

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Date: **18 December 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

Defence Request for Leave to Reply to Prosecution's Response to "Defence Observations on Fair Trial and Request for Order on Prosecution Resources"

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)**

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I. INTRODUCTION

1. Pursuant to Regulations 24(5) and 34(c) of the Regulations of the Court ('RoC'), the Defence for Dominic Ongwen ('Defence') respectfully requests leave to reply to the 'Prosecution's response to "Defence Observations on Fair Trial and Request for Orders on Prosecution Resources and Additional Defence Resources", ICC-02/04-01/15-1098' ('Prosecution Response').¹
2. Based on Regulation 24(5) of the RoC, the Trial Chamber has the discretion to determine the scope of a reply, if leave is granted. It includes the criterion of 'new issues' raised in the response which the replying participant could not reasonably have anticipated.
3. Here, the Defence avers that the Prosecution's mischaracterizations and misrepresentations constitute 'new issues' which could not have been anticipated when the 'Defence Observations on Fair Trial and Request for Order on Prosecution Resources' ('Defence Observations')² was submitted, since the Defence could not know how, and to what, the Prosecution would respond.
4. Therefore, judicial resolution of the issues raised in the Defence Observations requires that the arguments are accurately characterized and represented.

II. SUBMISSIONS

A. The heart of the Prosecution's mischaracterizations and misrepresentations is based on its disregard for, and/or lack of understanding of the fair trial right of notice

5. In its Observations, the Defence articulates the fair trial violation of notice, based on the confirmation of 70 charges and 7 modes of liability.³ The Defence makes no assertion here about cumulative charging.
6. Yet, the Prosecution, mischaracterizing and misrepresenting the Defence arguments, submits that, based on the Confirmation of Charges decision, the Defence arguments about cumulative

¹ ICC-02/04-01/15-1110.

² ICC-02/04-01/15-1098.

³ Defence Observations, paras 30-37.

charging are *res judicata*, and that the Defence attempts to re-litigate this issue.⁴ Notably, the Prosecution fails to support its position with any reference to the Defence Observations.

7. Hence, the Prosecution's arguments are misleading.
8. The Prosecution's Response also perpetuates the vagueness and lack of specificity of the charges in its conclusions about its investigations.⁵ In particular, it concludes that "63 of the 70 charged offences are new, and were investigated in 2015-2016."⁶
9. The Defence notes that several of the Prosecution's witnesses in the *Ongwen* case were interviewed by its investigators in the period from 2004 to 2006. For example, P-0003 was interviewed three times in 2004 and 2005; P-0045 was interviewed twice in 2004; P-0081 was interviewed in 2005; P-0138 was interviewed twice in 2006; P-0142 was first interviewed in 2006; and P-0145 was interviewed in 2006.
10. All of these interviews support that the Prosecution investigations took place in Uganda – at least for the witnesses above – between 2004 and 2006.
11. Hence, there is no way to determine if the Prosecution's representations that 63 out of 70 charges were investigated in 2015-2016 are, in fact, accurate or misleading. There are no details provided by the Prosecution. The Prosecution fails to indicate which of the 63 charges are new, and which remaining 7 charges are old. Again, the Defence is left in a position to guess. In order to defend Mr Ongwen, more specificity and detail in this matter would assist the Defence in conducting investigations of all the charges and modes of liability confirmed.
12. Furthermore, the Prosecution indicates that the initiation of the investigation into the Situation in Uganda, in 2004, resulted in five arrest warrants.⁷ Yet, the Prosecution fails to identify what evidence in Mr Ongwen's case was investigated prior to 2015-2016.
13. Since there were five arrest warrants arising out of the same Situation, it is only logical to ask: What evidence at the time pertained to Mr Ongwen, and what evidence pertained to each of the other four other persons; and whether there was any common evidence obtained since 2004

⁴ Prosecution Response, para. 9.

⁵ Prosecution Response, para. 8.

⁶ Prosecution Response, para. 8.

⁷ Prosecution Response, para. 8.

which applied to all five persons.⁸ Moreover, the Prosecution's use of terms, such as "for the most part" is vague and does not provide proper notice, leaving open what transpired for the rest of the time.⁹

14. Lastly, the Prosecution's argument regarding the fact that "most staff members working on the five-suspect case had left the Court long before Mr Ongwen's transfer to the Court, when new staff members were re-assigned from other cases"¹⁰ is irrelevant. The Prosecution is a single entity, regardless of who works in at, and at what period of time.¹¹

B. The Prosecution is playing 'fast and loose' by misrepresenting some of the jurisprudence to which it refers

15. The Prosecution's first argument concludes that the principle of equality of arms refers to procedural equality between parties. According to the Prosecution, this argument is based on a holding from the *Kupreškić et al.* case that the principle of equality of arms refers to a procedural equality.¹²
16. The Prosecution, however, has inaccurately represented the *Kupreškić et al.* case jurisprudence.¹³ At issue - in the *Kupreškić* Decision - were an accused's rights in respect to examination of witnesses. The Appeals Chamber's holding regarding procedural equality applies specifically to the examination of witnesses.¹⁴ It is not a general holding, as the Prosecution implies,¹⁵ in regard to all the sections of Article 21 of the ICTY Statute.
17. Similarly, the Prosecution footnotes the *Nahimana* Appeals Judgement, in its Response,¹⁶ to support that "[principle of equality of arms] does not require material equality in terms of financial and human resources".¹⁷ But, the Prosecution neglects to include the next sentences of

⁸ See ICC-02/04-01/15-57: (The original arrest warrant for Mr Ongwen, dated 8 July 2005, lists only 7 counts.).

⁹ Prosecution Response, para. 8.

¹⁰ Prosecution Response, para. 8.

¹¹ See Prosecutor v. *Bagosora et al.*, ICTR-98-41-T, *Certification of Appeal Concerning Access to Protected Defence Witness Information*, 29 July 2005, para. 5: ("The Prosecution employees act under the authority of the Prosecutor, as part of a single entity".)

¹² Prosecution Response, para. 3.

¹³ Prosecutor v. *Kupreškić et al.*, IT-95-16-AR73.3., *Decision on appeal by Dragan Papic against ruling to proceed by deposition*, 15 July 1999 ('*Kupreškić* Decision').

¹⁴ *Kupreškić* Decision, para. 24: "[...] 'examine or have examined the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him' (Article 21(4)(e)). This provision serves to ensure that the accused is placed in a position of procedural equality in respect of obtaining the attendance of witnesses with that of the Prosecution [...]."

¹⁵ Prosecution Response, para. 3.

¹⁶ Prosecution Response, para. 3, footnote 2.

¹⁷ Prosecution Response, para. 3.

the same paragraph of the *Nahimana* Appeals Judgement, holding that adequate time and facilities cannot be assessed in the abstract, but depend on the circumstances of the case.¹⁸

III. REMEDY SOUGHT

18. For the reasons stated above, the Defence requests the Trial Chamber to grant its leave to reply to the Prosecution's Response.

Respectfully submitted,



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Hon. Krispus Ayena Odongo
On behalf of Dominic Ongwen

Dated this 18th day of December, 2017
At Gulu, Uganda

¹⁸ Prosecutor v. *Nahimana et al.*, ICTR-99-52-A, *Judgement*, 28 November 2007, para. 220.