

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: **3 August 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 14
Items to its List of Evidence”, filed on 3 August 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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**Unrepresented
(Participation/Reparation)**

Applicants

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REGISTRY

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**Victims Participation and Reparations Other
Section**

I. INTRODUCTION

1. The Defence for Dominic Ongwen ('Defence') hereby responds to the Prosecution's Request to Add 14 Items to its List of Evidence ('Request').¹ The Defence:
 - a. Does not object to the addition of UGA-OTP-0278-0468 to the Prosecution's List of Evidence ('LoE');
 - b. Objects to the addition of UGA-OTP-0278-0376, UGA-OTP-0278-0385 and UGA-OTP-0278-0427 ('P-0250 Transcripts') to the Prosecution's LoE; and
 - c. Objects to the addition of UGA-OTP-0277-0849, UGA-OTP-0277-0866, UGA-OTP-0277-0899, UGA-OTP-0277-0933, UGA-OTP-0277-0960, UGA-OTP-0277-0991, UGA-OTP-0277-1020, UGA-OTP-0277-1041, UGA-OTP-0277-1060 and UGA-OTP-0277-1091 ('P-0372 Transcripts') to the Prosecution's LoE.

II. CONFIDENTIALITY

2. Pursuant to Regulation 23 *bis*(2) of the Regulations of the Court, the Defence files this response and annex as confidential. A public redacted version is filed contemporaneously.

III. BACKGROUND

3. From [REDACTED] 2015, the Prosecution interviewed P-0250.² The Prosecution disclosed the draft transcripts of the interview of P-0250 to the Defence on 13 November 2015.³
4. On 8 December 2015, the Prosecution received UGA-OTP-0278-0468 in unredacted form from the Registry.⁴

¹ ICC-02/04-01/15-927-Conf.

² See UGA-OTP-0243-1311, UGA-OTP-0243-1328, UGA-OTP-0243-1353, UGA-OTP-0243-1376, UGA-OTP-0243-1383, UGA-OTP-0243-1400, UGA-OTP-0243-1414, UGA-OTP-0243-1432, UGA-OTP-0243-1438, UGA-OTP-0243-1446, UGA-OTP-0243-1464, UGA-OTP-0243-1484 and UGA-OTP-0243-1509.

³ See *ibid.*

⁴ See ICC-02/04-01/15-365-CONF-Anx522 and ICC-02/04-01/15-384, para. 3.

5. On 24 December 2015, Pre-Trial Chamber II ordered, amongst other victim applications, that ICC-02/04-01/15-365-Anx522 be released to the Defence in an unredacted form.⁵
6. From [REDACTED] 2016, the Prosecution interviewed P-0372.⁶
7. On or about [REDACTED] 2016, the Prosecution met with P-0250.⁷
8. On 6 September 2016, the Prosecution submitted its list of witnesses.⁸
9. On 6 September 2016, the Prosecution disclosed UGA-OTP-0270-0122, which is an English only summary of the interview conducted by the Prosecution with P-0372 from [REDACTED] 2016.
10. On [REDACTED] 2017,⁹ the Prosecution re-interviewed P-0250 “in order to make clarifications on the discrepancy between his Victim’s application form and Statement provided to the OTP.”¹⁰
11. On 17 July 2017, the Prosecution disclosed Acholi/English versions P-0250 Transcripts.¹¹
12. On 24 July 2017, the Prosecution disclosed Acholi/English versions of P-0372 Transcripts.¹²
13. On 24 July 2017, the Prosecution submitted its Request.

IV. SUBMISSIONS

A. Standard for Leave to Add Items to the LoE for the Prosecution

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

⁵ ICC-02/04-01/15-384, p. 23.

⁶ UGA-OTP-0270-0122, p. 0122.

⁷ See metadata UGA-OTP-0272-0981, UGA-OTP-0272-0982 and UGA-OTP-0272-0983.

⁸ ICC-02/04-01/15-532-Conf-AnxB.

⁹ See UGA-OTP-0278-0014, UGA-OTP-0278-0376, UGA-OTP-0278-0385 and UGA-OTP-0278-0427.

¹⁰ UGA-OTP-0278-0014, p. 0014.

¹¹ See metadata of P-0250 Transcripts.

¹² See metadata of P-0372 Transcripts.

*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.*¹³

B. UGA-OTP-0278-0468

15. The Defence does not object to the addition of UGA-OTP-0278-0468 to the Prosecution's LoE. Regardless of the Request, the Defence will list this item for use during its examination of P-0250. Because of this fact, and that it has been in the hands of the Defence since late 2015, there is no prejudice to the Defence.

C. P-0250 Transcripts

16. The Defence objects to the addition of P-0250 Transcripts to the Prosecution's LoE. The Prosecution failed to use proper due diligence with P-0250.
17. The Registry notified the Prosecution of UGA-OTP-0278-0468 on 8 December 2015.¹⁴ The Prosecution noted the victim application as belonging to P-0250 on 23 December 2015.¹⁵ The Prosecution had both effective and actual knowledge of the victim application in December 2015.¹⁶
18. The Prosecution met with P-0250 in [REDACTED] 2016. It appears to have been for the purpose of collecting his [REDACTED].¹⁷
19. It took the Prosecution almost [REDACTED] months from effective knowledge of the victim application, and just over [REDACTED] months from actual knowledge of the victim application, to speak to P-0250 about the inconsistencies between the victim application and his interview with the Prosecution. The Prosecution met with P-0250

¹³ ICC-02/04-01/15-619, para. 10.

¹⁴ See ICC-02/04-01/15-365-CONF-Anx522 and ICC-02/04-01/15-384, para. 3.

¹⁵ ICC-02/04-01/15-379, para. 18.

¹⁶ The Defence notes that the metadata for UGA-OTP-0278-0468 is incorrect and should be changed to reflect the proper information.

¹⁷ See UGA-OTP-0272-0981, UGA-OTP-0272-0982 and UGA-OTP-0272-0983.

approximately [REDACTED] months after reviewing the victim application. The interview should have taken place then.

20. The issues which the Prosecution attempts to rectify relate to the witness's credibility and memory recall. These are simplistic issues which the Prosecution can easily discuss with the witness as he is testifying before the Court. P-0250 Transcripts serve no functional purpose.
21. The Defence respectfully requests the Chamber to reject the Request as it relates to the P-250 Transcripts.

D. P-0372 Transcripts

22. The Defence objects to the addition of P-0372 Transcripts to the Prosecution's LoE. The Prosecution should be disallowed from using P-0372 Transcripts.
23. The Defence understands that the Acholi portions of transcripts and translations are allowed to be disclosed to the Defence when the transcripts or translations are finished, but no later than three (3) months before the witness is expected to testify. This is the case for P-0372 Transcripts as the witness is not expected to testify until 2018.¹⁸
24. What is not the case is that the draft transcripts, *i.e.* English only transcripts were not disclosed to the Defence by 6 September 2016, or at a time earlier than the completed Acholi/English transcripts.
25. The ten (10) transcripts disclosed by the Prosecution on 24 July 2017 represents 84.1% of all the pages of disclosure for this witness. Even with the two (2) Prosecution summaries, the Defence must still review all material related to this witness and place it in proper context with other witnesses.
26. The Defence has been deprived of using information from this witness in its examinations up-to-date. It has not been able to test the information from the witness against the recollection of other witnesses, thus testing the witness's credibility and/or memory.

¹⁸ Request, para. 4.

27. The Prosecution has failed to conduct its affairs with this witness with proper due diligence, and has placed the Defence at a disadvantage in its examinations of previous witnesses. Because of this extended delay, the Prosecution should be disbarred from adding P-0372 Transcripts to its LoE.

V. RELIEF

28. The Defence respectfully asks the Chamber to:
- a. Allow the addition of UGA-OTP-0278-0648 to the Prosecution's LoE and
 - b. Disallow the additions of P-0250 Transcripts and P-0372 Transcripts to the Prosecution's LoE.

Respectfully submitted,



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Hon. Krispus Ayena Odongo
On behalf of Dominic Ongwen

Dated this 3rd day of August, 2017
At Kampala, Uganda