

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

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

Date: 28 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 “Prosecution’s Request to Add Witness Transcripts and  
Seven Additional Documents to its List of Evidence”**

**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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James Stewart, Deputy Prosecutor  
Benjamin Gumpert, QC

**Counsel for the Defence**

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**Unrepresented Victims**

**Unrepresented Applicants  
(Participation/Reparation)**

**The Office of Public Counsel for Victims**

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**Amicus Curiae**

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**REGISTRY**

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**Victims and Witnesses Unit**

**Detention Section**

**Victims Participation and Reparations Other  
Section**

## I. INTRODUCTION

1. The Defence for Dominic Ongwen ('Defence') hereby responds to the "Prosecution's Request to Add Witness Transcripts and Seven Additional Documents to its List of Evidence" ('Prosecution Request').<sup>1</sup>

## II. BACKGROUND

2. On 16 November 2016, the Prosecution formally disclosed to the Defence the seven (7) items listed in ICC-02/04-01/15-604-Conf-AnxB.<sup>2</sup> The Defence was not given advance notice about a possible request for inclusion on the Prosecution's list of evidence.
3. On 17 November 2016, the Prosecution called the Defence to inform it of recently discovered transcripts from an interview in December 2015 with Witness P-0142.<sup>3</sup> The Prosecution apologised for the oversight and stated that it would disclose the transcripts immediately.<sup>4</sup>
4. Later that evening, the Prosecution emailed the draft transcripts to the Defence of the abovementioned interview.<sup>5</sup> The Defence notes that the transcripts, from the text on the transcripts, are drafts, but that the interpreter's and witness's spoken words are transcribed in the transcripts.<sup>6</sup>
5. On 22 November 2016 after the close of business, the Prosecution formally disclosed the transcripts of P-0142's interview to the Defence.<sup>7</sup> The transcripts were loaded into Mr Ongwen's computer during the morning of 25 November

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<sup>1</sup> ICC-02/04-01/15-604 and Confidential Annexes A and B.

<sup>2</sup> Disclosure email received by the Defence from the Prosecution on 16 November 2016 at 10h53 CET.

<sup>3</sup> Phone call from Prosecution to Defence on 17 November 2016 at 16h58 CET and phone call from Defence to Prosecution on 17 November 2016 at 18h01 CET.

<sup>4</sup> *Ibid.*

<sup>5</sup> Emails received by the Defence from the Prosecution on 17 November 2016 at 18h25 and 18h29 CET.

<sup>6</sup> Whilst the Defence will be reviewing these documents in the coming weeks, the Defence cannot state whether or not parts of the transcripts need to be translated for Mr Ongwen. The Defence writes this because it cannot be sure at this time whether there were any direct discussions in English only with the witness.

<sup>7</sup> Disclosure email received by the Defence from the Prosecution on 22 November 2016 at 17h45 CET.

2016, even though he cannot view the files because of a computer malfunction on Mr Ongwen's computer at the ICC-DC and improper configuration of the computer in the Defence office caused by ICT.<sup>8</sup>

### III. SUBMISSIONS

#### *a) General Observations on the Items in the Prosecution Request*

6. The Defence notes that this is not the first request by the Prosecution to add items to its list of evidence since the Chamber's 6 September 2016 deadline. The Defence has serious concerns that this tardiness, that this lack of preparedness, shall continue throughout the trial.<sup>9</sup>
7. The Defence respectfully requests that this Chamber take a cautious approach. The Prosecution has spent over ten (10) years investigating this situation, and all of the documents within the Prosecution Request could have been notified to the Defence before the 6 September 2016 deadline set by this Chamber. The Defence shares the concern of the Chamber and hopes that this is the last isolated incident of late disclosure of items which could have been placed on the Prosecution's list of evidence by the 6 September 2016 deadline. Should this happen again, the Defence will not be as kind as it is in this response.
8. The Defence, as it is publicly funded by the ICC Legal Aid Policy, does not have large resources to carry out long-term investigation. The Defence currently has one approved investigator and one approved resource person.

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<sup>8</sup> Mr Ongwen has complained to the ICC-DC several times over the past few weeks that his computer was not working. This issue was to be taken care of during the week beginning 14 November 2016, but ICT did not have enough time to analyse the problem because of the ASP annual meeting. It was noticed this week that the Defence's office computer was off, even though it was used the previous week. The Defence assumes that the computer shut down due to an automatic update, forcing a shut down. As told to the Defence by ICT on 25 November 2016, Mr Ongwen's computer "broke" and needed to be replaced. ICT also stated that when the Defence moved offices at the beginning of August 2016, ICT did not configure Mr Ongwen's computer properly, meaning that he only had access to files uploaded before the change of offices. The Defence has verbally requested a report from ICT, and will make a written request the date this document is filed.

<sup>9</sup> See ICC-01/04-02/06-1646-AnxA, pgs 2-3. The Office of the Prosecutor has updated its list of evidence in the *Prosecutor vs Bosco Ntaganda* 25 times since it submitted its first list of evidence on 2 March 2015.

The funds for their salaries are not permanent. Eventually, the Defence shall be required to send members of its legal team to conduct investigations during trial. Late disclosure such as this is by definition prejudicial to the Defence.

*b) Submissions on the seven (7) items in Confidential Annex B*

9. The Defence notes that five (5) of the documents came into the possession of the Prosecution before the Prosecution filed its list of evidence.<sup>10</sup> The other two (2) documents, which are publicly available, are twelve (12) and seven (7) years old.<sup>11</sup>
10. Whilst this late disclosure is prejudicial to the Defence, the small amount of pages the Prosecution wishes to add, 13 pages, is minimal. The Defence has already reviewed said disclosure, even though it shall request the re-disclosure of UGA-OTP-0273-0056 in proper format.<sup>12</sup>
11. The Defence fails to see how five (5) of these documents are truly relevant. These are not original birth certificates; these are duplicates.<sup>13</sup> There is no documentation stating that these are certified copies of originals. All which is required to obtain these certificates is someone attesting to a birth. Regardless, the Defence understands that these are issues to be dealt with during cross-examination.

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<sup>10</sup> UGA-OTP-0272-0931, UGA-OTP-0272-0939, UGA-OTP-0272-0947 and UGA-OTP-0272-0951 were received by the Prosecution on 18 August 2016. UGA-OTP-0272-1018 was received by the Prosecution on 23 August 2016.

<sup>11</sup> UGA-OTP-0273-0041 has an estimated main date of 1 December 2004. UGA-OTP-0273-0056 has a main date of 16 December 2009.

<sup>12</sup> UGA-OTP-0273-0056 is a document found on a webpage. The Prosecution shrunk the entire webpage to fit on a single A4 piece of paper. When printed, this document is not readable, and is only readable on Ringtail when it is enhanced several times. The Defence maintains that this is not in the format required in the disclosure protocol.

<sup>13</sup> By originals, the Defence means that they are not certificates issued contemporaneously with birth.

12. The Defence does not object to the addition of the seven (7) documents in Confidential Annex B as the prejudice encountered by the Defence is minimal owing to the size of the request and the nature of the documents.

*c) Submissions on P-0142's transcripts from his third Prosecution interview*

13. The Prosecution seeks to introduce six (6) transcripts of its third interview of Witness P-0142. These six (6) transcripts total 178 pages and contain the spoken words of the interpreter and witness. The Prosecution states this witness shall testify about Lukodi and Abok.<sup>14</sup> These are two (2) of the four (4) crime-base locations.
14. Considering this witness is currently scheduled as the eleventh witness for the Prosecution, the Defence would request that these transcripts not be included in the Prosecution's list of evidence had it not been for the information in the following paragraph.
15. The Defence conducted an interview with this witness in March 2016 in the presence of the Prosecution. The Prosecution predicts that he will testify in the second round of witnesses after the presentation of evidence begins.<sup>15</sup>
16. Owing to Mr Ongwen's current issues with his computer at the ICC-DC, the Defence requests that the Chamber order that this witness not be allowed to testify until 1 March 2017.<sup>16</sup>
17. The Defence does not object to the addition of these six (6) transcripts to the Prosecution's list of evidence so long that Witness P-0142 does not testify before 1 March 2017. Since the Defence has conducted a short interview with the witness, the prejudice encountered by the Defence is low.

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<sup>14</sup> Prosecution Request, para. 8.

<sup>15</sup> Prosecution Request, para. 10. The Defence notes that it was told by the Prosecution that this witness would more than likely testify in early June 2017, not in the second batch of witnesses.

<sup>16</sup> See footnote 8 above.

#### IV. RELIEF

18. The Defence does not object to the introduction of these documents as the prejudice is minimal due to the reasons listed above.
19. Furthermore, the Defence respectfully requests the Chamber to caution the Prosecution for its lack of due diligence.

Respectfully submitted,



.....  
Hon. Krispus Ayena Odongo  
On behalf of Dominic Ongwen

Dated this 28<sup>th</sup> day of November, 2016

At Kampala, Uganda