

**Cour
Pénale
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**International
Criminal
Court**

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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
with Confidential Annex A**

Prosecution's Request to Add an Updated Forensic Report to its List of Evidence

Source: The Office of the Prosecutor

Document to be notified in accordance with regulation 31 of the Regulations of the Court to:

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Introduction

1. The Prosecution seeks leave from the Chamber to add to its List of Evidence (“LoE”) a Forensic Report from the Netherlands Forensics Institute (“NFI”),¹ which is a recently-identified revised version of an NFI report² that is already included in the LoE.

2. In February 2016, the Office of the Prosecutor (“OTP”) requested the NFI to carry out DNA extraction and analysis of buccal swabs of bodily tissues from women who are alleged to be forced wives of Dominic Ongwen and the children they allegedly bore him, in order to determine whether these children are related to the Accused. Whilst the initial Forensic Report dated 1 March 2016 was disclosed as incriminatory material on 9 March 2016,³ an updated version, dated 17 March 2016,⁴ which was transmitted to the OTP a few weeks later, was inadvertently overlooked and was not disclosed. This updated version includes the same information as in the original report but also adds new information on the NFI’s analysis of the maternal links to the children, which supplements the previously-included information on the NFI’s analysis of paternal links. The Updated Report has now been disclosed to the Defence which has indicated that it will respond to the request in writing, on or before 11 August 2017.

3. The Prosecution now seeks leave to add the Updated Report to its LoE. The report (UGA-OTP-0278-0529) is attached as Annex A to this filing.

¹ Annex A, 17 March 2016 Forensic Report, UGA-OTP-0278-0529.

² UGA-OTP-0258-0357.

³ Pre-Trial Incrim Package 18.

⁴ “The Updated Report”.

Confidentiality

4. Annex A to this request is classified as “Confidential” pursuant to regulation 23bis of the Regulations of the Court as it contains evidentiary information which has been disclosed as “Confidential”.

Relevant Law

5. The Chamber has previously indicated that it will consider requests for late insertion of relevant materials into the Prosecution’s LoE on a case-by-case basis.⁵ In assessing a request to add items to the LoE, the Chamber must 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.”⁶ Relevant factors for the Chamber’s consideration 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.”⁷

Submissions

6. On 1 February 2016, the OTP wrote to the NFI requesting that it carry out DNA extraction and analysis of buccal tissue swabs from six women and nine children to determine whether the children were related to the Accused. The buccal swabs of Dominic Ongwen were provided to the NFI on 24 September 2015 and those of the women and children were provided on 1 February 2016. The OTP requested the “extraction, analysis and comparison” of the buccal swabs obtained from Dominic Ongwen and those of the women and children.

⁵ ICC-02/04-01/15-619, paras. 8, 10.

⁶ ICC-02/04-01/15-619, para. 10.

⁷ *Id.*

7. The NFI provided a Forensic Report detailing the information and instruction, the methodology used and the results of the DNA kinship analysis. The results confirmed that using a prior probability of 50%, the probability of paternity is greater than 99.99% that Dominic Ongwen is the father of four of the children whose buccal swabs were analysed, but is not the father of another one of them.
8. Following this result, the OTP asked whether the NFI had analysed the buccal swabs of the mothers of these children to determine the DNA kinship of the mothers to the children. In response to this inquiry, the NFI produced a revised version of the 1 March 2016 Forensic Report that included information confirming the DNA kinship of the mothers and their children.⁸ The Updated Report was transmitted by email on 17 March 2016 to the OTP. However, due to an oversight, the Updated Report was overlooked for disclosure and addition to the Prosecution's LoE. After learning of this oversight five days ago, the OTP immediately informed the Defence, disclosed the Updated Report, and now seeks to add it to its LoE.
9. The Updated Report is relevant as it provides the DNA kinship results for four out of eleven children of the Accused currently known to the Prosecution. Furthermore, it provides the kinship of the children to their mothers who have already testified before the Court on the sexual and gender based crimes with which the Accused is charged.
10. Although there has been a significant delay between the receipt of the Updated Report and its disclosure to the Defence, the Prosecution submits that the Defence will not be prejudiced by the timing of the disclosure, since the expert is not scheduled to testify until the end of October 2017. This provides the Defence with

⁸ UGA-OTP-0278-0529.

sufficient time and opportunity to prepare for the examination and indeed provides greater insight into the evidence that the expert is expected to present in his oral testimony. Furthermore, the information in the report is not new to the Defence. The information in the 1 March 2016 Forensic Report is repeated in the Updated Report that is the subject of this application. The only additional information are the DNA results confirming the kinship of the mothers to the children – a fact the Defence has been aware of since the beginning of the article 56 proceedings in the case.

11. Thus, as regards the nature and amount of the material concerned, this comprises one report of nine pages, the majority of which is duplicative of the original report, with only limited new information that is itself corroborative of evidence already on record. Furthermore, upon disclosure of the Updated Report, the Defence had initially orally informed the Prosecution that it did not object to its inclusion in the LoE, but when pressed for a firm decision have indicated that they will respond in writing on or before 11 August 2017.⁹
12. The Prosecution notes that the disclosure of the 1 March 2016 Forensic Report to the Defence on 9 March 2016, and the notification in the summary of the witness statement filed before the Chamber on 9 August 2016 with updated versions on 6 September 2016, provides notice by the Prosecution of the availability of the Forensic Report (albeit in the original form) and its intention to use the report in the examination of the witness. Adding the Updated Report to the LoE will complete the record of the evidence of the witness.

⁹ Via email dated Friday 4 August 2017 at 06:18.

Relief Requested

13. The Prosecution requests leave from the Chamber to add the Updated Report attached as Annex A (UGA-OTP-0278-0529) to the Prosecution's LOE.



Fatou Bensouda, Prosecutor

Dated this 4th day of August 2017
At The Hague, The Netherlands