF informant may have played a major role in spying on the LRA members and providing [REDACTED] with information about any attempts to escape from the LRA, including Mr Ongwen's attempts to escape;
- 9) As [REDACTED], the UPDF informant was aware of the network of [REDACTED] who could thwart the escape of LRA members, including Mr Ongwen;
- 10) As someone with [REDACTED] and connections to the military and intelligence services, the UPDF informant may know of the threats and surveillance of Mr Ongwen [REDACTED].⁹³ The relevance of threats during [REDACTED] is that the Prosecution has sought to have the Trial Chamber infer that Mr Ongwen was not under duress during the charged period based upon his alleged commitment and independence [REDACTED];
- 11) The UPDF informant [REDACTED] and may have been present [REDACTED]. Given the references to speaking on the radio for the first time, this suggests that the individual [REDACTED];⁹⁴
- 12) The UPDF informant's identity is highly controversial. An individual [REDACTED] is not typically a threat to national security.⁹⁵ This also follows from the Ugandan Government's fear that the information cannot reach beyond the Prosecution's office;⁹⁶
- 13) The UPDF informant either knows Mr Ongwen or is known by Mr Ongwen. The purported danger described by the Ugandan Government of revealing the identity of the individual to Mr Ongwen is greatest where Mr Ongwen knows the person. The danger is very remote where the person is not a prominent individual and not known by Mr Ongwen. Thus, the invoking of this risk of harm by the Ugandan Government leads to the inference that Mr Ongwen is familiar with the individual;
- 14) The UPDF informant may have been one of the Prosecution witnesses in the *Ongwen* case. This follows from the Ugandan Government's e-mail communication alleging that [REDACTED] [REDACTED] [REDACTED]

⁹³ ICC-02/04-01/15-1189-Conf-Exp-AnxA, para. 9; UGA-OTP-0283-1502, at 1503, lines 72-86.

⁹⁴ UGA-OTP-0283-1502, at 1502, lines 11-12; and at 1503, lines 56-57; and also at 1504, lines 138-139.

⁹⁵ ICC-02/04-01/15-1217-Conf-AnxA.

⁹⁶ ICC-02/04-01/15-1240-Conf-AnxA, para 3.

██████████
██████████⁹⁷;

15) The UPDF informant's identity is embarrassing and detrimental to the Prosecution case. There is no indication that any particular condition was placed upon this item by the Ugandan Government in comparison to any other confidential item that has been disclosed. After being ordered to disclose, the Prosecution seeming of its own volition, sought to protect the national security of Uganda. This unprompted behaviour could lead to the conclusion that the failure to disclose the UPDF informant's identity earlier reflects poorly upon the Prosecution case and an ulterior reason for its non-disclosure was sought;

55. The Defence notes that inferences of bad faith can be drawn in the circumstances of an assertion of national security as well. This is because the information sought has been in the possession of the Prosecution for more than 10 years and no harm has been identified. The Defence loathes to cast aspersions on the Ugandan Government, but it appears that it is making an unsupported intervention and acting in bad faith. No national security interest has been identified and asserted. The objective effect of this conduct is to tilt the trial towards the Prosecution, and undermine any equality of arms between the parties, which is a fundamental element of a fair trial.
56. To conclude, the Ugandan Government's intervention under Article 72 of the Statute should be rejected and the Prosecution ordered to comply with the Single Judge's pre-existing order to disclose the identity of the UPDF informant to the Defence.

V. CONCLUSION AND RELIEF SOUGHT

57. In light of the above, the Defence opposes the Ugandan Government's request and respectfully requests the Trial Chamber to
- a) **REJECT** the Ugandan Government's request;
 - b) **ORDER** the Prosecution to comply with the Single Judge's order to disclose the UPDF informant's identity;

⁹⁷ ICC-02/04-01/15-1217-Conf-AnxA. (Bold added).

- c) **ORDER** the Prosecution to comply with the Single Judge's order to disclose RFA 24, the UPDF report, the sound recording, and any transcripts of the sound recording *via* E-Court; and
- d) **ORDER** the Prosecution to disclose the Ugandan Government's Response to the Prosecution's RFA 24, if available, *via* E-Court.



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Hon. Krispus Ayena Odongo
On behalf of Dominic Ongwen

Dated this 9th day of May, 2018
At Lira, Uganda