

**Cour
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**International
Criminal
Court**

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

Date: **13 June 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

Public Redacted Version of 'Prosecution's Response to the "Defence notification of List of Witnesses and Evidence in compliance with ICC-02/04-01/15-1021 and Request for Leave to Add Witnesses [to] its List of Witnesses and Materials to its List of Evidence" (ICC-02/04-01/15-1272)'

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 acknowledges the efforts which have gone into the “Defence notification of List of Witnesses and Evidence in compliance with ICC-02/04-01/15-1021 and Request for Leave to Add Witnesses [to] its List of Witnesses and Materials to its List of Evidence” (“Defence Notification”)¹ but notes that it does not include all information and material ordered by the Trial Chamber.²

2. Whilst the Defence’s List of Witnesses (“LOW”) includes 72 names, the summary of anticipated testimony has only been provided for 63 individuals. The Trial Chamber should strike from the current LOW five witnesses for whom no summary and no other concrete indication of anticipated testimony has been provided by the Defence to date. For the remaining four witnesses, the Prosecution accepts that whilst no summaries have been submitted, it is in receipt of their statements or reports and thus able to reasonably anticipate their testimony. Accordingly, the Prosecution does not oppose their inclusion into the LOW, but the Defence should nonetheless be instructed to file the requisite summaries.

3. The Trial Chamber should reject the Defence’s requests to add witnesses to its LOW and items to its List of Evidence (“LOE”) as premature. The Defence should provide a list setting out the order in which it proposes to call its witnesses by 27 June 2018.

¹ ICC-02/04-01/15-1272.

² The deficiencies are acknowledged by the Defence. Defence Notification, para. 14.

Confidentiality

4. This document is classified as confidential pursuant to regulation 23*bis* of the Regulations of the Court. The Prosecution files a public redacted version concurrently.

Relevant procedural background

5. On 13 October 2017, the Trial Chamber set out directions for the presentation of evidence by the legal representatives for victims (“LRVs”) and the Defence.³ These Preliminary Directions, *inter alia*, ordered the Defence to, within three weeks of the closing of Prosecution’s presentation of evidence:

- (i) provide the final lists of evidence and witnesses;
- (ii) certify that all necessary witness information forms have been completed and given to the VWU;
- (iii) provide anticipated testimony summaries for all witnesses;
- (iv) complete disclosure of all items it intends to use during its evidence presentation (to the extent not already disclosed); and
- (v) request any protective measures or relief under rule 68 of the Rules.

The deadline was subsequently modified to 31 May 2018.⁴

6. On 13 April 2018, the Prosecution formally closed its presentation of evidence.⁵ On 24 May 2018, the LRVs concluded their presentation of evidence.

7. On 18 April 2018, the Defence applied to the Trial Chamber for extension of the 31 May 2018 deadline, citing delays in the execution of cooperation requests.⁶ The

³ ICC-02/04-01/15-1021.

⁴ ICC-02/04-01/15-1199.

⁵ ICC-02/04-01/15-1225.

Trial Chamber rejected the request on 4 May 2018.⁷ Following an email request from the Defence for a two day extension, the Trial Chamber on 24 May 2018 extended the deadline to 4 June 2018.⁸

8. On 4 June 2018, the Defence filed the Defence Notification, with accompanying annexes A, B and C.⁹ Annex A is the Defence's LOW containing 72 names. Annex B is the Defence's LOE, containing 1095 items. Annex C is a compilation of witness summaries.

9. On 4 June 2018, the Defence also filed the "Application for In-Court Protective Measures, Special Measures and Rule 75 Notice",¹⁰ the "Request Pursuant to Rule 68(2)(c) of the Rules of Procedure and Evidence",¹¹ and the "Request to Introduce previously recorded Testimony pursuant to Rule 68(2)(b) of the Rules of Procedure and Evidence".¹² The latter was supplemented on 8 June 2018.¹³

10. On 5 June 2018, the Trial Chamber decided that the Defence will give its opening statement on 18 September 2018 and start with the presentation of its evidence on 27 September 2018.¹⁴

Submissions

11. The Defence's LOW includes the names of 72 individuals. The Defence has provided the summary of anticipated testimony for 63 witnesses and not for 64

⁶ ICC-02/04-01/15-1232.

⁷ ICC-02/04-01/15-1254.

⁸ Decision of Trial Chamber IX, notified via email, titled 'Re: Defence Request for a Two Day Extension for the 31 May 2018 Deadline' on 24 May 2018 at 09:58 hrs.

⁹ ICC-02/04-01/15-1272.

¹⁰ ICC-02/04-01/15-1273.

¹¹ ICC-02/04-01/15-1270.

¹² ICC-02/04-01/15-1271.

¹³ ICC-02/04-01/15-1277.

¹⁴ ICC-02/04-01/15-1275.

witnesses as claimed in the Defence Notification.¹⁵ No summary has been provided for the following individuals: D-0041, D-0042, D-0060, D-0080,¹⁶ D-0127, D-0133, D-0134, D-0135 and D-0139.

12. The nine witnesses for whom the Defence did not provide summaries of anticipated testimony can be grouped into two categories: (a) witnesses for whom no concrete indication of expected testimony is available to date (D-0060, D-0080, D-0127, D-0133 and D-0139) and (b) witnesses for whom the Parties and participants are in possession of at least some of their previously recorded statements or reports (D-0041, D-0042, D-0134, D-0135).

A. Inclusion of D-0060, D-0080, D-0127, D-0133 and D-0139 in the LOW is premature and should be disregarded, because no concrete indication of anticipated testimony is provided

13. The purpose of the LOW and of the summaries of anticipated testimony is to give the Parties, participants and the Trial Chamber notice about the calling party's presentation of evidence. Listing witnesses in the LOW for whom the calling party is unable to provide concrete indication of expected testimony cannot be considered sufficient. Mere inclusion of a name in the LOW without a summary of expected testimony does not fulfil the purpose that the two documents combined are intended to serve.

14. The Defence is yet to interview D-0080 and provides no information about his expected testimony. For D-0060, D-0127, D-0133 and D-0139, the Defence merely outlines general themes about which these witnesses are purported to give evidence

¹⁵ Defence Notification, para. 9.

¹⁶ The compilation of summaries includes an entry for D-0080, stating that the witness is yet to be interviewed. No summary is provided.

(cosmological space in the LRA,¹⁷ acoustics, phonetics and analysis of evidential recordings,¹⁸ experiences of conscription and use of child soldiers,¹⁹ formation, political and social structure of IDP camps and patterns of mortality²⁰). The Defence does not provide any information about concrete issues and/or testimonial lines. This is not surprising, since the Defence is yet to receive the reports/statements of these witnesses.²¹ With regard to P-0133, the Prosecution also observes that the reference to the witness's 'expert report' in the Defence Notification appears misplaced,²² because the witness is not characterised as an expert witness in the LOW.

15. The absence of sufficient indication of expected testimony for these witnesses means that their inclusion in the LOW is premature and for this reason the Prosecution requests the Trial Chamber to disregard the inclusion of D-0060, D-0080, D-0127, D-0133 and D-0139 in the LOW. The Defence should apply to add these witnesses to the LOW when it is in a position to provide such information.

16. With regard to witnesses affected by cooperation difficulties, the Prosecution notes that it has previously accepted that there may be circumstances in which the Defence should be permitted to add witnesses to the LOW where justified by cooperation difficulties identified in Defence's Extension Request of 18 April 2018.²³ The Prosecution has not altered this position. The Prosecution however emphasises that the appropriate procedural course is to request and discuss addition of such witnesses to the LOW at a time when the Defence is able to provide sufficiently concrete information about their expected testimony.

¹⁷ Defence Notification, paras. 29-31.

¹⁸ Defence Notification, para. 22.

¹⁹ Defence Notification, paras. 32-34.

²⁰ Defence Notification, paras. 27-28.

²¹ See e.g. Defence Notification, paras. 23, 26.

²² Defence Notification, para. 32.

²³ ICC-02/04-01/15-1243, para. 9.

B. The Defence should provide summaries for Witnesses D-0041, D-0042, D-0134, D-0135

17. The Prosecution does not oppose the inclusion of Witnesses D-0041, D-0042, D-0134 and D-0135 in the LOW. Whilst no summaries have been provided by the Defence for these witnesses either, their reports or prior recorded statements are available to the Parties and participants. Consequently, the Prosecution is reasonably able to anticipate the areas of these witnesses' testimony. The Prosecution nonetheless requests that the Defence be ordered to file summaries as soon as possible.

18. Witnesses D-0134 and D-0135 were included in the Prosecution's own LOW until 31 October 2017 as P-0224 and P-0048 respectively. Summaries of their anticipated testimony as Prosecution witnesses were submitted on 6 September 2016.²⁴ The Defence should provide their own summaries of anticipated testimony as Defence witnesses or state that they are adopting the summaries submitted by the Prosecution.

19. D-0041 and D-0042 are [REDACTED].²⁵ The Prosecution considers that this [REDACTED], together with other material already disclosed, sufficiently indicates the witnesses' anticipated testimony. The Prosecution therefore does not oppose D-0041's and D-0042's inclusion in the LOW, despite the missing summary, which should be provided as soon as possible.

20. The Defence states that it has asked [REDACTED].²⁶ Without seeing such a [REDACTED], the Prosecution is not in a position to comment on the appropriateness of [REDACTED] or on the full content of the experts' expected

²⁴ ICC-02/04-01/15-532, Annex C, pp. 39-41 and 169-176.

²⁵ [REDACTED].

²⁶ Defence Notification, para. 19.

testimony. It does however note that the alleged [REDACTED] comes very late in the proceedings, and after the testimony of Prosecution experts who should have been given the opportunity to comment on it. The Prosecution will give its detailed observations if and when the Defence applies to include any such [REDACTED] in the LOE.²⁷

C. The Defence's request for leave to add witnesses to its LOW and materials to its LOE is premature

21. The Defence requests leave from the Trial Chamber to add witnesses and items to its LOW and LOE respectively. Whilst termed 'a request', the Defence's submissions are in effect only notice of intent to file one or more such applications in the future. The 'request' should therefore be rejected *in limine*.

22. In its submissions, the Defence, *inter alia*, informs the Parties and participants about the areas of purported testimony of witnesses whose addition to the LOW it will seek (SGBC expert, military structure expert, direction finding expert).²⁸ The Defence does not identify these individuals by name. Similarly, the items to be added to the LOE are not identified with any precision, but merely described as expert reports (that are yet to be written) and associated materials.

23. The Prosecution cannot respond to vague requests of this kind without knowing the names of witnesses and content of the material that is proposed for inclusion. The Defence should therefore make the appropriate application(s) for additions to the LOW when it is able to provide the names of witnesses and summaries of their anticipated testimony. Similarly, the Defence should make appropriate application(s) to add items to the LOE when it is actually in possession

²⁷ See also ICC-02/04-01/15-1265, paras. 5-8.

²⁸ Defence Notification, paras. 35-44.

of these items and has disclosed them to the Parties and participants. Only then will the Prosecution be able to respond and the Trial Chamber to decide.

D. The Defence should submit a list setting out the order in which it proposes to call its witnesses by 27 June 2018

24. In its Initial Directions on the Conduct of Proceedings, the Trial Chamber instructed all participants “to provide an overall witness order when they file their final list of witnesses.”²⁹ Whilst the Trial Chamber did not set a specific deadline for the Defence to file an LOW organised by order of appearance, the Prosecution submits that the above general instruction also applies to the Defence. With the Defence’s presentation of evidence scheduled to commence on 27 September 2018, the Prosecution invites the Trial Chamber to instruct the Defence to file its first overall witness order no later than 27 June 2018. Although such witness order will naturally be subject to modification, it is nevertheless necessary to allow the Parties, the participants and the Trial Chamber to organise their work.

Conclusion

25. For reasons set out above, the Prosecution requests the Trial Chamber to:

-) strike Witnesses D-0060, D-0080, D-0127, D-0133 and D-0139 from the Defence’s LOW, because the Defence has not provided concrete information about the anticipated testimony of these witnesses;
-) order the Defence to file summaries of anticipated testimony for Witnesses D-0041, D-0042, D-0134 and D-0135;
-) reject *in limine* the Defence’s requests for leave to add witnesses to its LOW and material to its LOE;

²⁹ ICC-02/04-01/15-497, para. 16.

) instruct the Defence to submit, no later than 27 June 2018, an overall witness order.



Fatou Bensouda, Prosecutor

Dated this 13th day of June 2018

At The Hague, The Netherlands