

**Cour
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**International
Criminal
Court**

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

Date: **9 March 2018**

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 Response to Prosecution's Ninth Request to Add Materials Provided to its List
of Evidence**

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 Material Provided to its Mental Health Experts to its List of Evidence" ('The Request').¹ The Defence objects to the request because the late addition of the materials to the list of evidence, without an explanation as to the tardiness of The Request, would cause prejudice to Mr Ongwen.
2. Considering the number of previous Prosecution's requests and the Trial Chamber IX's ('The Chamber') decisions on the addition of witnesses and materials to the list of evidence, the advanced phase of the Prosecution case, and in particular regard to this issue, the Defence notes that the Prosecution has not acknowledged that The Request is exceptional in nature at this stage of the proceedings.

II. BACKGROUND

3. 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
4. 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 to *inter alia*, provide its final list of witnesses with summaries of anticipated witness testimony and estimated length of testimony.³ Any additional witnesses after the deadline were to be with leave of the Chamber.
5. On 9 August 2016, the Defence filed a notification that it would be relying on grounds under Article 31(1)(a) and committed to make a more formal submission by October 2016.⁴
6. On 6 September 2016, the Prosecution filed its submission of the list of evidence, the list of witnesses, and summaries of anticipated testimony.⁵

¹ ICC-02/04-01/15-1198.

² ICC-02/04-01/15-438, para. 7.

³ ICC-02/04-01/15-449, para. 8.

⁴ ICC-02/04-01/15-518.

⁵ ICC-02/04-01/15-532.

7. On 7 December 2016, the Defence disclosed their experts' report related to Mr Ongwen's mental health.⁶
8. On 21 February 2017, the Chamber ordered the disclosure of certain materials underlying the findings of the Defence Expert Report including Mr Ongwen's medical records from the Detention Centre.⁷ The Defence complied with the Chamber's orders and completed the disclosure obligations in May 2017.
9. On 13 April 2017, the Prosecution instructed its own experts, providing them with materials allegedly relating to Mr Ongwen's mental health as well as alleged audio and video statements made by Mr Ongwen.⁸
10. On 3 October 2017, the Prosecution disclosed the Prosecution Expert Reports to the Defence.⁹
11. On 24 October 2017, the Prosecution provided a list of the material provided to their experts for consideration and sought leave to add the three expert reports and other newly registered open source related documents to the list of evidence.¹⁰
12. On 16 November 2017, the Chamber granted the Prosecution request to add the requested materials to the list of evidence.¹¹
13. On 25 January 2018, the Prosecution sent an email notification of a supplemental chart that it had provided to its experts.¹²
14. On 2 February 2018, the Chamber ordered the Prosecution to submit any further documentary evidence by 1 March 2018.¹³

III. APPLICABLE LAW

15. The Prosecution must seek leave of the Chamber to add witnesses or materials to the list of evidence.¹⁴ The Chamber must then "determine *in concreto* whether reliance on the part of the

⁶ ERN: UGA-D26-0015-0004; ICC-02/04-01/15-628.

⁷ ICC-02/04-01/15-709.

⁸ The Request, para. 5.

⁹ ICC-02/04-01/15-1014.

¹⁰ ICC-02/04-01/15-1024.

¹¹ ICC-02/04-01/15-1073.

¹² Email titled "Forthcoming expert testimony" of 25 January 2018 at 20:14.

¹³ ICC-02/04-01/15-1162.

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.”¹⁵

IV. SUBMISSIONS

The Request should be denied

16. This Chamber has previously held that the timing of a request must be viewed in its full context.¹⁶ In this instance, The Request comes more than three months after another Prosecution request to add the expert reports and certain related documents was granted by the Chamber. Additionally, following the notification of the order from the Chamber to submit any further evidence by 1 March 2018,¹⁷ the Prosecution did not apply then to add the requested materials onto its list of evidence. The Defence avers that this request is exceptional in nature and should be denied because it has not been substantiated. The Prosecution has neither substantiated its request nor given any explanation for this exceptionally late request.
17. The Prosecution has been in possession of the materials reflected in para. 14(c) and (d) of The Request since May 2017 but they were not part of the 24 October 2017 request. The video of the proceedings of 2 March 2017 reflected in para. 14(e) was disclosed to the Defence on 28 July 2017, way before the 24 October 2017 request. Whereas the Prosecution may be entitled to present evidence disproving any affirmative defences raised by the Defence, this should still be done within the parameters of notice and fair trial protections. In this instance, the Prosecution was not diligent in adding the materials. The Defence acknowledges that the materials do not have new information *per se* but aver that to add them to the list of evidence at this time will cause prejudice to the Defence for it will have to revise the ongoing preparation for its cross examination of the expert witnesses.
18. The Prosecution argues that the Defence was “on notice of the relevance of these items to the Prosecution’s case.”¹⁸ It is the Defence’s submission that (a) it is not up to the Defence to determine what is relevant to the Prosecution case; and (b), even if this were true, the Defence cannot be expected to anticipate the Prosecution strategy for each individual witness. The

¹⁴ ICC-02/04-01/15-449, para. 8; ICC-02/04-01/15-600, para. 14.

¹⁵ ICC-02/04-01/15-619, para. 10.

¹⁶ ICC-02/04-01/15-1073, para. 11.

¹⁷ ICC-02/04-01/15-1162.

¹⁸ ICC-02/04-01/15-1198, para. 12.

purpose of the list of evidence is to give the opposing party notice of the evidence that will be relied upon in order to allow them adequate time to prepare. The notice in this case is not for relevance of the materials but for the intent to rely on the materials to enable the preparation of cross examination. The Request comes less than two weeks before the evidence block when all the experts are scheduled to testify. Given the limited resources available to the Defence, this late request impinges on Mr Ongwen's procedural rights because it impedes the Defence ability to adequately prepare and finalise questions for cross examination.

19. The chart of courtroom testimony under para. 14(a) of The Request should not be added to the list of evidence because it is not evidence. This is only an aid that the Prosecution is free to use as it pleases during the examination of the witnesses. The Defence submits that whereas indeed this will help to streamline the testimony of the expert witnesses, this chart is work product whose contents are duplicative because the contents are extracts of testimony already on record. The Prosecution has previously used similar aids in the examination of witnesses¹⁹ to assist the parties, participants and the Chamber to follow without such being admitted into evidence and the same treatment should be given to this chart.
20. Regarding the documentary film referenced in para. 14(b) of The Request, the Defence acknowledges that indeed some members of the team had a limited opportunity to watch it within a 48-hour period granted by the makers. However, the Defence did not review it within the context of this specific and peculiar issue and did not avail the same to its experts for review. Indeed, the Defence did not purchase the film or retain any other rights. The Defence submits that this film should not be added to the list of evidence because it is prejudicial for the following reasons:
 - a. The Prosecution has not indicated when it first watched the film and made a determination of its relevance to its case. The film has not been formally disclosed to the Defence;²⁰
 - b. The film is not available for the Defence and its experts to review in light of the proximity of the anticipated disclosure and the scheduled testimonies; and

¹⁹ See e.g., ICC-02/04-01/15-T-42-CONF-ENG ET, pp.7: (where a list of pseudonyms prepared by the Prosecution was used to limit recourse to private session during the testimony of P-0003. Similar practice has been consistently used during other witness testimonies).

²⁰ The Office of the Prosecutor disclosed a courtesy copy to the Defence on the afternoon of 8 March 2018 and formal disclosure would follow on 9 March 2018.

c. The film is edited and may not reflect the true nature and context. In addition, it was filmed for reasons not known to the parties and participants and there is no opportunity to cross examine the makers on the excerpts used in the film.

21. In conclusion, the film is irrelevant and has no probative value for the issues at hand because of the reasons articulated above.
22. In light of the Prosecution request in para. 14(f), the Defence notes the provisions in the Initial Directions on the Conduct of the Proceedings.²¹ Additionally, the transcript and translation of the audio recording was submitted into evidence at the conclusion of P-0142's testimony as reflected in the email decision dated 17 May 2017 at 10:54 titled "Decision on Submitted Items for P-142". The Defence therefore submits that this part of The Request is redundant and moot.

V. REMEDY SOUGHT

23. In light of the above, the Defence requests the Chamber to reject the Prosecution's request in its entirety because it will prejudice Mr Ongwen's procedural rights enshrined in Articles 67(1)(b) and (e) of the Rome Statute.

Respectfully submitted,



.....
Hon. Krispus Ayena Odongo
On behalf of Dominic Ongwen

Dated this 9th day of March, 2018
At Lagos, Nigeria

²¹ ICC-02/04-01/15-497, para. 30.