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**International
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Court**

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No.: **ICC-02/04-01/15**
Date: **7 November 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

Prosecution's Response to "Defence Request to Add Three Items to its List of Evidence"

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 opposes the Defence Request to Add Three Items to its List of Evidence (“Request”).¹ The nature of the items is such that they should not be added to the list, the time limit for such additions has expired, the grounds for extending the time limit are not made out and the justifications advanced by the Defence are unpersuasive.

The nature of the items is such that they should not be added to the list of evidence

2. The first item, UGA-D26-0015-1395 (“Complex Post Traumatic Stress Disorder article”), is an outdated study of a highly complex and controversial condition. Witnesses D-0041 and D-0042 (“Defence Experts”) have not touched on it from the beginning to the end of any of their four reports, and it cannot properly be introduced as a subject for their testimony at this stage of the proceedings.

3. The second item, UGA-D26-0015-1410 (“Criminal Responsibility article”), contains Professor Ovuga’s proposals for a six-part legal test for criminal responsibility. His opinions on this matter lie outside the expertise which is the basis of his engagement in this case. It is for law-makers, not psychiatrists, to determine the test for criminal responsibility. The Trial Chamber will apply the test laid down in the Rome Statute, not that suggested in this article.

4. The third item, UGA-D26-0015-1418 (“PTSD article”) is an article by Professor Ovuga, concerning one of the conditions which the Defence Experts have contended afflicted the Accused at the time of the alleged crimes. Professor Ovuga has already had four opportunities to express his opinion about this condition as it concerns the Accused in this case and has not felt the need to refer to this article.

¹ ICC-02/04-01/15-1654.

There are no grounds for extending the time limit

5. The addition of these items is requested by the Defence long after the expiry, on 4 June 2018, of the time limit for any such additions,² and over a month after the expiry on 30 September 2019 of the "final deadline" imposed by the Chamber³ to ensure that last minute additions such as those now requested by the Defence were avoided.

6. Regulation 35(2) of the Regulations of the Court requires that "good cause" must be shown to extend a deadline that has not yet lapsed. This provision also provides that "[a]fter the lapse of a time limit, an extension of time may only be granted if the participant seeking the extension can demonstrate that he or she was unable to file the application for reasons outside his or her control".

7. The Defence do not seek to demonstrate that they have been unable to file the Request for reasons outside their control. They characterise their failure to do so as "inadvertent" without explaining how it came about. The Prosecution, and the Trial Chamber are unable to assess whether the Defence were aware of the existence of these articles some time ago but failed to add it to its list, or whether the reality is that the articles have only recently come to the Defence's attention and they now wish their experts to be able to refer to them. In any event, the Request is precisely the last minute alteration of a party's case which the Trial Chamber's orders setting deadlines were designed to avoid.

Defence justifications are unpersuasive

8. The Defence advance four justifications for the addition of the three items to its list of evidence.

² ICC-02/04-01/15-1483-AnxXVI, Email Decision Granting Defence Request for a Two Day Extension of Deadline, 24 May 2018; ICC-02/04-01/15-1199-Red, Public Redacted Version of Decision on the Legal Representatives for Victims Requests to Present Evidence and Views and Concerns and related requests, 6 March 2018, para. 84; ICC-02/04-01/15-1021, Preliminary Directions for any LRV or Defence Evidence Presentation, 13 October 2017 ('Preliminary Directions'), paras. 6-7.

³ ICC-02/04-01/15-1572, Order Setting a Deadline for Evidence Related Requests, ICC-02/04-01/15-1570. *See also* Clarification on Order Setting a Deadline for Evidence Related Requests ('Clarification').

9. *First*, they assert that the subject matter of the testimony of the Defence Experts and their reports are of high importance in the case.⁴ The Prosecution accepts this assertion. But the importance of that testimony and those reports is irrelevant to the issue of whether or not these items should now be added to the Defence List of Evidence.

10. *Second* and *third*, they assert that, having disclosed the items on 18 October 2019,⁵ “the timing of the request and the nature and amount of material to be added cause no prejudice to the Prosecution and Victims”. This assertion is incorrect.

11. The Complex Post Traumatic Stress Disorder article concerns a condition (separate from PTSD) which was proposed for inclusion in both DSM-IV and DSM 5, but ultimately rejected. Professor Mezey testified that this condition “was never adopted as a formal diagnosis because it was felt that it lacked the validity and consistency to warrant a diagnostic classification.”⁶

12. Thus far no mention of this condition has been made by the Defence Experts. If it is to feature in the trial, it would be essential for the Trial Chamber to receive detailed written evidence in the form of reports from both Defence and Prosecution Experts about the existence of this condition and its nature. There would be significant prejudice, to both the Prosecution and the Victims, if the Trial Chamber were now to be asked to consider whether, in addition to the three conditions⁷ initially diagnosed by the Defence Experts, and the two added in their 2018 report,⁸ Dominic Ongwen may also have been suffering from this new condition at the time of the alleged crimes.

⁴ Request, para. 2(a).

⁵ Request, para. 2(c).

⁶ Testimony of P-0446, T-162, p.27-28.

⁷ Dissociation, Depression and PTSD.

⁸ Dissociative Amnesia and Obsessive Compulsive Disorder.

13. *Fourth*, the Defence assert that granting the Request will “avoid any additional litigation during or after the testimony of the Defence Experts, and thus supports the fair and expeditious conduct of the proceedings.”

14. The Trial Chamber cannot be persuaded to make orders based on the fear of future litigation. The Defence must justify the Request on the basis of concrete arguments which satisfy the legal test for the addition of the items. That test is set out at paragraph 6 above, and enlarged upon at paragraphs 5 to 8 of the Trial Chamber’s “Decision on Defence Request for Variation of the 30 September Deadline”⁹ of 10 September 2019.

Conclusion

15. For the reasons set out above, the Request should be rejected.



Fatou Bensouda, Prosecutor

Dated this 7th day of November 2019
At The Hague, the Netherlands

⁹ ICC-02/04-01/15-1591.