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TRIAL CHAMBER IX

Before: Judge Bertram Schmitt, Single Judge

**SITUATION IN UGANDA
IN THE CASE OF *THE PROSECUTOR v. DOMINIC ONGWEN***

Public

Decision on the 'Prosecution's Request to Add Transcripts and Seven Additional Documents to its List of Evidence'

To be notified, in accordance with Regulation 31 of the Regulations of the Court, to:

The Office of the Prosecutor

Fatou Bensouda
James Stewart
Benjamin Gumpert

Counsel for the Defence

Krispus Ayena Odongo

Legal Representatives of the Victims

Joseph Akwenyu Manoba and Francisco
Cox
Paolina Massidda

Legal Representatives of the 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

Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

Judge Bertram Schmitt, acting as Single Judge on behalf of Trial Chamber IX ('Single Judge' and 'Chamber', respectively) of the International Criminal Court ('Court') in the case of *The Prosecutor v. Dominic Ongwen*, having regard to Articles 64 and 67 of the Rome Statute and Rule 84 of the Rules of Procedure and Evidence ('Rules'), issues the following Decision on the 'Prosecution's Request to Add Transcripts and Seven Additional Documents to its List of Evidence'.

1. On 30 May 2016, the Chamber set at 6 September 2016 the time limit for the Office of the Prosecutor ('Prosecution') to disclose all materials falling under its disclosure obligations and provide a list of evidence 'containing the materials which [it] intends to submit as evidence during trial'.¹ The Chamber also clarified that the Prosecution may – and, in some cases, must – disclose materials after the time limit, but that 'leave of the Chamber is required for the Prosecution to rely on materials disclosed after the deadline as incriminating evidence at trial'.² Similarly, the Chamber indicated that leave must be obtained for the Prosecution to add materials to its list of evidence after the expiration of the time limit.³
2. On 6 September 2016, the list of the evidence on which the Prosecution intends to rely at trial ('List of Evidence') was submitted as ordered.⁴
3. On 23 November 2016, the Prosecution filed a request seeking leave from the Chamber to add to the List of Evidence the transcripts of an interview with

¹ Decision Setting the Commencement Date of the Trial, ICC-02/04-01/15-449, paras 7-8.

² Decision Setting the Commencement Date of the Trial, ICC-02/04-01/15-449, para. 7.

³ Decision Setting the Commencement Date of the Trial, ICC-02/04-01/15-449, para. 8.

⁴ List of Prosecution Evidence, ICC-02/04-01/15-532-Conf-AnxA.

Witness P-142 and seven newly collected items ('Request').⁵ The Defence provided its response to the Request ('Response') on 28 November 2016.⁶

I. Preliminary remarks

4. Prior to addressing the merits of the Request, the Single Judge addresses the general arguments made by the parties with respect to the prospective insertion of additional items in the Prosecution's List of Evidence in the course of the trial.
5. In the Request, the Prosecution submits that '[it] continues, on occasion, to receive individual items of evidence relevant to the case, including items upon which [it] may wish to rely to prove its case' and that '[t]hese are mainly items which were not immediately available when they were requested at the time of the Prosecution's conduct of its investigation or they were not in the immediate possession of the person from whom the document or material was requested'.⁷ On these grounds, the Prosecution 'seeks the guidance of the Chamber on how it should handle other subsequent materials that will be available during the course of its case and which the Prosecution will seek to add to its List of Evidence'.⁸
6. The Defence, observing that in the case of *The Prosecutor v. Bosco Ntaganda* the list of evidence of the Office of Prosecutor has been updated 25 times since its first submission, expresses the concern that the 'tardiness' and 'lack of preparedness' of the Prosecution may continue throughout this trial,⁹ and submits that should further applications similar to the Request be filed in the future 'the Defence will

⁵ Prosecution's Request to Add Transcripts and Seven Additional Documents to its List of Evidence, ICC-02/04-01/15-604 and its two confidential annexes.

⁶ Defence Response to "Prosecution's Request to Add Transcripts and Seven Additional Documents to its List of Evidence", ICC-02/04-01/15-608.

⁷ Request, ICC-02/04-01/15-604, para. 15.

⁸ Request, ICC-02/04-01/15-604, para. 19.

⁹ Response, ICC-02/04-01/15-608, para. 6.

not be as kind as it is in th[e] response'.¹⁰ The Defence also argues that '[l]ate disclosure [...] is by definition prejudicial to the Defence'¹¹ and requests the Chamber 'to caution the Prosecution for its lack of due diligence'.¹²

7. In light of these submissions, the Single Judge makes the following remarks. The provision of a list of evidence by the Prosecution, while not required as such by the legal instruments of the Court, has been ordered consistently by trial chambers of this Court – including in the present case – with a view to facilitating preparation of defence teams by having the Prosecution indicate, prior to the commencement of the trial, the items of evidence which it intends to rely on for trial. As recalled above, in the present case, the time limit for the submission of the Prosecution's list of evidence has been set at three months before the start of the trial.¹³ In the view of the Single Judge, this instrument is an important guarantee for the trial preparation of defence teams before the Court.
8. At the same time, the Single Judge is cognisant that certain relevant materials may be received by the Prosecution only after the expiration of the time limit for the provision of its list of evidence, or that the relevance of certain others may only become apparent to it with the development of the trial proceedings which are necessarily dynamic in nature. Errors, while unfortunate and hopefully isolated and limited, may also occur and, insofar as made in good faith and in the absence of indications of an abuse on the part of the Prosecution, may also justify late insertions into the list of evidence. In other words, it would be unreasonable for the Chamber, to which a truth-seeking function is assigned by the Statute, to determine that potentially relevant evidence could not, under any circumstance, be used by the Prosecution at trial if not itemised in the list of evidence three months before the trial commences.

¹⁰ Response, ICC-02/04-01/15-608, para. 7.

¹¹ Response, ICC-02/04-01/15-608, para. 8.

¹² Response, ICC-02/01-01/15-608, para. 19.

¹³ Decision Setting the Commencement Date of the Trial, ICC-02/04-01/15-449.

9. It is with these different considerations in mind that the Chamber (i) ordered the Prosecution to provide a list of evidence three months before the commencement of the trial while (ii) accepting that materials could be added after the expiration of the time limit, but (iii) leave to do so must be obtained by the Chamber.
10. As already clarified by the Chamber, a determination of whether leave to add items to the list of evidence should be granted is not a decision under Regulation 35 of the Regulations of the Court.¹⁴ Rather, the Chamber must determine *in concreto* whether reliance on the part of the Prosecution on items of evidence additional to those included in the original list of evidence causes an undue prejudice to the procedural rights of the Defence. Relevant factors for the Chamber's determination in this regard include, *inter alia*, the extent to which the requested addition is opposed by the Defence, the time when the addition is sought, the nature and amount of the material concerned, the intended purpose for the Prosecution's requested reliance on such material as well as its prospective significance in light of the charges brought against the accused and the rest of the available evidence.
11. The Single Judge notes the Prosecution's submission that it would file any further application to add items to the List of Evidence 'after a careful consideration of the relevance and probative value of the items and their utility for the truth finding function of the Chamber', and its proposal that 'rather than filing *ad hoc* applications to the Chamber every time an item is received, registered, reviewed and disclosed, it would file a consolidated application to add such items to the [List of Evidence]'.¹⁵ In its Response, the Defence did not comment on the Prosecution's proposal.

¹⁴ Decision on Prosecution Request to Add Items to its List of Evidence, to include a Witness on its List of Witnesses and to Submit Two Prior Recorded Testimonies under Rule 68(2)(b) and (c), 22 November 2016, ICC-02/04-01/15-600, para. 14.

¹⁵ Request, ICC-02/04-01/15-604, para. 16.

12. The Single Judge expresses no position on this proposal at this point in time. At the same time, it must be emphasised that, should the Prosecution eventually elect to file periodic consolidated applications rather than *ad hoc* ones every time a discrete item is received, the Prosecution must in any case inform the Defence of its intention to request leave for the insertion in the List of Evidence of any such item as soon as the determination to subsequently file such request is made.¹⁶

13. After these remarks, the Single Judge turns to the merits of the Request.

II. Request to add the transcripts of an interview of Witness P-142 to the List of Evidence

14. The Prosecution requests leave to add to the List of Evidence the transcripts produced during an interview between the Prosecution and Witness P-142 which took place on 3 December 2015 (UGA-OTP-0273-0294, UGA-OTP-0273-0313, UGA-OTP-0273-0348, UGA-OTP-0273-0385, UGA-OTP-0273-0405, UGA-OTP-0273-0441). This was the third interview that the Prosecution conducted with the witness – the transcripts of the other two interviews were disclosed to the Defence in May and September 2015, respectively, and included in the List of Evidence.

15. Witness P-142 is scheduled to testify live at trial. The disclosure of the transcripts of his interviews by the Prosecution falls under the Prosecution's disclosure obligations pursuant to Rule 76 of the Rules. Concerning the requested addition of the transcripts of Witness P-142's third interview to the List of Evidence, the Single Judge observes that: (i) the witness is currently scheduled to appear as the 11th witness in the trial;¹⁷ (ii) the Defence, in the presence of the Prosecution,

¹⁶ As in fact proposed by the Prosecution itself (Request, ICC-02/04-01/15-604, para. 16).

¹⁷ See Updated List of Prosecution Witnesses, 30 November 2016, ICC-02/04-01/15-613-Conf-AnxB.

conducted an interview with this witness in March 2016;¹⁸ (iii) the insertion in the List of Evidence of the material concerned (which is testimonial in nature) is only for the purposes of use by the Prosecution during the questioning of the witness at trial; and (iv) the Defence has been aware of the fact that Witness P-142 is a witness on whom the Prosecution intends to rely on in these proceedings since the pre-trial stage of the case¹⁹ and has had access to the transcripts of the other two interviews that the Prosecution conducted with him since May and September 2015, respectively.²⁰

16. In addition, the Single Judge notes the Defence request that Witness P-142 not appear to testify before 1 March 2017, and its submission that, under this ‘condition’, it would not object to the addition to the List of Evidence of the transcripts concerned.²¹ The Defence submits that its request is justified by the late disclosure of the materials concerned compounded by technical problems with Dominic Ongwen’s computer at the detention centre.²² The Single Judge recalls that this witness is scheduled to appear as the 11th witness during trial. This makes it unlikely that he will testify during the first ‘evidentiary block’ between 16 January and 3 February 2017. As already announced by the Chamber, the ‘first evidentiary block’ will be followed by a three-week break²³ – the ‘second evidentiary block’ is therefore expected to commence on Monday, 27

¹⁸ Response, ICC-02/04-01/15-608, para. 15. The Defence itself concedes that, because of this fact, ‘any prejudice encountered by the Defence is low’ (Response, ICC-02/04-01/15-608, para. 17).

¹⁹ See Prosecution’s list of evidence under Rule 121(3) of the Rules, ICC-02/04-01/15-375-Conf-AnxD and Prosecution’s Pre-Confirmation Brief, ICC-02/04-01/15-375-Conf-AnxC, both served on the Defence on 21 December 2015. See also, Transcripts of the hearing on the confirmation of charges, ICC-02/04-01/15-T-21-Red2, 22 January 2016, page 3, lines 20-22, page 31, lines 16-19 and page 34, lines 17-19.

²⁰ Also, the Pre-Trial Brief filed on 6 September 2016 (ICC-02/04-01/15-533) summarises the aspects of the witness’s evidence that the Prosecution considers of importance to the case, as does the summary of the witness’s anticipated testimony that was initially provided to the Defence on 19 July 2016 (ICC-02/04-01/15-502-Conf-AnxB, pages 30-38. See also the consolidated summaries of anticipated witness testimonies filed on 6 September 2016, ICC-02/04-01/15-532-Conf-AnxC, pages 102-109).

²¹ Response, ICC-02/04-01/15-608, para. 17.

²² The Defence submits that ‘[t]he transcripts [of Witness P-142’s third interview with the Prosecution] were loaded into Mr Ongwen’s computer during the morning of 25 November 2016, even though he cannot view the files because of a computer malfunction on Mr Ongwen’s computer at the ICC-DC and improper configuration of the computer in the Defence office caused by ICT’ (Response, ICC-02/04-01/15-608, para. 5).

²³ Email from the Chamber sent on 10 October 2016 at 16.53.

February 2017. According to the Single Judge this, as a matter of fact, sufficiently resolves the Defence request that Witness P-142 not be called to appear before Wednesday, 1 March 2017.

17. For these reasons, the Single Judge grants the Prosecution's request to add the transcripts of Witness P-142's third interview to the List of Evidence.

III. Request to add newly collected materials to the List of Evidence

18. The Prosecution requests the Chamber's leave to add to the List of Evidence also seven documents that were registered and disclosed by the Prosecution after the submission of the list on 6 September 2016. These documents are the birth certificates of Witnesses P-97,²⁴ P-252,²⁵ P-307,²⁶ P-396²⁷ and P-410,²⁸ and two open source documents relating to the relevant experience of Witness P-6.²⁹ The Prosecution submits that these items 'have significant probative value and will assist the Chamber in its truth-seeking function' as '[t]he determination of the ages of some [...] witnesses, for instance through the use of birth certificates, goes to the heart of the charges of conscription and use of child soldiers'.³⁰
19. The Defence submits that '[w]hilst th[e] late disclosure is prejudicial to the Defence, the small amount of pages the Prosecution wishes to add, 13 pages, is minimal'³¹ and that it does not object to the addition of the material concerned into the List of Evidence 'as the prejudice encountered by the Defence is minimal owing to the size of the request and the nature of the documents'.³²

²⁴ UGA-OTP-0272-0939.

²⁵ UGA-OTP-0272-1018.

²⁶ UGA-OTP-0272-0951.

²⁷ UGA-OTP-0272-0947.

²⁸ UGA-OTP-0272-0931.

²⁹ UGA-OTP-0273-0041 and UGA-OTP-0273-0056.

³⁰ Request, ICC-02/04-01/15-604, para. 11.

³¹ Response, ICC-02/04-01/15-608, para. 10.

³² Response, ICC-02/04-01/15-608, para. 12.

20. Given that the request is unopposed, and considering the limited amount of materials concerned and the fact that the witnesses to whom these materials relate are not among the upcoming witnesses to testify at trial,³³ the request for leave to add these materials to the List of Evidence can be granted.

FOR THE FOREGOING REASONS, THE SINGLE JUDGE HEREBY

GRANTS the Prosecution leave to add to its list of evidence documents UGA-OTP-0272-0931, UGA-OTP-0272-0939, UGA-OTP-0272-0947, UGA-OTP-0272-0951, UGA-OTP-0272-1018, UGA-OTP-0273-0041, UGA-OTP-0273-0056, UGA-OTP-0273-0294, UGA-OTP-0273-0313, UGA-OTP-0273-0348, UGA-OTP-0273-0385, UGA-OTP-0273-0405 and UGA-OTP-0273-0441.

Done in both English and French, the English version being authoritative.



Judge Bertram Schmitt
Single Judge

Dated 2 December 2016

At The Hague, The Netherlands

³³ Witness P-6 is currently scheduled as the 38th witness; Witness P-97 as the 31st; Witness P-252 as 21st; Witness P-307 as 59th; Witness P-396 as 19th; and Witness P-410 as 58th (see Updated List of Prosecution Witnesses, 30 November 2016, ICC-02/04-01/15-613-Conf-AnxB).