

**Cour  
Pénale  
Internationale**



**International  
Criminal  
Court**

Original: English

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

Date: **22 February 2019**

**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 ‘Corrected version of  
“Defence Request for Leave to Reply to Prosecution and CLRV Responses to  
‘Defence Request for Orders to the Prosecution in Relation to  
Information Concerning Mr Ongwen’s Family’  
(ICC-02/04-01/15-1425-Conf and ICC-02/04-01/15-1427-Conf),  
filed 30 and 31 January 2019” (ICC-02/04-01/15-1435-Conf), filed 5 February 2019**

**Source: Defence for Dominic Ongwen**

**Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:****The Office of the Prosecutor**

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## I. INTRODUCTION

1. On 30 January 2019, the Prosecution responded<sup>1</sup> to the ‘Defence Request for Orders to the Prosecution in Relation to Information Concerning Mr Ongwen’s Family’.<sup>2</sup> On 31 January the Common Legal Representative for Victims (‘CLRv’) also responded.<sup>3</sup>
2. In this consolidated request, the Defence seeks leave, pursuant to Regulation 24(5) of the Regulations of the Court (‘RoC’) to reply to the Prosecution and CLRv Responses on a total of six issues.
3. The Prosecution response raises new issues and makes misrepresentations which the Defence could not reasonably have anticipated. The CLRv raises new legal issues and proposes an approach to the Defence Request which fails to address the concerns raised by the Defence. In respect to both responses, replies are merited under the criteria set out in Regulation 24(5) and the interests of justice.
4. The Defence requests leave to reply:
  - a. To correct unsubstantiated claims and provide additional information;<sup>4</sup>
  - b. To address misrepresentations of the Defence Request;<sup>5</sup>
  - c. To critique the Prosecution’s review of material only following the Defence Request;<sup>6</sup>
  - d. To reply to Prosecution arguments invoking uncharged facts;<sup>7</sup>
  - e. To provide further submissions in respect to consent and the Article 56 hearings;<sup>8</sup> and
  - f. The conflict of interest inherent within the CLRv’s proposal.<sup>9</sup>
5. Pursuant to Regulations 23bis of the Regulations of the Court (‘RoC’), this request is submitted as confidential as it refers to filings of the same classification.

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<sup>1</sup> ICC-02/04-01/15-1425-Conf (‘Prosecution Response’).

<sup>2</sup> ICC-02/04-01/15-1414-Conf (‘Defence Request’).

<sup>3</sup> ICC-02/04-01/15-1427-Conf (‘CLRv Response’).

<sup>4</sup> See para. 7 below.

<sup>5</sup> See para. 12 below.

<sup>6</sup> See para. 16 below.

<sup>7</sup> See para. 18 below.

<sup>8</sup> See para. 21 below.

<sup>9</sup> See para. 27 below.

## II. SUBMISSIONS

6. Though the issues described below concern specific errors, misrepresentations, and new issues raised by the Prosecution and CLRV, in evaluating the issues raised for reply the Defence underscores that the Trial Chamber must not lose sight of the basic principle that, as an un-convicted person, Mr Ongwen continues to benefit from the presumption of innocence pursuant to Article 66. Particularly in regards to the prejudicial Prosecution and CLRV speculation addressed below,<sup>10</sup> the Trial Chamber cannot take it as a given that for the purposes of weighing the Defence request, the crimes asserted by the Prosecution have been proved beyond a reasonable doubt.

### A. Unsubstantiated claims and the provision of additional relevant information

7. The Prosecution Response contains several assertions that are either supported by inaccurate citations or simply require correction.<sup>11</sup> Unsupported prejudicial claims and claims requiring correction could not be reasonably anticipated by the Defence. Fairness demands that the Defence be permitted to reply to the unsupported claims or provide information where the Trial Chamber has an incomplete picture. The Defence seeks leave to provide the reply to three sub-issues contained in the following paragraphs of this section.
8. Firstly, the Prosecution argues that:

[a]s previously noted by the Prosecution, the Accused continues to manifest an apparent belief that the fact the Prosecution witnesses have borne his children legitimises relationships which result solely from his sexual violence.<sup>12</sup>

Filing 482 which is cited does not make that argument and does not have a paragraph 19 or 20 as cited in footnote 3 of the Prosecution Request. Such a prejudicial comment should be disregarded by the Trial Chamber without clarification from the Prosecution.

9. Secondly, paragraph 14 of the Prosecution Request cites a Registry Report which states that Mr Ongwen said that [REDACTED] are the legal guardians of Mr Ongwen's children.<sup>13</sup> The Registry report does not attribute the legal claim to Mr Ongwen.<sup>14</sup> The Defence has sought

<sup>10</sup> See paras 10-11 below.

<sup>11</sup> The Defence notes that the Prosecution Response, at paragraph 8, incorrectly states that P-214 spoke to the court on 11 November 2017 when in fact this was 11 November 2015 (ICC-02/04-01/15-T-15-CONF-ENG). The Defence has subsequently filed a corrected version of its Defence Request upon which the error seems to have been based.

<sup>12</sup> Prosecution Response, para. 1.

<sup>13</sup> ICC-02/04-01/15-542-Conf, para. 12: the Prosecution concludes that these are individuals [REDACTED].

<sup>14</sup> ICC-02/04-01/15-539-Conf, paras 7-8.

clarification in relation to the Registry's claim with respect to legal guardianship. An explanation is not possible at the time of filing; however, the Defence cautions that the Trial Chamber should not accept the Prosecution characterisation as a given fact.

10. Thirdly, the Defence has previously sought leave to reply to the Registry<sup>15</sup> and Prosecution<sup>16</sup> on their failure to explain the risks associated with the delivery of a letter to Mr Ongwen which could justify their insistence on interference with his fundamental human rights. The Defence concern in those requests for leave to reply is also relevant here and a reply is similarly justified because the Defence cannot anticipate unsupported and speculative arguments.
11. Neither the CLRV,<sup>17</sup> nor the Prosecution,<sup>18</sup> have explained what would lead to witness interference or how it could occur or how preventing transmission of the information in the Defence request is necessary for preserving the integrity of the proceedings. As presented, the unspecified risk is pure speculation. It is unclear how the Prosecution concludes that provision of the requested information will "facilitate contact between the Accused and victims".<sup>19</sup> Asserting that there is a risk of witness interference without explaining a mechanism or specific risk is not a basis upon which children should be potentially denied support or Mr Ongwen should be prevented from providing support to his children. **Given that support has already been provided following the provision of information<sup>20</sup> and to date there has been no allegation of witness interference resulting from this,** the Defence respectfully requests the Trial Chamber to ignore the submissions on this matter from the Prosecution and CLRV.

#### **B. Misrepresentation of the Defence argument and the Prosecution's role in the lives of Mr Ongwen's children**

12. The Prosecution misrepresents the Defence arguments and plays down its own role in the lives of the children. The Defence seeks leave to reply with the following to correct the misrepresentation of its arguments.
13. At paragraph 23 the Prosecution states:

<sup>15</sup> ICC-02/04-01/15-1422-Conf, para. 7.

<sup>16</sup> ICC-02/04-01/15-1429-Conf, paras 5-6, and 9.

<sup>17</sup> CLRV Response, para. 18.

<sup>18</sup> Prosecution Response, paras 21, 22, and 26.

<sup>19</sup> *Ibid.*, para. 1.

<sup>20</sup> *See inter alia* Defence Request, paras 11 and 12; Prosecution Response, paras 27-30; and CLRV Response, para. 19; and ICC-02/04-01/15-1414-Conf-AnxA, p.2.

The Defence allegation that the harm of the accident could have been prevented had the Prosecution promptly disclosed the information is incorrect. Prosecution took immediate steps to attend to the concern of P-0227 when she informed the Office of the incident. The circumstances would not have changed had the Defence been informed immediately as the injury/harm was already sustained any way.<sup>21</sup>

14. Until the Prosecution Response, no information has entered the proceedings to indicate that the Prosecution did anything to assist the injured child.<sup>22</sup> The Defence Request did not argue that the initial harm of [REDACTED] could be prevented<sup>23</sup> rather the request argument is that the choice of whether to convey or not convey information was a condition *sine qua non* as to whether Mr Ongwen could provide assistance. Because information was not conveyed, the Prosecution's decision was a significant factor as to whether support was provided – or not – to an injured child.
15. The Prosecution has additionally sought to downplay its role in the lives of the children through the filing. It states that the children are not “persons at risk through the activities of the Court” because “the harm to P-0227[REDACTED] resulted from an accident with no connection whatsoever to the Court”.<sup>24</sup> However, but for the Prosecution's actions seeking communication restrictions, the information could have reached Mr Ongwen and he could have acted to help the injured child. The Prosecution's inactions increased the risk to the child.

### C. Prosecution's review of material only following the Defence Request

16. The Defence notes that the Prosecution Response continues to repeat a pattern in the litigation in this case. The Prosecution indicates that, upon receiving the request filing from the Defence, it conducted a review of material.<sup>25</sup> It is important to stress that it did not conduct a review following the *inter partes* request or at least did not communicate this through its response or *inter partes* response.<sup>26</sup> This is the third time<sup>27</sup> that the Prosecution has dragged

<sup>21</sup> Prosecution Response, para. 23.

<sup>22</sup> See ICC-02/04-01/15-1414-Conf-AnxA and UGA-OTP-0282-0522.

<sup>23</sup> Defence Request, para. 24 (“The Prosecution *inter partes* response provided no information that any medical treatment was given or that any similar future occurrence would be reported to Mr Ongwen so that he can take the necessary actions for the child's best interests. The harm of the accident and the lack of treatment could have been prevented had the Prosecution promptly disclosed the information.”).

<sup>24</sup> Prosecution Response, para. 37.

<sup>25</sup> *Ibid.*, para. 31 (“*In light of the current Defence request*, the Prosecution conducted a fresh electronic search of its evidence database for any undisclosed item containing information related to the Investigation Note.” – emphasis added).

<sup>26</sup> ICC-02/04-01/15-1414-Conf-AnxA, p. 1.

<sup>27</sup> ICC-02/04-01/15-792, para. 2 (“*In response to the Defence Request*” – emphasis added); ICC-02/04-01/15-1341-Conf, para. 10 (“[...] *upon receiving the current Request* the Prosecution conducted a fresh electronic search of its evidence database [...]” – emphasis added); and Prosecution Response, para. 31. See also ICC-02/04-01/15-1142, para.

its feet until the Defence has brought the issue before the Trial Chamber. The Prosecution's disclosure obligations are not triggered only when the Defence files before the Trial Chamber. The Defence seeks leave to reply on this issue with the submissions in the present subsection.

17. It appears that the Prosecution fears a clarification of its disclosure obligations – which could entail an expansion – and seeks to circumvent any issue when a disclosure issue is ripe for decision by a Trial Chamber. This approach is a litigation tactic that should not be encouraged or condoned by the Trial Chamber. The approach taken by the Prosecution belabors the proceedings and disclosure process, exhausts Defence resources, and stunts the growth of jurisprudence on disclosure which can streamline the process and increase legal certainty in this trial and beyond. It is submitted, the Trial Chamber should send an indication to the Prosecution that such an approach is not an acceptable way to proceed.

#### **D. Prosecution arguments invoking uncharged facts**

18. At paragraph 16 the Prosecution Response describes the disclosure of the meeting note which is the starting point for the Defence Request as:

[...] the Prosecution disclosed an Investigation Report dated [REDACTED] which indicated that P-227's son *whom she bore to Mr Ongwen as a result of the crimes charged*, had sustained an injury as a result of an accident.<sup>28</sup>

The submission could be viewed as an attempt to expand the evidentiary basis, temporal jurisdiction, or charges<sup>29</sup> through the backdoor. The Defence seeks leave to reply on this matter.

19. The document containing the charges does not allege the [REDACTED]<sup>30</sup> is part of the charges against Mr Ongwen and the confirmation of charges decision does not make any finding as regards to forced pregnancy and P-227[REDACTED].<sup>31</sup>
20. Though the Defence submits that whether or not the children form part of the charges is immaterial to an evaluation of the Defence Request, particularly here where the Prosecution submissions seek to persuade the Trial Chamber with reference to a non-charged and non-

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8 where a search was not conducted until a judicial order. *See also* ICC-02/04-01/15-1189-Conf-Exp, para 5 where it appears that searches were also prompted by litigation.

<sup>28</sup> Emphasis added.

<sup>29</sup> Forced pregnancy was not confirmed by the Pre-Trial Chamber. On these grounds it is a violation of notice.

<sup>30</sup> ICC-02/04-01/15-375-Conf-AnxA, paras 109 to 116.

<sup>31</sup> ICC-02/04-01/15-422-Conf, paras 118 and 119; pp. 95 and 96.

proven fact it is in the interests of justice to dismiss the argument *in limine*, and if not, permit the Defence to make submissions.

#### **E. Further submissions in respect to consent and the Article 56 hearings**

21. Both the Prosecution<sup>32</sup> and CLRV Responses<sup>33</sup> have emphasised the importance of consent in respect to their position that the Defence Request should be dismissed. Neither participant raised this issue in *inter partes* discussions<sup>34</sup> and therefore the Defence could not have anticipated that it would be raised as an argument to bar provision of the information described in the Defence Request.
22. Multiple issues in relation to consent arise from the responses: the CLRV Response indicates that the CLRV will respect her client's consent<sup>35</sup> and at the same time appears to question whether that consent should be considered voluntary and therefore followed.<sup>36</sup> The Prosecution does not have the same professional obligation that the CLRV asserts yet still argues that information in its possession should not be provided without consent. Moreover, the Prosecution's mother's consent argument is a misreading or miscomprehension of Article 3 of the Convention on the Rights of the Child<sup>37</sup> ('CRC').
23. The Prosecution seeks to circumscribe both the rights of the child under the convention and that of Mr Ongwen's to perform his Article 3 obligations to his children. Whatever legal efforts the Prosecution has made during the proceedings, it did and could not obviate the parental rights and obligations of Mr Ongwen and the best interests of his children afforded by international law.
24. The Defence seeks leave to reply to make submissions on the role of consent in the proceedings to this point in relation to the Article 56 individuals. The Defence has previously made an email request to the Trial Chamber<sup>38</sup> with respect to an issue apparently raised by P-214 whereby it appears that she was not aware that her testimony would be used to harm Mr Ongwen. That email does not yet have a response from the Trial Chamber.

<sup>32</sup> Prosecution Response, paras 20 and 30.

<sup>33</sup> CLRV Response, paras 2, 13, 15, 16, 17, and 19.

<sup>34</sup> ICC-02/04-01/15-1414-Conf-AnxA.

<sup>35</sup> CLRV Response, para. 19.

<sup>36</sup> *Ibid.*, para. 17.

<sup>37</sup> UN General Assembly, Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3, available at: <https://www.refworld.org/docid/3ae6b38f0.html>, Article 3.

<sup>38</sup> Email, sent 11 January 2019 at 15h03, subject line 'Information and request for order to Registry'.

25. The Prosecution and CLRV place consent at the heart of their responses to the Defence Request yet it appears that questions can be asked as to whether the Article 56 individuals consented to charges being brought on their behalf. The Pre-Trial Single Judge dismissed the need for a representative<sup>39</sup> and Article 56 individuals were not warned<sup>40</sup> or advised by the Pre-Trial Chamber about their rights – pursuant to Rule 75(1) – in reference to answering questions that could incriminate Mr Ongwen or adversely impact on the internationally protected rights of their children.
26. If the Trial Chamber considers that the Defence Request for information is conditioned on the mother's consent, then it should be undisputable that their consent is fully informed concerning their role in the case and what is being said and done on their behalf. Though the Defence position is that information should be conveyed in any case, the Defence therefore requests leave to reply to make further submissions on the issue of consent.

#### **F. The conflict of interest inherent within the CLRV's proposal**

27. The CLRV Response argues for a process of how and whether information is communicated.<sup>41</sup> Through the CLRV Response, the issue of consent and legal privilege is also raised.<sup>42</sup> The issue of privilege was not raised in *inter partes* communications, therefore the Defence seeks leave to reply in respect to the new issue raised by the CLRV Response.
28. A reply is merited to address the issue of a conflict of interest for the CLRV. The CLRV is not the children's lawyer and it is certainly conceivable that in some circumstances the mother and children's interests may diverge. Though the CLRV acknowledges this ethical dilemma<sup>43</sup> the solution proposed by the CLRV does not address the concern that she may not be in a position to balance the interests concerned due to professional responsibilities to her client.
29. For the same reason, the Prosecution's suggestion<sup>44</sup> that consent from the mother is required before information is conveyed is not workable. The lawyer who will advise the individual from whom consent is sought may be obliged to recommend that consent is not in their interests. The restrictions previously put in place did not adequately take the interests of the children into consideration and the Prosecution's and Victim's Counsel have not

<sup>39</sup> ICC-02/04-01/15-293-Conf, para. 17.

<sup>40</sup> See for example P-226 was informed about rights in relation to self-incrimination only (ICC-02/04-01/15-T-8-CONF-ENG, p. 7, lines 23-250).

<sup>41</sup> CLRV Response, para. 15.

<sup>42</sup> See for example CLRV Response, paras 2, 10, 13, and 14.

<sup>43</sup> CLRV Response, para. 14.

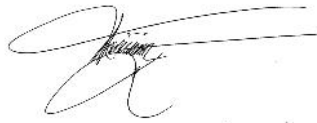
<sup>44</sup> Prosecution Response, para. 30.

demonstrated that they put in place a mechanism to enforce the rights of the children. The Defence requests leave to reply to make submissions on the conflict of interest inherent within the CLRV's proposal.

### III. RELIEF

30. For the reasons described above, the Defence respectfully requests Trial Chamber IX to grant it leave to:
- a. REPLY to the Prosecution Response with the submissions identified in sections A, B, and C; and
  - b. FILE a further reply in regards to the matter described in paragraph D, E, and F.

Respectfully submitted,



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

Dated this 22<sup>nd</sup> day of February, 2019  
At The Hague, The Netherlands