

**Cour
Pénale
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**International
Criminal
Court**

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

Date: **9 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

**Defence Response to the Prosecution's Request to Add Two Items to its List of
Evidence (ICC-02/04-01/15-585)**

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's Request to Add Two Items to its List of Evidence" ('Prosecution Request').¹ The Defence respectfully requests the Chamber to deny the Prosecution Request.

II. PROCEDURAL HISTORY

2. On 30 May 2016, Trial Chamber IX, through Single Judge Bertram Schmitt, ('Chamber') ordered that the Prosecution file its final list of evidence on 6 September 2016.²
3. On 6 September 2016, the Prosecution filed its final list of evidence for trial.³
4. On 28 October 2016, the Prosecution informed the Defence that "the two documents were not registered in Ringtail at the time the interviews were conducted because they were misplaced in the course of the evidence registration process back in 2005/6."⁴ Attached to the email were documents UGA-OTP-0129-0419 and UGA-OTP-0167-0118-R01. The Prosecution also informed the Defence that it would file a motion for inclusion of the two (2) annexes onto its list of evidence.
5. On 4 November 2016, the Prosecution filed the Prosecution Request.⁵
6. On 4 November 2016, the Chamber shortened the deadline to file responses to the Prosecution Request to 9 November 2016.⁶

¹ ICC-02/04-01/15-585.

² ICC-02/04-01/15-449, paras 5-8.

³ ICC-02/04-01/15-532 with Confidential Annexes A-C (specifically Confidential Annex A).

⁴ Email from Prosecution to Defence, 28 October 2016 at 15h27 CET.

⁵ Prosecution Request.

⁶ Email from the Chamber to the Parties and Participants, 4 November 2016 at 16h28 CET.

III. SUBMISSIONS

- a) *The Prosecution has failed to meet the burden of Regulation 35(2) of the Regulations of the Court*
7. In granting an extension of time after a deadline has expired, Regulation 35(2) of the Regulations of the Court ('RoC') requires the requesting party to:
- a. Show good cause that warrants an extension to the deadline and
 - b. "[D]emonstrate that he or she was unable to file the application with the time limit for reasons outside his or her control."
8. As in ICC-02/04-01/15-577, the Prosecution fails to explain how it could not meet the appropriate deadline set by the Chamber. Its only explanation was that "[f]ollowing a review, the Prosecution discovered that certain exhibits produced during interviews of P-0016 had been collected and sealed in an evidence bag, but had not been registered and uploaded to Ringtail at the time."⁷
9. The Defence is not privy to the Prosecution's evidence protocols. From a plain read of the quoted text in paragraphs 4 and 8 above, it appears that the evidence was left within the respective evidence bags and not registered in 2005/6.
10. The Defence wonders why the first page of UGA-OTP-0167-0118-R01 was uploaded into Ringtail as UGA-OTP-0167-0040-R01? This annex was removed from the evidence bag at some time before 17 August 2015.⁸ The Prosecution's explanation does not comport with the fact that this document was removed and partially uploaded.
11. Furthermore, the chain-of-custody for both documents are the same. If there was something wrong with the system, if the bag was unsealed, one would

⁷ Prosecution Request, para. 2.

⁸ This is the disclosure date of UGA-OTP-0167-0040-R01, which is the first page of UGA-OTP-0167-0118-R01.

expect there to be additional information in UGA-OTP-0167-0118-R01. Again though, the Defence does not know the Prosecution's evidence protocols.⁹

12. The Prosecution is correct that the audio files which correspond to the untouched transcripts were disclosed to the Defence in a timely fashion and placed on the Prosecution's list of evidence, but these audio files do not have hand-written notes from Witness P-0016. The two (2) annexes in question ceased to be transcripts the moment that the witness altered them; the transcripts were transformed into annexes to a statement, which are unique.
13. The Prosecution should be denied to add UGA-OTP-0129-0419 and UGA-OTP-0167-0118-R01 to its list of evidence as it did not explain the criteria required pursuant to Regulation 35(2) of the RoC.

b) The Prosecution is not prejudiced by the exclusion of the two annexes

14. The Prosecution argues that the inclusion of the two (2) annexes do not prejudice the Defence.¹⁰ The Defence argues the opposite towards the Prosecution; the exclusion of the two (2) annexes does not prejudice the Prosecution.
15. The Prosecution admits that the alleged radio transmissions are on the Prosecution's list of evidence.¹¹ The transcripts from those alleged radio transmissions are potentially admissible into evidence.
16. Nothing stops the Prosecution from recreating these two (2) annexes by having Witness P-0016 listen to the proposed audio files during his live testimony and

⁹ The Defence can imagine possibilities where the chain-of-custody would not have been different. For example, if the entire document was loaded in Trim in 2006, but not in Ringtail. That does not answer the question about the materials being sealed in evidence bags.

¹⁰ Prosecution Request, paras 7-8.

¹¹ Prosecution Request, fns 5 and 9. The audio file for UGA-OTP-0167-0118-R01 is item UGA-OTP-0025-0625, which is item 616 on the Prosecution's list of evidence. The audio file for UGA-OTP-0129-0419 is item UGA-OTP-0054-0046, which is item 1041 on the Prosecution's list of evidence.

marking a new set of transcripts. This is the perfect remedy for the issue in the Prosecution Request.

17. Additionally, one (1) of the annexes, UGA-OTP-0167-0118-R01, has nothing to do with any of the crimes charged.¹² It deals with allegations not found in the Decision on the Confirmation of Charges.
18. The Defence respectfully requests the Chamber to deny the addition of the two (2) annexes on the grounds that the Prosecution suffers no prejudice from the exclusion of the documents since Witness P-0016 is a live witness and can recreate the documents during his testimony from materials already listed on the Prosecution's list of evidence.

IV. RELIEF

19. The Defence requests the Chamber to deny the Prosecution Request on the grounds that:
 - a. The Prosecution does not fulfil the requirements of a deadline extension pursuant to Regulation 35(2) of the RoC and
 - b. The Prosecution is not prejudiced by the exclusion of the annexes because it can be recreated from materials already on the Prosecution's list of evidence.

¹² See Prosecution Request, para. 6.

Respectfully submitted,



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Hon. Krispus Ayena Odongo
On behalf of Dominic Ongwen

Dated this 9th day of November, 2016

At Kampala, Uganda