

**Cour
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**International
Criminal
Court**

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No.: **ICC-02/04-01/15**
Date: **8 November 2016**

TRIAL CHAMBER IX

Before: Judge Bertram Schmitt, Single 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 Consolidated Response to Prosecution Filings ICC-02/04-02/15-577 and ICC-02/04-01/15-579-Conf”, filed 7 November 2016

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') hereby responds to Prosecution filings ICC-02/04-01/15-577 and ICC-02/04-01/15-579-Conf.
2. Prosecution filing 577 should be dismissed as the Prosecution has not justified the addition of P-0001 to its list of witnesses and extra materials to its list of evidence.
3. Since the Prosecution has not justified the addition of P-0001 to its list of evidence or the additional materials to its list of evidence, Trial Chamber IX ('Chamber') should reject the Prosecution's request to admit the witness's statement pursuant to Rule 68(2)(b) of the Rules of Procedure and Evidence ('RPE') and the addition of materials to its list of evidence.
4. As for the introduction of witness P-0096's prior recorded testimony pursuant to Rule 68(2)(c) of the RPE, the Chamber should reject the admission of the prior recorded testimony because it is irrelevant and immaterial.

II. CONFIDENTIALITY

5. Pursuant to Regulation 23 *bis*(2) of the Regulations of the Court ('RoC'), the Defence files this response and its annex as confidential. A public redacted version shall be filed on or before 8 November 2016.

III. PROCEDURAL HISTORY

6. On 30 May 2016, the Chamber ordered that the Prosecution file its final list of witnesses on 6 September 2016.¹
7. On 6 September 2016, the Prosecution filed its final list of witnesses for trial.²
8. On 6 October 2016, the Defence asked the Prosecution why certain witnesses appeared within its Pre-Trial Brief, but yet not on its list of witnesses.³

¹ ICC-02/04-01/15-449, paras 5-8.

² ICC-02/04-01/15-532 with Confidential Annexes A-C.

³ Email from Defence to Prosecution, sent on 6 October 2016 at 18h24.

9. On 25 October 2016, the Prosecution requested to add items to its list of evidence and add P-0001 to its list of witnesses.⁴
10. On 28 October 2016, the Chamber shortened the deadline for responses to Prosecution filing ICC-02/04-01/15-577 to 7 November 2016.⁵ Later that day, the Prosecution filed ICC-02/04-01/15-579-Conf.
11. On 31 October 2016, the Chamber shortened the deadline for responses to Prosecution filing ICC-02/04-01/15-579-Conf to 7 November 2016.⁶

IV. LAW

12. Article 64(6)(f) of the Rome Statute empowers the Chamber to rule on any relevant matter at trial.
13. In granting an extension of time after a deadline has expired, Regulation 35(2) of the RoC requires the Chamber to determine whether:
 - a. Good cause has been shown that an extension is warranted and
 - b. The moving Party or Participant has “demonstrated that he or she was unable to file the application within the time limit for reasons outside his or her control.”
14. The Defence has already explained its interpretation of Rule 68(2)(b) of the RPE, and incorporates its previous submissions by reference.⁷
15. Rule 68(2)(c) of the RPE requires the Chamber to consider all of the following factors before deciding to admit or deny prior recorded testimony:
 - a. The person is unavailable for trial;
 - b. Article 56 measures could not have been anticipated;
 - c. The prior recorded testimony has sufficient indicia of reliability and

⁴ ICC-02/04-01/15-577.

⁵ Email from Chamber to Parties and Participants, received 28 October 2016 at 12h25 CET.

⁶ Email from Chamber to Parties and Participants, received 31 October 2016 at 10h48 CET

⁷ See ICC-02/04-01/15-509-Conf, paras 9-13, 15-40, 42-49 and 55-64.

- d. Whether the prior recorded testimony goes to proof of acts and conduct of an accused.⁸

16. Rule 76(3) of the RPE requires that statements from Prosecution witnesses be translated in a language which the Accused fully understands and speaks.

V. SUBMISSIONS

The Prosecution fails to demonstrate good cause for the late addition of witness P-0001 to its list of witnesses

17. The Prosecution fails to explain good cause for the late addition of P-0001 to its list of witnesses. To be more precise, the Prosecution only states “that the exclusion of Witness P-0001 was an error and that it intended to apply to the Chamber for leave to remedy that error.”⁹
18. The Prosecution states that previous chambers of the Court have allowed materials to be added to a list of evidence after the passage deadlines pursuant to Articles 64(2), 64(6)(d), 64(6)(f) and 69(3) of the Rome Statute.¹⁰ The Prosecution is correct that these inclusions fell within the discretionary power of the chambers which allowed the late introduction of evidence, and by extension, witnesses. What the Prosecution fails to demonstrate though are the specific circumstances in which the late additions were allowed.
19. In the case at bar, the Prosecution neglects to demonstrate good cause; it merely states that it was an oversight.
20. The Prosecution fails to comprehend that not adhering to deadlines is prejudicial to the Defence. Instead of preparing for opening statements and witness cross-examinations, the Defence must now use its valuable resources and time to

⁸ Unlike Rule 68(2)(b), the fact that the acts described goes to the acts and conduct of the Accused does not require the Chamber to reject the prior recorded testimony under Rule 68(2)(c) of the RPE.

⁹ ICC-02/04-01/15-577, para. 7. *See also* paragraph 21 of ICC-02/04-01/15-577.

¹⁰ ICC-02/04-01/15-577, para. 8. The items sought for late inclusion of the Prosecution’s list of evidence includes materials by P-0001.

respond to this application. Any time consumed by the Defence whilst it is preparing its own case casts prejudice against it, especially at a time when it is in the final stages of its Article 31(1)(a) preparation. These are issues which the Defence sought to circumvent when it recommended that a final disclosure date of six (6) months before trial could alleviate or obviate such problems.¹¹

21. Finally, the Defence complained about this witness not being on the Prosecution's list of witnesses on 26 July 2016.¹² The Prosecution was put on noticed when it received the Defence's first Rule 68 response that Witness P-0001 was not on its list, and should have corrected it accordingly.
22. The Defence maintains that the Prosecution has failed to show good cause, as required in Regulation 35(2) of the RoC, as to why Witness P-0001 should be added late to its list of witnesses, and therefore should be rejected.

The Prosecution fails to explain why it was out of the control of the Prosecution to add Witness P-0001 to its list of witnesses by 6 September 2016 and the additional materials to its list of evidence

23. Once again, instead of explaining why this witness and these materials could not have been added to the Prosecution's list of witnesses and evidence before the 6 September 2016 deadline and why it was out of the control of the Prosecution to do as such, the Prosecution discusses how the late addition of this witness and materials are relevant, probative and does not prejudice the rights of Mr Ongwen.¹³
24. The Prosecution fails to proffer a single cogent reason as to its lack of due diligence in preparing its list of witnesses and evidence. This is further evidence by the fact that that Prosecution failed to file a proper list of witnesses on 6 September 2016, and was order by the Chamber to refile a proper list on 30 September 2016.

¹¹ See ICC-02/04-01/15-439-Conf, paras 4-6.

¹² ICC-02/04-01/15-509-Conf, para. [REDACTED]

¹³ ICC-02/04-01/15-577, paras 10-20 and 22-27.

25. The Prosecution fails to explain why it was out of its control to include this material in its list of evidence and this witness in its list of witnesses within the proper time ordered by the Chamber, and must therefore be rejected by the Chamber for the Prosecution's failure to adhere to the second prong of the standard set out by Regulation 35(2) of the RoC.

Should the Chamber accept Witness P-0001's inclusion in the Prosecution's list of witnesses, it should still reject P-0001's prior recorded testimony pursuant to Rule 68(2)(b) of the RPE

26. The Defence has previously responded as to its recommendations for the standard to be used when assessing whether a witness's prior recorded testimony should be accepted into evidence pursuant to Rule 68(2)(b) of the RPE, and incorporates it by reference herein.¹⁴

27. The Defence notes the recent Appeals Chamber decision in *The Prosecutor vs Gbagbo and Blé Goudé*, and requests that the Chamber take a cautious approach when determining reliability of a witness for the purpose of Rule 68(2)(b) of the RPE. As the Defence stated before, the procedural formalities of interviewing a witness and taking a statement merely authenticate that the interview and document was conducted and signed by the person whom the Prosecution states it is. These interviews do not imbue the same moral consequences that testifying live before the Chamber does.

28. As to the materials in dispute of P-0001's prior recorded testimony, the Defence first notes that the Prosecution materially misstated an agreed fact.¹⁵ As submitted on 1 July 2016, the Defence agreed that "[o]n or about 10 October 2003, there was an attack on Pajule IDP camp."¹⁶ The Defence **did not agree** that LRA fighters attacked Pajule IDP camp. The removal of "LRA" from this proposed agreed fact was performed as a result of the *inter partes* discussions between the Defence and

¹⁴ See footnote 7 above.

¹⁵ ICC-02/04-01/15-579-Conf, para. 10.

¹⁶ ICC-02/04-01/15-487-AnxA, pg. 5.

Prosecution, which can be evidence by an email sent from the Prosecution to the Defence on 24 June 2016, which is attached as Confidential Annex A.¹⁷ The Defence insists that interpreting this agreed fact any other way than what is specifically written in ICC-02/04-01/15-487-AnxA is absolutely incorrect.

29. The Defence also notes that as of the date of this response, the Prosecution has not disclosed an Acholi translation of UGA-OTP-0138-0002-R01.¹⁸ In relation to Witness P-0001, the Prosecution is in violation of Rule 76(3) of the RPE, and thus must be barred from seeking its introduction at this time.

30. Finally, the Defence complained about the Prosecution not including this witness in its potential list of witnesses during the Defence's first Rule 68 response.¹⁹ [REDACTED]

[REDACTED]²⁰ The information which P-0001 gives about [REDACTED] is crucial for the Prosecution's case, and failure to allow the Defence to cross-examine this witness is highly prejudicial to the Defence and completely against the interest of justice. Article 64(2) demands that the trial is fair and expeditious, not merely expeditious. With this witness, and the aforementioned witnesses of [REDACTED], the Prosecution seeks to provide most, if not all, of the information collected by [REDACTED] about the attack and aftermath at [REDACTED] through Rule 68(2)(b) of the RPE. This cannot be allowed.

31. For the abovementioned reasons, if the Chamber decides to admit P-0001 to the Prosecution's list of witnesses, the Defence requests that the Chamber reject the Prosecution's request for P-0001's prior recorded testimony to be admitted into evidence pursuant to Rule 68(2)(b) of the RPE.

¹⁷ See Confidential Annex A, pg. 13 of 23, proposed agreed fact E1.

¹⁸ The Defence checked both its Ringtail database and eCourt on the morning of 7 November 2016, and no translations were attached to the witness statement. Additionally, no translations of this statement were connected to P-0001 when searched with the "Related to witness" field.

¹⁹ ICC-02/04-01/15-509-Conf, [REDACTED]

²⁰ Again, P-0001 is [REDACTED].

The Chamber should reject the Prosecution's application pursuant to Rule 68(2)(c) to admit the materials related to witness P-0096

32. Witness P-0096's testimony is immaterial and irrelevant, and thus the Prosecution's request for its admittance into evidence pursuant to Rule 68(2)(c) of the RPE should be rejected. Furthermore, the Defence received the translations of ten (10) of the eleven (11) transcripts two (2) months ago,²¹ and thus does not adhere to the Chamber's 7 June 2016 order for translations to be disclosed three (3) months before a witness testifies.²²
33. Witness P-0096 testimony relates to a former suspect, *to wit*, Okot Odhiambo.²³ The act of persecution, as framed by the Prosecution and decided by Pre-Trial Chamber II, relates to Pajule, Odek, Lukodi and Abok. It does not relate to acts committed at Abia IDP camp or in Teso district.
34. Unlike as the Prosecution alleges, P-0096's transcripts serve no true purpose. As an alleged low level functionary, P-0096 would not be privy to the type of alleged information that P-0028, P-0224, P-0240 or P-0258 might be privy to. The applicability of his transcripts to this case would be nothing more than minor hearsay and conjecture.
35. Finally, the Prosecution disclosed all but one of the translations of the transcripts, amounting to 399 pages, two (2) months ago. As with P-0001, this does not adhere to the Chamber's 7 June 2016 order for translations to be disclosed three (3) months in advance of the witness's proposed testimony date, and thus admission at this time should be rejected.²⁴
36. The Defence sees no reason for witness P-0096's testimony to be admitted into evidence as it is irrelevant and immaterial to Mr Ongwen and this case, and thus

²¹ All of the transcripts, minus UGA-OTP-0262-0045 (draft ERN of UGA-OTP-0228-1901-R01), was received by the Defence on 6 September 2016.

²² ICC-02/04-01/15-457, para. 10.

²³ See ICC-02/04-01/15-579-Conf, paras 20-21.

²⁴ ICC-02/04-01/15-457, para. 10.

the Defence requests the Chamber to reject the Prosecution's request to admit this prior recorded testimony.

VI. RELIEF

37. The Defence respectfully requests the Chamber to:

- a. Deny the addition of witness P-0001 to the Prosecution list of witnesses;
- b. Deny the addition of the materials to the Prosecution's list of evidence sought in ICC-02/04-01/15-577;
- c. Deny the Prosecution's request to admit the prior recorded testimony of witness P-0001 if the Chamber grants the Prosecution's request to admit him to the Prosecution's list of witnesses and
- d. Deny the Prosecution's request to admit witness P-0096's prior recorded testimony.

Respectfully submitted,



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Hon. Krispus Ayena Odongo

On behalf of Dominic Ongwen

Dated this 8th day of November, 2016

At Kampala, Uganda