

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 28 February 2020

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

**With Confidential Annexes A and B, and
Confidential, *ex parte*, Annexes 1 to 29 available to Prosecution only**

**Prosecution's Response to the "Defence Request for Remedies in Light of
Prosecution Disclosure Violations"**

Source: The Office of the Prosecutor

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

The Office of the Prosecutor

Ms Fatou Bensouda
Mr James Stewart
Mr Benjamin Gumpert

Counsel for Dominic Ongwen

Mr Krispus Ayena Odongo
Mr Charles Taku
Ms Beth Lyons

Legal Representatives of Victims

Mr Joseph Akwenyu Manoba
Mr Francisco Cox
Ms Paolina Massidda

Legal Representatives of Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
Defence**

States Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Peter Lewis

Counsel Support Section

Victims and Witnesses Section

Detention Section

**Victims Participation and Reparations
Section**

Other

Introduction

1. The Defence request¹ ("Request") for a stay of proceedings together with 10 associated remedies should be rejected. It is based upon a disclosure violation by the Prosecution in respect of material of marginal relevance which was remedied over four months ago. The Defence have raised numerous speculative and peripheral concerns but, contrary to their assertions in the Request, have demonstrated no concrete prejudice arising from the violation.

2. The Request also seeks disclosure of 27 Biographic Data and Security Questionnaires and Individual Protection Assessments (collectively 'BSQs') from which excerpts have previously been disclosed and which are the subject of an entirely unrelated request.²

3. These BSQs resulted from non-evidentiary interviews of witnesses and potential witnesses conducted for the sole purpose of allowing the Prosecution to maintain contact with these individuals and to fulfil its protection obligations towards them. This required the Prosecution routinely to ask witnesses about topics which are of a personal and sometime sensitive nature, and which may affect the witnesses' and their family members' safety and well-being. No questions were asked with the purpose of collecting case-related evidence, and in the unusual circumstances where some disclosable information was obtained, such information has already been reproduced in an investigation report and disclosed to the Defence.

4. The Prosecution therefore submits that these 27 items (apart from the material already excerpted and disclosed) do not contain any information material to the preparation of the Defence, and submits that the personal information and internal

¹ ICC-02/04-01/15-1718-Conf.

² Defence Request, para. 5 and 59 to 61.

OTP work product contained in the BSQs should not be disclosed to the Defence absent an informed determination by the Trial Chamber that disclosure is required.

5. To facilitate such a determination, the Prosecution has provided all 29 items (which include documents and a few audio recordings) to the Chamber, for *in camera* review, as confidential *ex parte* Annexes 1 to 29, available only to the Prosecution and the Chamber. The reason why there are 29 annexes relating to just 27 items is because the three audio tracks captured in annexes 23 – 25 all relate to one item.

Confidentiality

6. The Prosecution files this response and Annexes A and B confidentially pursuant to regulation 23 *bis* of the Regulations of the Court because it responds to a confidential filing of the Defence. The Prosecution requests that the Chamber reclassify this filing and Annexes A and B as public. Annexes 1 to 29 should remain confidential and *ex parte*, available only to the Prosecution and the Chamber, because they contain personal information of witnesses and internal OTP work product.

Submissions

The Material

7. The Defence base their Request upon an admitted failure of disclosure by the Prosecution. As a result of Defence inquiries on 25 September 2019, the Prosecution discovered that it has in its possession material originating from the Ugandan Amnesty Commission which was received in 2004 and which had not, by reason of its format (Microsoft Access), been entered into Ringtail. As a result, it had not been reviewed for disclosure. This was an error. The Prosecution provided this material to the Defence on 8 October 2019.

8. The material consists of extracts from a database held by the Ugandan Amnesty Commission containing details of individuals applying for amnesty. The Prosecution

has received extracts from the same database on subsequent occasions (in a Ringtail-friendly format) and have disclosed these extracts to the Defence.³ There is a significant overlap between the previously disclosed material and the material provided on 8 October 2019. The Prosecution believes that of the 13,107 records of individuals' details contained within the material provided on 8 October, 6,183 are essentially duplicates of records previously disclosed.⁴

9. Of the records that had not previously been disclosed in duplicate form, only 197⁵ reveal that the person seeking amnesty had an affiliation to the LRA. There is no reason to think that the other 6,727 records are in any way material to the preparation of Dominic Ongwen's defence. And of the 197 LRA members, only 11 reported having served in the Sinia Brigade and just one reported that Dominic Ongwen had been his commanding officer.

10. The Defence have had the Amnesty Commission material for over four months now. They have not sought to contradict the figures set out in the previous paragraph, which were first brought to their attention in an *inter partes* correspondence on 4 October 2019.

P-0038

11. Neither of the documents which record the Prosecution's receipt of the Amnesty Commission material⁶ make mention of any involvement of P-0038 or the UPDF (in which P-0038 served then and now). The OTP-generated electronic metadata associated with these documents record that P-0038 was part of the chain of custody by which the Prosecution came into their possession. That metadata was

³ UGA-OTP-0165-0124 and UGA-OTP-0244-0909.

⁴ The material provided on 8 October 2019 included a number of extra fields, including matters such as the names of the individual concerned's parents, the level of his or her education, his or her occupation before and after his or her return and the assistance he or she required.

⁵ The Excel document setting out the 197 records is available to the Chamber as an attachment to an *inter partes* email which was copied to the Chamber at 11h34 on 6 December 2019.

⁶ UGA-OTP-0012-0519 and UGA-OTP-0012-0523 (disclosed to the Defence on 6 December 2019), reproduced in Annex A.

entered into the Prosecution's Ringtail-based evidence database more than a decade ago and the Prosecution is not now able to explain with certainty why it contains the information it does.

12. The metadata's erroneous mention of P-0038 provides the tenuous link on which the Defence seeks to build its wide-ranging request. The Defence observe that they have previously made a request (on 22 October 2018) for review and disclosure of items relating to P-0038 and that this failed to elicit the material provided on 8 October 2019. From this, they extrapolate that other documents which should have been disclosed in response to the 2018 request are likely to exist.

13. The Defence's logic is faulty. The reason that the material provided on 8 October was not previously disclosed, despite the metadata link to P-0038, is because it was not stored within Ringtail, and thus not within the parameters of the Prosecution's search. Furthermore, had the material been reviewed, review of the underlying documents would have immediately made apparent that they have no connection to P-0038, rendering them non-responsive to the Defence's P-0038-related request.

14. So far as the Defence's application (paragraph 29 of the Request) for the Prosecution to "disclose all material for which P-0038 is listed on the chain of custody including all PRF forms on which he is listed and all material which he provided to the Prosecution", the Prosecution notes that it carried out another review in October 2018 of all the undisclosed material related to P-0038. There are approximately 50 such items and these were individually reviewed with the Prosecution being satisfied that none were disclosable under rule 77.

Further Prosecution Review

15. Although the material provided to the Defence on 8 October 2019 was not in Ringtail, reference to it (in the shape of the documents referred to in paragraph 11 above) was, and this should have triggered a query about its whereabouts and its nature.

16. As the Prosecution has explained to the Defence in *inter partes* correspondence, the Prosecution was indeed gravely concerned by the realisation that material had not been the subject of its review and disclosure because of formatting difficulties, and because it overlooked references to this material.

17. Following this realisation, the Prosecution undertook a comprehensive review of undisclosed materials to check for any other items of which content had not been imported into Ringtail and thus not reviewed. The Prosecution reviewed 6,017 items relating to 1,134 pre-registration forms encompassing 13,841 pages in total and found no material requiring disclosure. This is, effectively, the process which the Defence asks the Prosecution to undertake in paragraphs 24 and 64(e) of the Request. There are no other cases where an item was registered, but the associated data referred to in that item is not uploaded in Ringtail. The Prosecution informed the Defence of its further review and its findings by email on 15 November 2019. This part of the Request is therefore moot.

CHARMS Database

18. The Prosecution does not accept that the CHARMS database has any relevance to the *Ongwen* case. It was provided to the Defence because it was collected by the Prosecution on the same data carrier as the Amnesty material, and this was copied for the Defence in its totality. The suggestion in paragraphs 30-32 of the Request that, because other material from the Ugandan Human Rights Commission concerning alleged wrongdoing by government agents has been used in cross-examination and submitted in evidence, all material emanating from this source must be of relevance

is unpersuasive. If one took the Defence's approach to relevance, then any alleged offence or malfeasance by any governmental actor in Uganda would be relevant in this case. Clearly, this cannot be so.

Prejudice

19. The Request speculates (in paragraph 35) that the material provided on 8 October 2019 may contain new material relating to Prosecution witnesses and that the Defence may have been deprived of the opportunity of testing the credibility and reliability of those witnesses. In the four months during which they have had the chance to study the Amnesty Commission material, they claim to have identified just three records with a name similar to Prosecution witness (P-0379).

20. On the Prosecution's analysis there are two (not three) records relating to P-0379 included in the material provided to the Defence on 8 October. These records are not part of the 197 new, LRA related, records. They were disclosed to the Defence in September 2015. Whatever the number, there is nothing relating to a person with the same name as P-0379 among the 197 new, LRA related, records. Just one of those records is of an individual with the same name as a Prosecution witness (P-0145). However this witness testified that he escaped in 2005⁷ whereas the 197 records derive from a dataset obtained by the Prosecution in 2004.

21. The Prosecution accepts that if, as a result of late disclosure, the Defence has been deprived of the opportunity of exploring relevant and identifiable issues with particular witnesses then this may amount to concrete prejudice and could merit a concrete remedy. But a party seeking such a remedy is obliged to demonstrate concrete harm caused on the basis of specific evidence, and nowhere in the 25 paragraphs in the Request under the heading 'Prejudice' is there any such specificity.

⁷ T-143, p.8, 32.

Remedies

22. The Defence asks, in paragraphs 36 and 64(d) of the Request, for a 'temporary stay of proceedings'. The Prosecution understands this to mean that the closing arguments scheduled for 10, 11 and 12 March should not take place. The Defence submit that this stay should remain in place until the Prosecution has disclosed "all the material in its possession" and sufficient time has elapsed for the Defence to review "the late disclosed material".

23. As noted in paragraph 36 of the Request, a stay of proceedings is appropriate where the consequences of breaches of the rights of the accused are such as to make it impossible for a fair trial to take place. That is the case even when, as in the *Lubanga* trial, the Chamber imposing the stay recognises that the stay may in the future be lifted.⁸ In the instant case, however, the Defence is unable to point to any concrete and adverse consequences of either the admitted or the alleged breaches of the Prosecution's disclosure obligations. A stay is not available. What the Defence is effectively asking for is an adjournment of the closing arguments.

24. The Prosecution recognizes that it has been at fault by virtue of its late disclosure of the material provided on 8 October. But the Defence were under an obligation to mitigate the prejudice which they allege they have suffered as a result of that late disclosure. If they considered that, without a further extensive review of undisclosed material by the Prosecution, the case could not properly proceed to its conclusion they were obliged to say this immediately, rather than waiting until a few days before the submissions of the closing briefs and arguments. Had they done so, the Chamber would have been able to consider the merits of the Parties' submissions and make any appropriate orders for further disclosure reviews without disturbing the time frame of the trial.

⁸ ICC-01/04-01/06-T-91-ENG, p. 30-33.

25. It would be disproportionate now, because of the choice the Defence has made about the timing of the Request, to cancel the proceedings in March. The prospect of material emerging that will affect the content of the closing arguments is remote in the extreme. It will be open to the Defence, should such material emerge and good cause arise, to move the Chamber at any time in the months before judgment is passed to reopen proceedings so that further submissions, or even evidence, can be heard.

Manner of disclosure

26. The Prosecution does not accept the submissions made by the Defence in paragraphs 50 to 57 of the Request concerning the manner in which the material provided on 4 October should have been disclosed.

27. However, given the late stage of the proceedings, and in order to limit the scope of the matters to be decided by the Chamber in dealing with the Request, the Prosecution will make formal disclosure of the material provided to the Defence on 8 October 2019 through the eCourt system as requested by the Defence. The Prosecution makes it plain that, while it accepts that the Amnesty databases fall under Rule 77, this does not apply to the CHARMS database, which is provided because it was contained within the same data carrier as the Amnesty material.

Remedies requested

28. The Prosecution has the following observations in respect of the remedies requested in paragraph 64(a)-(l) of the Request:

- a) The Prosecution accepts that the late disclosure of the two Amnesty Commission databases was a disclosure violation, but does not accept that the same applies to the CHARMS database.
- b) The Prosecution will disclose the two Amnesty Commission databases through the eCourt mechanism by 3 March 2020.

- c) The Prosecution accepts that the Trial Chamber should not consider any incriminatory factual propositions from the Prosecution in relation to the material provided on 8 October 2019. In any event, the Prosecution advances no such propositions.
- d) The Prosecution submits that no stay of proceedings should be ordered for the reasons advanced at paragraphs 22-25 above. It is only if the Defence is able to demonstrate concrete prejudice arising from the disclosure violation that the Chamber should consider taking the violation into account in the article 74 judgment or sentencing in the event of a conviction.
- e) The Prosecution submits that no order should be made for the re-review of all undisclosed material for the reasons advanced at paragraphs 15-17 and 18-20 above.
- f) The Prosecution avers that there are no "materials underlying the whole chain of custody of databases on June and October 2004" beyond those previously disclosed and reproduced in Annex A. Consequently, no order should be made in this respect.
- g) The Prosecution submits that no order should be made for it to "disclose all PRF forms for which P-0038 is named or is in the chain of custody". Checks have been made (*see* paragraph 17 above) to ensure that all material received by the Prosecution, whatever its format, has been reviewed for potential disclosure. It is the material itself which is potentially disclosable, not the Prosecution's internal records recording the receipt of the material.
- h) The Prosecution submits that no order should be made for it to "disclose all material for which P-0038 is the source or upon which P-0038 is on the chain of custody." This review has already been carried out, as detailed in paragraph 14 above.
- i) The Prosecution submits that the 27 documents should not be disclosed for the reasons advanced in paragraphs 2 to 5 above. The Prosecution will act according to the Chambers determination of the matter.

- j) The Prosecution has no records concerning the examination of “narrative statements” at the Amnesty Commission nor any information about the existence of such material other than the “Declaration Forms”⁹ made by applicants for Amnesty. All such “Declaration Forms” in the possession of the Prosecution have been disclosed to the Defence. The Prosecution submits that no order should be made as requested in this sub-paragraph of the Request.
- k) In light of the matters set out at (j) above, no order should be made for the Prosecution to seek to obtain narrative statements.
- l) The Prosecution submits that no further remedies such as those instanced by the Defence are appropriate and that no orders should be made.

Conclusion

29. For the forgoing reasons, the Prosecution requests that the Request be disposed of in accordance with the submissions in paragraph 28 above.



Fatou Bensouda, Prosecutor

Dated this 28th day of February 2020
At The Hague, the Netherlands