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No.: **ICC-02/04-01/15**
Date: **11 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 Seventh Request for Late Disclosure to be added to its List of Evidence", filed on 11 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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I. INTRODUCTION

1. The Defence for Dominic Ongwen ('Defence') hereby responds to "Prosecution's Request to Add an Updated Forensic Report to its List of Evidence" ('Application').[1] The Defence objects to the addition of the Updated Forensic Report ('Updated Report') to the Prosecution List of Evidence because the Prosecution has failed to give a proper explanation for the late disclosure beyond the 6 September 2016 deadline.

2. Additionally, the Defence requests Trial Chamber IX ('Chamber') to order: (1) a conditional stay of the proceedings currently scheduled to start on 11 September and continue to 6 October 2017, (2) the Prosecution to conduct a comprehensive review of its case-file, and (3) the Prosecution to file a certification attesting that no other materials in its possession ought to be disclosed. These remedies are requested to avoid further prejudice to the Defence in the ongoing proceedings.

3. Finally, the Defence requests the Chamber to reprimand the Prosecution for repeated violations of its obligations to properly evaluate its case and disclose all relevant information to the Defence to avoid prejudicing Mr Ongwen's fair trial rights.

II. BACKGROUND

4. On 18 May 2016, the Prosecution committed to meet its disclosure obligations for trial by 5 September 2016, and undertook to notify the Chamber in case circumstances arose to imperil this commitment.[2]

5. On 30 May 2016, the Chamber in its Decision Setting the Commencement Date of the Trial, set 6 September 2016 as the deadline for the Prosecution disclosure of materials in its possession. The Chamber stated that by that deadline, the Prosecution "*<u>must have reviewed all the materials in its possession</u> and disclosed all the materials falling under its disclosure obligations*."[3]

[1] ICC-02/04-01/15-933.
[2] ICC-02/04-01/15-438, para. 7.
[3] ICC-02/04-01/15-449, para. 7. (emphasis added)

6. On 6 September 2016, the Prosecution filed its submission of the list of evidence, the list of witnesses and summaries of anticipated testimony.[4]

7. On 24 October 2016, the Prosecution sought leave to add 405 items to its list of evidence. It acknowledged that only 19 of those items were new and that the other 386 items had been omitted from the 6 September submission.[5]

8. On 4 November 2016, the Prosecution sought leave to add two (2) items to its list of evidence.[6]

9. On 23 November 2016, the Prosecution sought leave to add seven (7) items and six transcripts relating to P-142.[7]

10. On 7 February 2017, the Prosecution sought leave to add two (2) items to its list of evidence.[8]

11. On 21 June 2017, the Prosecution sought leave to add two (2) items to its list of evidence.[9]

12. On 24 July 2017, the Prosecution sought leave to add 14 items to its list of evidence.[10]

13. On or about 1 August 2017, the Prosecution and Defence conducted an *inter partes* meeting about the Updated Report. Unlike as the Prosecution wrote,[11] the Defence's potential agreement was based solely on a mistake in Decision 497. The Defence representative stated that he thought the Defence could not object because he thought Decision 497 allowed for the late submission of expert reports if it was within 30 days of the expert testifying, and that he would check on that fact when he returned to his office. The Defence representative was wrong, and the Prosecution was informed of this mistake on 3 August 2017 *via* a telephone conversation. The Prosecution's explanation in paragraph 11, whether intentional or unintentional, mis-states the truth and is misleading to the Chamber.

[4] ICC-02/04-01/15-532.
[5] ICC-02/04-01/15-577.
[6] ICC-02/04-01/15-585.
[7] ICC-02/04-01/15-604.
[8] ICC-02/04-01/15-699.
[9] ICC-02/04-01/15-899.
[10] ICC-02/04-01/15-927.
[11] Application, para. 11.

14. On 4 August 2017, the Prosecution filed the Application seeking to add one (1) item to its list of evidence.

III. CONFIDENTIALITY

15. Pursuant to Regulation 23 *bis*(1) of the Regulations of the Court, the Defence submits this response and annex as confidential as it refers to the names of protected witnesses. The Defence shall file a public redacted version in due course.

IV. SUBMISSIONS

16. The present filing addresses both (a) the present Prosecution Application and (b) the ongoing pattern of disclosure following the 6 September cut-off set by the Chamber. The Defence's position is that the Updated Report should not be added to the list of evidence or submitted due to the prejudice it will cause to Mr Ongwen's fair trial rights. More generally, the Defence's position is that the pattern of Prosecution evidence disclosure following the 6 September 2016 deadline is already prejudicial and has become a slow motion fair-trial violation.

A. The Prosecution request should be denied

1. The Prosecution has failed to exercise due diligence in carrying out its disclosure obligations enshrined in Article 67(2) of the Statute, Rule 77 of the Rules of Procedure and Evidence, and in direct contravention of the Chamber's Order

17. Pursuant to Article 67(2), exculpatory material must be disclosed "as soon as practicable". As was emphasised at the Pre-Trial phase in this case,[12] timely disclosure – which includes material relevant to the preparation of the Defence under Rule 77 – is closely tied to the right of the Accused to have "adequate time for the preparation of his or her defence" pursuant to Article 67(1)(b).

18. Incriminatory evidence should also be disclosed as soon as practical. Pursuant to Article 67(1)(a), the Accused has a right "[t]o be informed promptly and in detail of the nature, cause and content of the charge". If incriminatory evidence appears at random intervals during a trial, then the Defence misses opportunities to raise issues

[12] ICC-02/04-01/15-203, paras 17-18.

and seek clarification with witnesses who have testified and is deprived of the full available time to investigate whichever issues the incriminatory material relates. Though the most egregious omissions might be remedied through the recall of witnesses, the more subtle and spontaneous missed opportunities to pursue connections between evidence in preparation, ask follow-up questions, and so on cannot be remedied easily as time cannot be re-wound, and so fairness suffers.

19. Given that both preparation and notice are protected fair-trial rights, the timely disclosure of Rule 77 evidence, it is submitted, "must be understood as being the earliest opportunity after the evidence comes into the Prosecutor's possession."[13]

20. A cursory glance at the procedural history outlined above shows that the Prosecution has so far requested to add approximately 451 items to its list of evidence. The first request was only six (6) weeks after the deadline of 6 September 2016. In its filing, the Prosecution conceded that of the 405 items sought to be admitted only 19 items had been collected and disclosed after the submission of the original list of evidence, while the rest were omitted from the original list. In addition, the Prosecution also acknowledged that it had inadvertently omitted to add P-0001 on their list of witnesses and sought leave to add the witness.[14]

21. The Prosecution has also exhibited an almost casual approach towards its investigation and disclosure obligations regarding sexual and gender based crime charges against Mr Ongwen. This is not withstanding the fact that this section of the charges accounts for 11 counts of the total charges against Mr Ongwen. During the Confirmation of Charges Hearing, the matter of the NFI Report was raised and the Prosecution admitted that pursuing that report was not a priority. This led to criticism from Pre-Trial Chamber II.[15]

22. Just a few days later, according to the current Application, the Prosecution wrote to NFI to follow up on the extraction, analysis and comparison of the DNA samples.[16] It was soon after the receipt of the original report that the Prosecution asked if NFI had

[13] ICC-02/04-01/15-203, para. 18.
[14] ICC-02/04-01/15-577.
[15] ICC-02/04-01/15-T-23-CONF-ENG ET, p. 58, lns 12-23.
[16] ICC-02/04-01/15-933, para. 6.

conducted an analysis on the samples from the mothers.[17] NFI provided a revised report because of this request and delivered it to the Prosecution on 17 March 2016.[18] In light of the previous Pre-Trial Chamber II rebuke, it would be expected that the prudent approach would have been to immediately transmit a courtesy copy to the Defence pending official disclosure.

2. Granting the Prosecution request will lead to prejudice to Mr Ongwen

23. The Prosecution submits that the addition of the Updated Report shall cause no prejudice to Mr Ongwen. The prosecution avers that information in this report is not new to the Defence and that the "*only additional information of the DNA results confirming the kinship of the mothers to the children – a <u>fact</u> the Defence has been aware of since the beginning of the Article 56 proceedings in this case*."[19] The Defence disagrees with the Prosecution's conclusory assessment of what is a fact – or rather an allegation – until proven otherwise. At paragraph 10 of the filing, the Prosecution acknowledges that the updated report provides greater insight into the evidence that the expert is expected to present. Moreover, if indeed the kinship of all the children to their mothers in the Updated Report was a fact, there would be no need for the Updated Report.

24. The Prosecution now seeks to add the Updated Report that allegedly links the children to their mothers who are the alleged victims of the crimes charged against Mr Ongwen. This is not a mere update on what was already known to the Defence. It is an effort by the Prosecution to tie together the loose ends of its case. To do so at the present stage of proceedings is highly prejudicial, especially now that P-0414's testimony draws near.

25. The Defence further notes that the Prosecution's assertion that the 9 March 2016 disclosure of the original report and the summary of witness statement filed on 9 August 2016 provides adequate notice of its intention to use the report in the witness examination is misplaced. In its Pre-Trial Brief, the Prosecution categorically

[17] ICC-02/04-01/15-933, para. 8.
[18] *See metadata*, UGA-OTP-0278-0529.
[19] ICC-02/04-01/15-933, para. 10. (Emphasis added)

mentions the reports of 1 March 2016, 6 June 2016 and 6 July 2016.[20] If the Prosecution would have mentioned the Updated Report, the Defence would have noticed it.[21] There is no mention of the Updated Report. Allowing the Updated Report prejudices Mr Ongwen since the Defence now must allocate the already stretched resources to address this new information and be prepared to competently proceed by the time of the witness's projected date of testimony.

26. This new information creates an extra burden on the Defence to adequately prepare for the testimony of the witness. This cannot be mitigated by the projected testimony date being set for end of October 2017. This alleged highly incriminating information is the kind that should have been in the possession of the Defence before the commencement of the trial.

3. *The late disclosure of the updated report is part of a pattern of prejudicial conduct vis-á-vis the sexual and gender charges and a broader trend of failure to investigate exonerating circumstances as required by Article 54(1)(a)*

27. It is not lost on the Defence that it was not until after the receipt of the original report that the Prosecution withdrew P-0198 as the results did not support her story. This serves as a good reminder that what the Prosecution believed to be an airtight case against Mr Ongwen has many holes. The trauma and prejudice of the false accusations of P-0198 could have been avoided had the Prosecution diligently sought the report at an earlier time. Perhaps this does not amount to bad faith *per se*, but the Defence submits that it is indicative of a deficient review process within the Office of the Prosecutor. An order from this Chamber requiring the Prosecution to certify that it has conducted a comprehensive review of its case file is therefore warranted and necessary.

28. Further, the Defence notes that the Prosecution Application does not give an accounting of why this mistake has occurred. The Prosecution has failed to explain to the Chamber for its previous applications either. It is not enough for the Prosecution to assert that the proposed addition has probative value or that the Defence shall not be prejudiced by the addition. This undermines the notion of deadlines in litigation and

[20] ICC-02/04-01/15-533, para. 604.
[21] *See* Confidential Annex A, p. 3. The Defence emailed the Prosecution on 23 September 2016 inquiring about, amongst other issues, ERNs within the Pre-Trial Brief which were not on the Prosecution's List of Evidence.

waters-down protection of the principle of an Accused having notice of the case against them.

29. The Defence urges the Chamber not to consider the Prosecution Application and its circumstances in isolation. A common thread runs through the manner in which the Prosecution has conducted investigations and accompanying disclosures.

30. Following is a sample list of examples:

a. The Prosecution has neglected to pursue investigations of exculpatory evidence as required under Article 54(1)(a). As the text of Article 54(1)(a) makes clear, the obligation to establish the truth includes investigation of exonerating circumstances. This obligation, it is submitted, includes an obligation of timeliness as well. If exculpatory evidence must be disclosed "as soon as practicable", it would be incoherent if the obligation to investigate known potentially exculpatory circumstances could be discharged at any time throughout the trial process. The Defence highlighted this during the Confirmation of Charges Hearing.[22] On 6 January 2016, the Defence interviewed [REDACTED]. He was disclosed as a witness for the Defence on 6 January 2016. On 9 August 2016, the Defence filed a notification of an alibi defence regarding the Pajule attack and listed [REDACTED] as one of the potential witnesses to support this defence.[23] It was only after this filing that the Prosecution transmitted the interview transcripts via email on 19 August 2016, despite the fact that they had interviewed him in [REDACTED] and should have become aware of the exculpatory nature of his testimony.[24] At that time the Prosecution made no effort to explain what efforts it had made between [REDACTED] and August 2016 to get these materials to the Defence to assist in the preparation of its case although it was well aware of the importance of the witness at a much earlier time, especially in light of the

[22] ICC-02/04-01/15-T-23-CONF-ENG ET, p. 25, ln. 15 to p. 26, ln. 5.
[23] ICC-01/04-01/06-519.
[24] Email from the Prosecution to the Defence on 19 August 2016 at 09h29 CET, titled "[REDACTED]".

Defence submissions during the Confirmation of Charges Hearing on the lack of exculpatory evidence disclosed by the Prosecution.[25]

b. Another example of the Prosecution's failure to investigate evidence tending to show Mr Ongwen's innocence or to mitigate his guilt is apparent in the fact that the Prosecution did not initially investigate the likelihood of duress, notwithstanding the fact that it does not dispute the fact that he was also abducted as a child and indoctrinated by the LRA.[26] As a matter of fact, the Defence points out that it was not until the after Confirmation of Charges Hearing that the Prosecution started to interview witnesses to counter the duress argument, but not the likelihood of its presence. For example, in the upcoming witness block of September 2017, P-0355 was not interviewed until [REDACTED], *i.e.* after the Confirmation of Charges Hearing. The Prosecution clearly indicates in its summary of evidence relating to the witness that the bulk of his testimony is only to counter whether Mr Ongwen was acting under duress or not.[27] This is against the jurisprudence of this court where the Appeals Chamber has emphasised that it is desirable, and indeed ideal, that the Prosecution should largely have completed the core of its investigations **before the Confirmation of Charges**.[28]

c. Under Article 67(2), exculpatory material includes evidence that may affect the credibility of the prosecution evidence. The Prosecution failed to investigate one "[REDACTED]" mentioned in [REDACTED]. [REDACTED] alleges that the said "[REDACTED]" heard P-0009 (Rwot Oywak) on the phone with Vincent Otti inviting him to come and attack Pajule IDP Camp.[29] The Defence has conducted a global search of the items disclosed and has found nothing apparent to indicate that the Prosecution followed up on this information, notwithstanding the vast amount of information pointing to Rwot

[25] The Defence notes that it received a telephone call from the Prosecution on 19 August 2016 at 09h12 CET stating that the witness's transcripts were overlooked as the Prosecution classified his interview as not being a priority. Telephone call from Paul Bradfield to Thomas Obhof.
[26] ICC-02/04-01/15-T-20-ENG WT2, p.18, ln. 25 to p.19, ln 6.
[27] ICC-02/04-01/15-532-Conf-AnxC, pp 289-293.
[28] ICC-01/04-01/06-568, para. 54. *See also* ICC-01/04-01/10-514, para 44.
[29] UGA-OTP-0070-0029, para. 44.

Oywak's general complicity with the LRA and his particular role regarding the Pajule attack.

d. In its 23 November 2016 request to add transcripts for P-0142, the Prosecution again claimed an omission to disclose the transcripts relating to its 3 December 2015 interview of the witness.[30] In that filing, again the Prosecution did not explain the basis of its mistake and instead dwelt on the probative value of the evidence as well as the alleged non-prejudice to Mr Ongwen. This is notwithstanding the fact that the witness gave further clarifications not on general matters, but on the Odek and Lukodi attacks.

e. Lastly, but by no means least, the Defence recalls its filing, following a deadlock in *inter partes* communication, requesting the Chamber to order the Prosecution to disclose materials deemed exculpatory under Article 67(2) or relevant to the preparation of the Defence pursuant to Rule 77.[31] Having been presented the basis for the disclosure, it was only in response to that filing, and seemingly the pending scrutiny of the Chamber, that the Prosecution accepted that the request was material, did not contest the arguments in the slightest,[32] and assigned senior lawyers to conduct a supplementary review of undisclosed items in the prosecution's possession. From that review, the Prosecution found 15 previously undisclosed items.[33]

31. The Defence requests the Chamber to follow in the footsteps of Trial Chamber I in *Gbagbo and Blé Goudé*. On 13 May 2016, Trial Chamber I prohibited the Office of the Prosecutor from adding any further incriminatory evidence, stating "[t]he Chamber has the obligation to ensure the fairness of the proceedings and especially the Defence's rights under article 67(1) of the Statute to have adequate time to prepare its defence and to be tried without undue delay."[34] This is the seventh request to add late disclosure to the Prosecution's list of evidence. The Defence maintains that this must

[30] ICC-02/04-01/15-604, para. 3.
[31] ICC-02/04-01/15-759.
[32] ICC-02/04-01/15-792.
[33] ICC-02/04-01/15-792.
[34] ICC-02/11-01/15-524, para. 21. The Defence notes that a very limited exception remained in para. 22 of this decision.

stop. The Chamber should disallow the addition of the Updated Report, and any further material, to the Prosecution's list of evidence.

B. The relief sought is appropriate for the violations

32. Even if one would like to give the Prosecution the benefit of doubt as to several earlier inadvertences, the trend has continued unabated up to now. The Defence avers that this conduct cannot be explained as a mere oversight, but rather a clear and systematic failure that points to a fundamental deficiency in the manner in which the evidence so far has been reviewed. This tardiness and lack of preparedness throughout the trial is a documented worry of the Defence.[35] It is becoming more apparent that the Prosecution was not prepared to begin trial. Postponing the trial for the month of September will afford the Prosecution the much needed time to conduct a thorough review of its case file, make the necessary disclosures and certify to the Chamber that the trial is ready to continue. A motion for leave to add items to the list of evidence should be only for exceptional circumstances.

33. The Chamber has been gracious with the Prosecution on several occasions in this regard. However, it appears obvious that the Prosecution has taken this to mean that it can circumvent the Chamber's order to have its list of evidence filed on time. The arguments of the Prosecution on probative value alone should not be a cover to shield it from the office's duty to the Court to be prepared and follow judicial orders.

34. The Defence recalls the Single Judge's remarks that the deadline for filing the list of evidence was with the view of facilitating preparation of the Defence. The Single Judge was cognisant of the fluidity of trial which may make other items relevant as the trial progresses, or errors, which would hopefully be isolated and limited, in so far as they are made in good faith in the absence of indications of an abuse on the part of the Prosecution.[36]

35. The Defence submits that a suspension or conditional stay of the proceedings is within the authority of the Chamber in accordance with internationally recognised human

[35] ICC-02/04-01/15-608, para. 6.
[36] ICC-02/04-01/15-619, para. 8.

rights norms. This was applied by Trial Chamber I in *Lubanga* case and upheld by the Appeals Chamber in the same case where the Appeals Chamber held that a conditional stay of proceedings is an available and appropriate remedy in circumstances where a fair trial is not presently possible, but may become so at a later stage of proceedings due to a change of circumstances.[37] Trial Chamber V in the *Kenyatta* case also applied a stay of the commencement of the trial in order to give the defence a proper opportunity to prepare for trial. In addition, Trial Chamber V reprimanded the Prosecution for its conduct and ordered it to conduct a complete review of its case file and certify before the Chamber that it had done so in order to ensure that no other materials in its possession that ought to have been disclosed to the defence were left undisclosed.[38]

36. In the numerous times the Prosecution has sought to add new items on the list of evidence, it is not demonstrated that this has been necessitated by the dynamics of the trial. In addition, the Defence believes that the error has now changed from being in good faith to negligence on the part of the Prosecution. As such, the relief sought by the Defence is warranted.

V. RELIEF

37. In light of the above submissions, the Defence respectively requests the Chamber to:

a. Deny the Prosecution request for leave to add the Updated Report;

b. Suspend the scheduled September proceedings;

c. Order the Prosecution to conduct a comprehensive review of its case file;

d. Order the Prosecution to file a certification before the Chamber that all disclosable material has been given to the Defence; and

e. Reprimand the Prosecution for its gross violations of its investigations and disclosure obligations.

[37] ICC-01/04-01/06-1486, para. 80.
[38] ICC-01/09-02/11-728, para. 97.

Respectfully submitted,

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Hon. Krispus Ayena Odongo

On behalf of Dominic Ongwen

Dated this 11th day of August, 2017

At Kampala, Uganda