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Original: **English**

No.: **ICC-02/04-01/15**
Date: **10 September 2019**

TRIAL CHAMBER IX

Before: **Judge Bertram Schmitt, Single Judge**

SITUATION IN UGANDA

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

Public

Decision on Defence Request for Variation of the 30 September Deadline

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

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Others

Judge Bertram Schmitt, acting as Single Judge on behalf of Trial Chamber IX ('Single Judge' and 'Chamber', respectively) of the International Criminal Court, in the case of *The Prosecutor v. Dominic Ongwen*, having regard to Regulation 35 of the Regulations of the Court (the 'Regulations'), issues the following 'Decision on Defence Request for Variation of the 30 September Deadline'.

1. On 4 June 2018, on a deadline set by the Chamber,[1] the Defence filed its final lists of witnesses and evidence and requested all relief sought under Rule 68 of the Rules of Procedure and Evidence (the 'Rules').

2. On 21 August 2019, the Single Judge issued the 'Order Setting a Deadline for Evidence Related Requests' (hereinafter: 'Order Setting Deadline'), ordering the parties and participants to file any request related to evidence at this stage of the proceedings by 30 September 2019.[2]

3. On 29 August 2019, the Defence submitted a request, seeking authorisation to file additional requests concerning 'the introduction of new evidence', 'if the pending and potential requests for rebuttal and rejoinder evidence from the Prosecution and the Defence are granted'.[3] The Defence also requests that irrespective of any requests on rebuttal and rejoinder evidence, the 30 September 2019 deadline is extended until 1 November 2019 in relation to any request to submit material into evidence via 'bar table' and any application for introduction of prior recorded testimony under Rule 68(2)(b) of the Rules.[4] With respect to the 'bar table' motions, the Defence submits that extending the time limit in order to allow the Defence to prepare detailed and precise submissions constitutes a good cause.[5] The Defence also argues that in relation to applications for

[1] Email Decision Granting Defence Request for a Two Day Extension of Deadline, 24 May 2018 ICC-02/04-01/15-1483-AnxXVI; 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, ICC-02/04-01/15-1199-Red, para. 84; Preliminary Directions for any LRV or Defence Evidence Presentation, 13 October 2017, ICC-02/04-01/15-1021 (the 'Preliminary Directions'), paras 6-7.
[2] 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, ICC-02/04-01/15-1572 ('Clarification').
[3] Defence Request for Variation of the 30 September Deadline, ICC-02/04-01/15-1576 (the 'Request'), paras 5, 11.
[4] Request, ICC-02/04-01/15-1576, paras 6, 11.
[5] Request, ICC-02/04-01/15-1576, para. 8.

Rule 68(2)(b) witnesses, the extension of deadline is also warranted as it is planning to conduct a joint mission to obtain the required certifications.[6]

4. On 2 September 2019, the Office of the Prosecutor (the 'Prosecution') filed its observations opposing the Request.[7] While agreeing with the Defence that the need to request authorisation to introduce rebuttal or rejoinder evidence may only arise at a later stage, it submits that the rest of the Request is too general and should be rejected.[8] The Prosecution argues that the Defence is requesting the Chamber 'to make an order now to cope with possible future eventualities'.[9] In its view, the Defence should file any request to submit additional evidence after the deadline on a case-by-case basis.[10]

5. The Single Judge recalls that the Order Setting Deadline clearly sets out that the 30 September 2019 date should be respected '[t]o the extent possible'.[11] Also, as noted above, the original deadline for the Defence to file its final list of witnesses and the list of evidence expired over a year ago.[12] Accordingly, the Single Judge reiterates that the 30 September 2019 date should not be understood 'as indicating that any request that is filed by this point in time will automatically be granted'.[13] Regulation 35(2) of the Regulations 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'.

6. Specifically in relation to Rule 68(2)(b) applications and any eventual request for submission of rejoinder evidence, the Single Judge considers that the Defence has failed to present concrete reasons and has rather presented only a hypothetical case. The Single Judge again emphasises that the deadline for the Defence list of witnesses, list of evidence and Rule 68 requests lapsed on 4 June 2018, meaning that such requests – even

[6] Request, ICC-02/04-01/15-1576, para. 10.
[7] Prosecution's Response to "Defence Request for Variation of the 30 September Deadline" (ICC-02/04-01/15-1576), ICC-02/04-01/15-1580 (the 'Response').
[8] Response, ICC-02/04-01/15-1580, paras 2-3.
[9] Response, ICC-02/04-01/15-1580, para. 4.
[10] Response, ICC-02/04-01/15-1580, para. 5.
[11] Order Setting Deadline, ICC-02/04-01/15-1570, para. 7.
[12] Clarification, ICC-02/04-01/15-1572, para. 5.
[13] Clarification, ICC-02/04-01/15-1572, para. 5. *See also* Preliminary Directions, ICC-02/04-01/15-1021.

if filed by 30 September 2019 – must still justify why they were filed after the lapse of this earlier deadline. The Defence has also previously been informed that the Single Judge will not 'pre-approve' witnesses or evidence additions based on an intent to request them in the future.[14] Accordingly, the Defence is instructed to file such requests seeking an extension of time limit, if and when the need will arise to introduce such new evidence on the record. In that event, the Defence shall demonstrate how the requirements for an extension of time limit and/or for the presentation of rejoinder evidence are met.

7. As regards the foreseen 'bar table' motion, the Single Judge takes note of the arguments put forward by the Defence regarding their current workload given the ongoing trial hearings and their inability to work on such a motion.[15] The Single Judge recalls that heavy workload may, under certain circumstances, constitute a good cause, within the meaning of Regulation 35 of the Regulations.[16] Nonetheless, the Single Judge has discretion to decide on the extension of a deadline and the existence of a good cause does not automatically mean that the requested extension shall be granted.[17]

8. Taking into consideration all relevant factors and the current status of the proceedings the Single Judge remains unconvinced that the deadline should be extended until 1 November 2019. As the Chamber has recalled in several occasions, the Defence has submitted its final lists of witnesses and evidence on 4 June 2018.[18] While the need for

[14] Decision on Requests Following Final Defence Witness and Evidence Lists, 21 June 2018, ICC-02/04-01/15-1289, paras 5-7. *Similarly, see,* Trial Chamber II, *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the "Prosecution's Application for Leave to Appeal the 'Order concerning the Presentation of Incriminating Evidence and the E-Court Protocol'" and the "Prosecution's Second Application for Extension of Time Limit Pursuant to Regulation 35 to Submit a Table of Incriminating Evidence and related material in compliance with Trial Chamber II 'Order concerning the Presentation of Incriminating Evidence and the E-Court Protocol'", 1 May 2009, ICC-01/04-01/07-1088, para. 39 where the Chamber held that '[t]he Chamber cannot entertain applications for extension of time limit that are not sufficiently precise and specific and it must therefore reject open-ended applications for extension of time limit that are based on hypothetical arguments'.

[15] Request, ICC-02/04-01/15-1576, paras 7-10.

[16] Trial Chamber II, *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Order on the Request by the Registry for the Extension of a Time Limit (regulation 35 of the Regulations of the Court), 14 January 2009, ICC-01/04-01/07-826-tENG, paras 3-4.

[17] *Similarly*, Trial Chamber II, *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the Prosecution request for the addition of witness P-219 to the Prosecution List of Incriminating Witnesses and the disclosure of related incriminating material to the Defence, 23 October 2009, ICC-01/04-01/07-1553, para. 24.

[18] Confidential Redacted Version of 'Defence notification of List of Witnesses and Evidence in compliance with ICC-02/04-01/15-1021 and Request for Leave to Add Witnesses its List of Witnesses and Materials to its List of Evidence', ICC-02/04-01/15-1272-Conf-Red. The list of witnesses is contained in confidential annex A, ICC02/04-01/15-1272-Conf-AnxA. The list of evidence is contained in confidential annex B, ICC-02/04-01/151272-Conf-AnxB.

sufficiently detailed and precise submissions, in order to ensure a fair and expeditious trial, may constitute a good cause, the Single Judge finds that the Defence has not provided a sufficient explanation as to why, at this point of the proceedings, the Defence has been put in a situation where a one-month extension is required.

9. Accordingly, in exercising its discretion under Regulation 35(2), the Single Judge decides to extend the deadline for the submission of evidence via a 'bar table' motion until 15 October 2019.

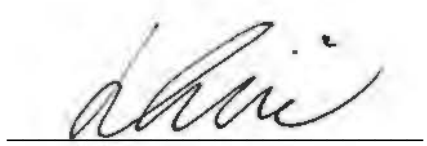
10. The Defence shall file any other request related to evidence, to the extent possible, within the 30 September 2019 deadline.

FOR THE FOREGOING REASONS, THE SINGLE JUDGE HEREBY

GRANTS the Request, in part, and extends the deadline for any 'bar table' motion until 15 October 2019; and

REJECTS the remainder of the Request.

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



Judge Bertram Schmitt, Single Judge

Dated 10 September 2019
At The Hague, The Netherlands