

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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Date: 22 August 2017

TRIAL CHAMBER IX

Before: Judge Bertram Schmitt, Single Judge

SITUATION IN UGANDA

IN THE CASE OF *THE PROSECUTOR v. DOMINIC ONGWEN*

Public

**Decision on Prosecution's Request to Add Updated Forensic Report to its List
of Evidence**

To be notified, in accordance with Regulation 31 of the *Regulations of the Court*, to:

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Counsel Support Section

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Detention Section

**Victims Participation and Reparations
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Others

Judge Bertram Schmitt, acting as Single Judge on behalf of Trial Chamber IX ('Single Judge' and 'Chamber', respectively) of the International Criminal Court ('Court') in the case of *The Prosecutor v. Dominic Ongwen*, having regard to Articles 64(2) and 67 of the Rome Statute ('Statute'), issues the following 'Decision on Prosecution Request to Add Updated Forensic Report to its List of Evidence'.

A. Procedural History

1. On 30 May 2016, the Chamber issued a decision setting 6 September 2016 as the deadline ('6 September Deadline') for the Office of the Prosecutor ('Prosecution') to submit, *inter alia*, its final list of evidence and disclose all incriminating evidence.¹ The Prosecution duly submitted its list of evidence ('List of Evidence') on the indicated day.²
2. On 4 August 2017, the Prosecution filed a request to add an updated forensic report (Updated Report) to the List of Evidence ('Request').³
3. On 11 August 2017, the defence for Mr Ongwen ('Defence') submitted its response to the Request ('Response'), requesting that it be dismissed and asking for a series of additional remedies.⁴
4. On 15 August, the Prosecution sent an email, requesting leave to reply to the Response.⁵ The Defence responded that this request should be rejected.⁶

¹ Decision Setting the Commencement Date of the Trial, ICC-02/04-01/15-449.

² Prosecution's submission of the list of evidence, the list of witnesses and summaries of anticipated testimony, 6 September 2016, ICC-02/04-01/15-532, with three confidential annexes, A to C.

³ Prosecution's Request to Add an Updated Forensic Report to its List of Evidence, ICC-02/04-01/15-933 with confidential annex A, containing the Updated Report, ICC-02/04-01/15-933-Conf-AnxA.

⁴ Defence Response to the Prosecution's Seventh Request for Late Disclosure to be added to its List of Evidence, ICC-02/04-01/15-941-Conf with confidential annex A. A public redacted version was filed on the same day, ICC-02/04-01/15-941-Red.

⁵ Email by the Prosecution to Trial Chamber IX Communications, on 15 August 2017, at 17:13.

⁶ Email by the Defence to Trial Chamber IX Communications, on 16 August 2017, at 17:54.

B. Submissions of the parties

5. The Prosecution explains that the Updated Report is the revised version of a forensic report from the Netherlands Forensics Institute ('NFI'). In February 2016, the Prosecution requested the NFI to provide a comparison of DNA kinship analysis of Dominic Ongwen and a number of children. The NFI provided a report confirming that Mr Ongwen is with a probability of greater than 99.99% the father of four of the children ('Original Report'). The Original Report was disclosed to the Defence in March 2016.⁷ The Prosecution requested the NFI then to compare the sample provided by the mothers of the children, in order to confirm their DNA kinship with the children, which led to the Updated Report.⁸
6. The Updated Report was transmitted to the Prosecution on 17 March 2016. However, due to an oversight, the Prosecution forgot to include it on its List of Evidence and disclosed it to the Defence only end of July 2017.⁹ The Prosecution now requests that the Updated Report be included in its List of Evidence. It argues that the Defence will not be prejudiced by the addition since witness P-414, the author called to testify as an expert witness about the Updated Report, is not scheduled to testify until the end of October 2017.¹⁰ Further, it submits that the information in the Updated Report is only new to the Defence in the respect of the information regarding the kinship of the mothers.¹¹ Finally, it asserts that the fact that the Original Report was disclosed to the Defence and mentioned in the summary of the anticipated testimony of P-414 showed the intent of the Prosecution to use it in the proceedings.¹²

⁷ Request, ICC-02/04-01/15-933, paras 2 and 7.

⁸ Request, ICC-02/04-01/15-933, para. 8.

⁹ Request, ICC-02/04-01/15-933, para. 8.

¹⁰ Request, ICC-02/04-01/15-933, para. 10.

¹¹ Request, ICC-02/04-01/15-933, para. 11.

¹² Request, ICC-02/04-01/15-933, para. 12.

7. The Defence submits that the Request should be denied, since the Prosecution failed to carry out its disclosure obligations by not immediately disclosing the Updated Report.¹³ Further, it argues that granting the Request will prejudice the Defence due to the information contained in the Updated Report and the fact that the Defence was not aware that the Prosecution intended to use the Updated Report.¹⁴ The Defence submits that the extra burden that an addition of the Updated Report to the List of Evidence would create, in combination with the incriminating character of the information contained in the Updated Report, impedes its belated addition.¹⁵

8. Furthermore, the Defence submits that ‘the late disclosure of the [U]pdated [R]eport is part of a pattern of prejudicial conduct *vis-à-vis* the sexual and gender charges and a broader trend of failure to investigate exonerating circumstances’¹⁶ and provides a series of examples it considers to be failures by the Prosecution to investigate exonerating circumstances.¹⁷ The Defence submits that there is ‘a clear and systematic failure that points to a fundamental deficiency in the manner in which the evidence so far has been reviewed.’¹⁸ Accordingly, it requests that the Chamber: (i) suspend the scheduled September proceedings; (ii) order the Prosecution to conduct a comprehensive review of its case file; (iii) order the Prosecution to file a certification before the Chamber that all disclosable material has been given to the Defence; and (iv) reprimand the Prosecution for its gross violations of its investigations and disclosure obligations.¹⁹

¹³ Response, ICC-02/04-01/15-941-Red, paras 17-22.

¹⁴ Response, ICC-02/04-01/15-941-Red, paras 23-25.

¹⁵ Response, ICC-02/04-01/15-941-Red, para. 26.

¹⁶ Response, ICC-02/04-01/15-941-Red, page 8.

¹⁷ Response, ICC-02/04-01/15-941-Red, para. 30.

¹⁸ Response, ICC-02/04-01/15-941-Red, para. 32.

¹⁹ Response, ICC-02/04-01/15-941-Red, para. 37 b-e.

C. Analysis

9. Firstly, the Single Judge considers that no reply is necessary in order to rule on the Request and the additional relief sought by the Defence.
10. The Single Judge recalls the previous decisions, clarifying that the belated addition of items is not a decision under Regulation 35 of the Regulations of the Court.²⁰ Rather, the Single Judge will determine on a case-by-case basis if the addition is prejudicial to the Defence. Relevant factors for this determination are, *inter alia*, the nature and amount of the material to be added, the degree to which the Defence opposes the request, the timing of the request.²¹
11. From the Response, it is clear that the Defence is highly opposed to the addition. However, the Chamber agrees with the Prosecution's assertion that the added material is mostly a duplicative of the Original Report, since the only additional information pertains to the kinship of the mothers. The additional pages in the Updated Report are very similar in kind to those in the Original Report – the 'update' is merely a further sample analysis to confirm the mothers of the children analysed in the Original Report. As such, any questions about Mr Ongwen's paternal link to these children or on P-414's expertise and methodology would not be expected to meaningfully change due to the Updated Report.
12. The Single Judge disagrees with the Defence's assertion that the material contained in the Updated Report is so 'highly incriminating'²² that it cannot, under no circumstance, be added to the List of Evidence. He notes that the material in question is of limited scope and that P-414 is expected to comment on

²⁰ Decision on Prosecution Request to Add Items to its List of Evidence, to include a Witness on its List of Witnesses and to Submit Two Prior Recorded Testimonies under Rule 68(2)(b) and (c), 22 November 2016, ICC-02/04-01/15-600, para. 14; Decision on the 'Prosecution's Request to Add Transcripts and Seven Additional Documents to its List of Evidence', ICC-02/04-01/15-619, para. 10.

²¹ See also, ICC-02/04-01/15-619, para. 10.

²² Response, ICC-02/04-01/15-941-Red, para. 26.

the Updated Report. Accordingly, the Defence will be in a position to fully challenge the content of the Updated Report or any issue as to its production by questioning its author. No undue prejudice arises by the addition of the Updated Report.

13. However, in order to fully preserve the rights of the Defence to have adequate time for its preparation, the Single Judge orders the Prosecution and the Defence to liaise in order to determine a date for the testimony of P-414 which allows the Defence to 'address this new information and be prepared to competently proceed'.²³ The Single Judge expects these discussions to occur in good faith and that an amicable resolution can be reached.
14. Accordingly, the Single Judge grants the Request, under the condition set up in paragraph 13.
15. In respect to the additional relief sought by the Defence, the Single Judge does not find that the Request is indicative of a 'systematic failure', as asserted by the Defence. He is cognisant that several requests for addition of material to the List of Evidence have been filed by the Prosecution.²⁴ For parts the Single Judge found that their addition to the List of Evidence were not strictly necessary, but welcomed them for reasons of clarity,²⁵ other items came into the Possession of the Prosecution after the 6 September Deadline.²⁶ The Single Judge stresses that he considers the entirety of past and pending requests by the Prosecution when finding that, while there have been oversights in the disclosure by the Prosecution this is not indicative of a general failure within the Prosecution's

²³ Response, ICC-02/04-01/15-941-Red, para. 25.

²⁴ The Single Judge is also aware that a further request for 14 items, ICC-02/04-01/15-927-Conf, is still pending.

²⁵ Decision on Prosecution Request to Add Two Items to its List of Evidence, ICC-02/04-01/15-906, para. 4.

²⁶ Decision on Prosecution Request to Add Items to its List of Evidence, to include a Witness on its List of Witnesses and to Submit Two Prior Recorded Testimonies under Rule 68(2)(b) and (c), ICC-02/04-01/15-600, para. 9. Decision on the "Prosecution's Request to Add Transcripts and Seven Additional Documents to its List of Evidence", ICC-02/04-01/15-619, paras 18-20.

disclosure system. In fact, after the Prosecution request of 24 October 2016,²⁷ which indeed contained a number of oversights but was exceptional in its nature, was filed shortly after the 6 September Deadline and over two months before the commencement of the presentation of the evidence, the Prosecution has only requested the addition of 10 items due to oversight (including the current Request), the addition of the other items were motivated by other reasons.²⁸ No facts indicate the existence of a systematic failure and structural defect in Prosecution's disclosure obligations which warrant the measures sought by the Defence.

16. Further, the Single Judge fails to see how the failure of timely disclosure of incriminating information, is part of 'a broader trend of failure to investigate exonerating circumstances', as asserted by the Defence.²⁹ The Defence presents no evidence which shows that the Prosecution deliberately neglects its duties under Article 54(1)(a) of the Rome Statute. For instance, the fact alone that the Prosecution may not have investigated all aspects of a strategy pursued by the Defence (the likelihood of duress of the accused) is in and of itself no proof that it violated its duties to investigate exonerating circumstances. This is particularly the case given that the Prosecution was only formally notified of the possibility of raising such a defence in August 2016. Accordingly, the Single Judge rejects the additional relief sought by the Defence.

²⁷ Prosecution's Request to Add items to its List of Evidence and to include P-0001 to its List of Witnesses, ICC-02/04-01/15-577.

²⁸ The request of 4 November 2016, ICC-02/04-01/15-585, contains a request for the addition of two items due to a Prosecution oversight. The request of 23 November 2016, ICC-02/04-01/15-604, contains a request for the addition of six items due to a Prosecution oversight, the addition of the other seven items was sought because the Prosecution came only in their possession after the 6 September Deadline. The request of 7 February 2017, ICC-02/04-01/15-699, was motivated by the testimony of witness P-15 and not because of an oversight. As mentioned above, the request of 21 June 2017 was welcomed by the Chamber but not necessary. In the last request of 24 July 2017, ICC-02/04-01/15-927, still pending, 9 out of the 13 items in question came only in the possession of the Prosecution after the 6 September Deadline, which leaves one item whose addition is motivated due to an oversight of the witness.

²⁹ Response, ICC-02/04-01/15-941-Red, page 8.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

REJECTS the Prosecution's request for leave to reply to the Response;

GRANTS the Request under the condition set out in paragraph 1313 above;

REJECTS the additional relief sought in the Response; and

DIRECTS the Prosecution to file an updated List of Evidence.

Done in both English and French, the English version being authoritative.

A handwritten signature in black ink, appearing to read 'Schmitt', is written over a horizontal line.

Judge Bertram Schmitt, Presiding Judge

Dated 22 August 2017

At The Hague, The Netherlands