

**Cour
Pénale
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**International
Criminal
Court**

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

Date: **6 July 2017**

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 “Prosecution’s Request to Add Two Items to its List of Evidence” (ICC-02/04-01/15-899-Conf)’, filed on 3 July 2017

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 the "Prosecution's Request to Add Two Items to its List of Evidence"¹ ('Application'). Though the Defence does not object to the transcripts being used by the interpreters during testimony, the Defence objects to the Prosecution request because the Prosecution has not explained the purpose for the addition clearly. The transcripts should not be used or submitted as evidence, and the lack of diligence in providing these items to the Defence until this stage is prejudicial to the Defence.
2. The Defence also reiterates one of its standing objections to Trial Chamber IX ('Chamber') that a Party or Participant should be disallowed from submitting into evidence transcripts and translations of non-ICC interview audio files which were not disclosed before the 6 September 2016 deadline set by the Court.²

II. CONFIDENTIALITY

3. Pursuant to Regulation 23 *bis*(2), the Defence submits this response as confidential. A public redacted version shall be filed in due course.

III. BACKGROUND

4. On 6 September 2016³ and 30 November 2016,⁴ the Prosecution list UGA-OTP-0182-0032 ('Audio File') as number 1885 on its list of evidence.
5. On 21 June 2017, the Prosecution submitted the Application in which it requested the addition of UGA-OTP-0277-0834 and UGA-OTP-0277-0824 ('Audio Transcripts') to its list of evidence.⁵

¹ ICC-02/04-01/15-899-Conf.

² The Defence notes the Chamber's previous ruling in ICC-02/04-01/15-497, para. 30.

³ ICC-02/04-01/15-532-Conf-AnxA.

⁴ ICC-02/04-01/15-613-Conf-AnxB.

⁵ Application, paras 1 and 15.

IV. SUBMISSIONS

The standard outlined by the Chamber

6. In Decision 619, the Chamber determined that to add materials to the Prosecution's list of evidence, the Chamber shall determine whether:

reliance on the part of the Prosecution on items of evidence additional to those included in the original list of evidence causes an undue prejudice to the procedural rights of the Defence. Relevant factors for the Chamber's determination in this regard include, inter alia, the extent to which the requested addition is opposed by the Defence, the time when the addition is sought, the nature and amount of the material concerned, the intended purpose for the Prosecution's requested reliance on such material as well as its prospective significance in light of the charges brought against the accused and the rest of the available evidence.⁶

Purpose

7. The Prosecution's request fails to explain clearly the purpose for which the items are being added to the List of Evidence as set out as criteria by the Trial Chamber⁷ in its own filing.⁸ The Prosecution indicates that "The audio recording may be played to P-0054 in the course of his direct examination, and he may be able to comment on its content, which will assist the Chamber in its truth-finding function"⁹ yet an explanation regarding the *audio* does not explain the purpose for adding the *transcripts*. The use of transcripts to assist interpretation is part of the conduct of proceedings directions¹⁰ and is generally uncontroversial. It is unclear why the Prosecution would not indicate this if it were its purpose for the request.

The Audio Transcripts lack Probative Value

8. The lack of an indication of purpose in the Prosecution request leaves the Defence to speculate as to its purpose. Given the absence of a clear purpose and argumentation, the Defence reserves its right to object to any future submission request; however, one element of a future argument is relevant to the present response.

⁶ ICC-02/04-01/15-619, para. 10.

⁷ ICC-02/04-01/15-619, para. 10.

⁸ Application, para. 9.

⁹ Application, para. 10.

¹⁰ ICC-02/04-01/15-497, para. 23.

9. The Defence rejects the Prosecution's argument that the Audio Transcripts have probative value.¹¹ The material that are potentially probative are the Audio File and the comments made by the witness during his testimony. The witnesses interpretation of what he said at the time, whether he still stands by it, and how cogently he explains the ambiguities if any are what is probative.
10. The Prosecution stated that it may play the Audio File for the witness during his testimony.¹² If the Audio File is played during his testimony, the Prosecution is free to question the witness about the entire content. His testimony before the Chamber, not what is written in the Audio Transcripts, is what the Chamber should rely upon for the purposes of the trial.

Prejudice to the Defence

11. The Defence recognises that the Audio File was disclosed by the Prosecution in November 2015¹³ and that the Audio Transcripts are short in length. Yet, the prejudice arises because of the tardiness in which the Prosecution disclosed the Audio Transcripts. The Audio File has been in the possession of the Prosecution since May 2006,¹⁴ or more to the point: *over a decade*. The Prosecution is only now – weeks before testimony – disclosing and requesting the usage of these items. With the limited resources available to the Defence, verification of the transcription and translation of the Audio places an additional burden upon the Defence which may later delay proceedings if errors are subsequently identified.
12. Additionally, the witness was interview by the Prosecution in [REDACTED] 2006,¹⁵ [REDACTED] 2015,¹⁶ [REDACTED] 2015¹⁷ and [REDACTED] 2016.¹⁸ No fewer than five (5) Prosecution personnel met with and questioned this witness.¹⁹ The Defence

¹¹ Application, para. 10.

¹² *Ibid.*

¹³ Application, para. 11.

¹⁴ See chain of custody field in eCourt.

¹⁵ See UGA-OTP-0221-1715-R01, UGA-OTP-0221-1722-R01, UGA-OTP-0221-1757-R01 and UGA-OTP-0221-1795-R01.

¹⁶ See UGA-OTP-0245-0017-R01, UGA-OTP-0245-0027-R01, UGA-OTP-0251-0048-R01, UGA-OTP-0251-0070-R01, UGA-OTP-0251-0101-R01 and UGA-OTP-0251-0128-R01.

¹⁷ See UGA-OTP-0271-2056-R01, UGA-OTP-0271-2061-R01, UGA-OTP-0271-2074-R01, UGA-OTP-0271-2090-R01, UGA-OTP-0271-2118-R01, UGA-OTP-0271-2143-R01 and UGA-OTP-0271-2149-R01.

¹⁸ See UGA-OTP-0271-2261-R01, UGA-OTP-0271-2295-R01 and UGA-OTP-0271-2298-R01.

¹⁹ The Prosecution personnel that interviewed this witness are: 1) In [REDACTED] 2005, [REDACTED] and a REDACTED person, 2) in [REDACTED] 2015, a REDACTED person and [REDACTED], 3) in [REDACTED]

respectfully submits that the Prosecution must have known or could have, with any amount of diligence, anticipated that it would use this witness for trial. This witness was one of the many referenced in the Prosecution's list of evidence for the Confirmation of Charges Hearing ²⁰ and the witness was on the first provisional list of witnesses submitted in the case on 7 June 2016.²¹

13. The timing of the disclosure of the Audio Transcripts of the Audio File is severely late when all things are considered.

V. RELIEF

14. The Defence respectfully requests the Chamber to deny the addition of the Audio Transcripts to the Prosecution's list of evidence.

Respectfully submitted,



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Hon. Krispus Ayena Odongo
On behalf of Dominic Ongwen

Dated this 6th day of July, 2017

At Kampala, Uganda

2015, [REDACTED] and [REDACTED] and 4) in [REDACTED] 2016, [REDACTED] and [REDACTED]. The Defence notes that is in not counting the REDACTED persons as any one of the five (5) Prosecution personnel.

²⁰ ICC-02/04-01/15-375-Conf-AnxD, pp. 7-8.

²¹ See ICC-02/04-01/15-458-AnxA, p. 2, row 24.