

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Date: **24 September 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***

Confidential

Defence Request for Leave to Reply to ICC-02/04-01/15-1341-Conf

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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**Victims Participation and Reparations
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Other

I. INTRODUCTION

1. On 20 September 2018, the Prosecution responded¹ to a Defence request for disclosure² and remedies in light of untimely disclosure.³ The Defence requests leave to reply to the Prosecution on several matters pursuant to Regulation 24 and 34 of the Regulations of the Court ('RoC').
2. Pursuant to Regulation 24(5) RoC, "a reply must be limited to new issues raised in the response which the replying participant could not reasonably have anticipated". The Prosecution Response contains 3 new issues which the Defence submits merit reply.
3. The Defence points out that with respects to issue B below, the reasons for which leave is sought are effectively included in the leave for reply itself.

II. CONFIDENTIALITY

4. Pursuant to Regulations 23*bis* of the RoC, this request is submitted as confidential as it refers to a filing of the same classification.

III. SUBMISSIONS

A. Substantive legal issues within a response to a procedural filing

5. The request for disclosure was a motion of a procedural nature. In its Response, the Prosecution raises a number of new issues addressing substantive legal matters. The two most notable examples include (a) its submission in footnote 21 where it appears to suggest an interpretation of Article 25(3)(a) at odds with its prior submissions⁴ or alternatively seems to suggest that it has not staked its case against Mr Ongwen on the basis that the LRA was an organisation that could secure automatic compliance through threats and violence;⁵ and (b) its submissions in paragraph 17 concerning the interpretation of duress pursuant to Article 31(1)(d).
6. If Trial Chamber IX ('Trial Chamber') decides to consider these substantive submissions of the Prosecution in delimiting the scope of disclosure and remedies it will order, then the interests of

¹ ICC-02/04-01/15-1341-Conf ('Response').

² The Defence confirms that the errors identified in the Response footnote 30 and 32 were inadvertent.

³ ICC-02/04-01/15-1329-Conf-Corr ('Request').

⁴ See *inter alia* ICC-02/04-01/15-533 ('Pre-Trial Brief'), paras 140(b), footnote 434, 146, and 147.

⁵ Pre-Trial Brief, para. 145.

justice demands that the Defence be given an opportunity to make a reply setting out arguments on these substantive matters as well.

B. In respect to the List of Commanders

7. At paragraph 5, the Prosecution submits that it received the list of commanders⁶ from the Government of Uganda authorities in 2004. The Prosecution further submits that it received the list alongside a 54 page document containing information related to crimes allegedly committed by the LRA including the named commanders.⁷
8. The Defence notes that the Prosecution did not specify in its Response to which 54 page document it was making reference. The Prosecution email annexed to the original Request⁸ identifies UGA-OTP-0032-0038-R01 as received together with the List of Commanders. UGA-OTP-0032-0038-R01 has a reference number that is two pages higher than the List of Commanders⁹ and has 54 pages.
9. At the time of the *inter partes* communication, the Defence accepted the chain of custody information indicated by the Prosecution. The mention of the connected document in the Response without a citation led the Defence to re-review the available information.
10. The Defence is therefore not able to conclude with certainty that the 54 page document the Prosecution is referring to in its Response is UGA-OTP-0032-0038-R01. This is particularly so because the Defence draws to the attention of the Trial Chamber that according to the chain of custody metadata in e-court, the 54 page document was received 11 October 2004 whereas the List of Commanders document was received nearly four months later on 25 January 2005. Often, a document with the lower evidence reference number¹⁰ is registered in the court databases before those with higher reference numbers.¹¹ Also, the header 'SECRET' does not appear on the List of Commanders as it does on UGA-OTP-0032-0038-R01.
11. On this issue the Prosecution Response merits a reply from the Defence in the interests of justice. If indeed the 54 page document is UGA-OTP-0032-0038-R01, the Prosecution Response raises the issue of how these two documents were received together but the meta-data indicates otherwise. Does the undisclosed document UGA-OTP-0032-0037 provide this information? The

⁶ UGA-OTP-0032-0036 ('List of Commanders').

⁷ ICC-02/04-01/15-1341-Conf, para. 5.

⁸ ICC-02/04-01/15-1329-Conf-Corr-Anx, p. 3.

⁹ UGA-OTP-0032-0036.

¹⁰ E.g. the List of Commanders - UGA-OTP-0032-0036.

¹¹ E.g. UGA-OTP-0032-0038-R01.

discrepancy also adds further to the Defence concerns raised in the original Request that important information has not been disclosed to the Defence and for which the remedy in paragraph 81(c) and (d) of the original Request is sought.

C. New information with respect to disclosed material and ‘responsive’ items

12. The Prosecution Response contains new pieces of information which were not available to the Defence at the time of the making the original Defence Request. These new pieces of information merit time to formulate a reply in the interests of justice.
13. The Prosecution indicates that their Ugandan situation database contains “over 38,000 items”.¹² It explains that it has disclosed more than 25,000 items. It explains that there are 5,900 items which are either related to chain of custody – in other words pre-registration forms (‘PRF’) – or are duplicates of other disclosed items. Thus, though the Prosecution does not indicate¹³ the total number of items in the Uganda situation, on the numbers provided by the Prosecution a conservative estimate means that there are 7,100 items that have not been disclosed or a little under 19% of the total number of documents have not been disclosed.
14. Numbers made available to the Defence on 2 March 2015,¹⁴ indicated that there were 17,791 documents “in the Uganda collection” at that time. It appears that the Uganda collection has grown by at least 20,209 items between March 2015 and September 2018.
15. The Prosecution also indicates that in response to the Defence request it conducted a fresh electronic search of its evidence database and identified 745 items “containing the name of any of the individuals listed in UGA-OTP-0032-0036 (other than the Accused)”.¹⁵ It explains that

Most of the items were responsive only because another person with a similar name was mentioned in the item, because the item mentioned Joseph Kony (with no connection to the facts or charges of this case), or because the Prosecution (rather than a witness) named one of the persons on the list, for example in the context of updating potential witnesses regarding the progress of proceedings. Ultimately, none of the items was determined to be material to the preparation of the defence.¹⁶

¹² ICC-02/04-01/15-1341-Conf, para. 8 (emphasis added).

¹³ It merely indicates that there are over 38,000.

¹⁴ ICC-02/04-01/15-191-Anx-Red, p. 4.

¹⁵ ICC-02/04-01/15-1341-Conf, para. 10.

¹⁶ *Ibid.*

16. The Defence is grateful for the further information but also considers that a reply is merited because the Defence did not anticipate being provided a voluntary partial remedy as substitute for the whole remedy requested.
17. Firstly, PRF forms are important for Defence preparation. The Prosecution has elicited PRF forms during its case to seek to show the chain of custody of the intercepts. Moreover, unless duplicates are precisely identical, they should be disclosed as any marks or differences may be relevant for Defence preparation.
18. Secondly, the Prosecution describes “a fresh electronic search of its evidence database”¹⁷ but does not mention a document by document review. The description of the false results¹⁸ is consistent with a search-based rather than document-by-document approach. As the Prosecution is aware, and has previously indicated,¹⁹ many documents are not automatically searchable with a computer because, for example, they are hand-written notes or sketches. At the time of the March 2015 submissions 75% of the pages²⁰ in possession of the Prosecution were not searchable and required “manual review”.²¹
19. Thirdly, the Prosecution provides the new information that only 745 undisclosed items appear to contain the names of supposedly senior LRA commanders. The Defence concern regarding the accuracy of the search merits a reply because it is an incongruous result. The Prosecution has previously indicated²² that the outstanding material was reviewed – without indicating what was beyond the Defence request – for a Defence disclosure request with broad criteria concerning the other party to the conflict: the UPDF/LDU.²³ That search in relation to the UPDF/LDU yielded only 15 documents²⁴ which suggests that the 7,100 items do not relate to the UPDF/LDU. This raises questions as to what these items are relate? That so many undisclosed documents do not appear to address matters related to actors in the conflict in Uganda suggests to the Defence that the Prosecution has not reviewed the material according to its obligations correctly and the remedy requested is still pertinent.

¹⁷ ICC-02/04-01/15-1341-Conf, para. 10.

¹⁸ *Ibid.*

¹⁹ ICC-02/04-01/15-191-Anx-Red, p. 5.

²⁰ *Ibid.*, p. 5: 72,490 unsearchable pages of 94,620 total pages.

²¹ *Ibid.*, p. 5.

²² ICC-02/04-01/15-792, para. 2.

²³ *Ibid.*, paras 2-4.

²⁴ *Ibid.*, para. 2.

20. Given these two new pieces of information²⁵ a reply is therefore merited to address whether the Prosecution remedy offered is sufficient to address the Defence Request. Though a description of this issue provides much of the submissions that would be offered upon reply, the Defence notes that the 3 day deadline provided for seeking leave to reply does not provide sufficient time to comprehensively identify all issues raised in the Prosecution Response in relation to this new information. Granting leave to reply is therefore merited in the interests of justice.

IV. CONCLUSION

21. For the reasons stated above, the Defence respectfully requests leave to reply to the Prosecution Response pursuant to Regulation 24(5) RoC on the three issues described above, and requests adequate time for this in accordance with Article 67(1)(b).

Respectfully submitted,



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Hon. Krispus Ayena Odongo
On behalf of Dominic Ongwen

Dated this 24th day of September, 2018
At Kampala, Uganda

²⁵ See paras 13 and 15 above.