

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: **English**

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

Date: **23 November 2016**

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
with Confidential Annexes A to B**

**Prosecution's Request to Add Witness Transcripts and Seven Additional
Documents 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:

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

Legal Representatives of Victims

Mr Joseph Akwenu 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**

Ms Paolina Massidda
Ms Caroline Walter
Mr Orchlon Narantsetseg

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

Amicus Curiae

States Representatives

REGISTRY

Registrar

Mr Herman von Hebel

Counsel Support Section

Victims and Witnesses Section

Detention Section

**Victims Participation and Reparations Other
Section**

Introduction

1. Pursuant to the Decision Setting the Commencement Date of the Trial,¹ the Office of the Prosecutor (“Prosecution”) seeks leave from the Chamber to add the transcripts of Prosecution Witness P-0142 produced during an interview conducted on 3 December 2015 as well as recently registered documentary evidence relating to Prosecution witnesses, to its List of Evidence (“LoE”). Annexes A² and B respectively, set out the transcripts, and the recently registered documents disclosed after the submission of the original LoE on 6 September 2016.
2. The Prosecution also seeks guidance on how best to submit future requests to add materials on to the LoE.

Background

3. The Prosecution recently discovered that it had omitted to disclose to the defence a set of transcripts produced during the interview of P-0142 conducted on 3 December 2015. The Prosecution had requested for the transcription of the tapes of the interview on 27 April 2016. A first draft of the transcribed transcripts in Acholi and English were made available in June 2016. The transcripts were then to be quality checked and a final version produced, registered and disclosed to the Defence before the deadline for filing of the Prosecution’s LoE. The process of quality checking the documents and registering them did not take place. At 13h30 on 17 November 2016, it was discovered that these transcripts were yet to be finalised and disclosed to the Defence. The Prosecution immediately notified the Defence of this oversight and apologised to the Defence for the failure to disclose. The Prosecution further informed the Defence that it will seek leave from the

¹ ICC-02/04-01/15-449, para. 7-8.

² UGA-OTP-0273-0294; UGA-OTP-0273-0313; UGA-OTP-0273-0348; UGA-OTP-0273-0385; UGA-OTP-0273-00405; UGA-OTP-0273-0441.

Chamber to add the transcripts to its LoE. In the meantime, draft transcripts were immediately registered, and preliminary disclosure was made to the Defence by 18h25 of the same day.³ A chart setting out the registration number and a brief synopsis of the six transcripts generated from the interview is appended to this Motion as Annex A.

4. Annex B sets out seven items – five birth certificates and two reports - registered and disclosed after the submission of the Original LoE on 6 September 2016. The Prosecution submits that these items are relevant and probative and their addition to the LoE will cause no prejudice to the defence.

Confidentiality

5. Annexes A and B to this request are classified as “Confidential” pursuant to regulation 23*bis* of the Regulations of the Court. They contain evidentiary information which has been disclosed as “Confidential”.

Submissions

Addition of Items on Annex A and B to the List of Evidence

6. The Prosecution seeks leave to add the six transcripts in Annex A and the newly registered items in Annex B, to its list of evidence in view of the relevance and probative value of the items. The Prosecution adopts the submissions on the law made in its two previous requests to add items to the LoE⁴. It further relies upon

³ Email sent to the Defence on Thursday, November 17, 2016 at 18h25.

⁴ ICC-02/04-01/15-577; ICC-02/04-01/15-585.

decision #600 of the Chamber⁵ that “any request to add further items to the List of Evidence is not a request pursuant to Regulation 35 of the Regulations”.

Annex A - The transcripts are relevant and probative

7. P-0142 is a Prosecution witness and former LRA member, who features in the Prosecution’s list of witnesses⁶ and has given three interviews to OTP investigators, containing incriminatory evidence on Ongwen’s participation in the attacks on Odek and Lukodi IDP camps.⁷ The transcripts of the first two interviews were disclosed to the Defence in May and September 2015, respectively,⁸ and included in the original LoE filed on 6 September 2016.
8. The third interview of the witness which has generated the transcripts in Annex A is relevant as it complements the previous testimony of the witness and provides further particulars on the attacks in Odek and Lukodi.⁹

Lack of prejudice to the Accused

9. The addition of the transcripts to the List of Evidence will not prejudice the rights of Accused as the Defence has been on notice of this witness and the nature of his relevance to the case—particularly, his relevance for the Odek and Lukodi charges—for over one year. As noted above, transcripts of the witness’s first two interviews, comprising the bulk of his evidence, were disclosed to the Defence in

⁵ ICC-02/04-01/15-600; para. 14.

⁶ Filed on 19 October 2016.

⁷ ICC-02/04-01/15-533, Prosecutor’s Pre Trial Brief refers to P-0142’s evidence in paragraphs 26,91,94,99,100,101,114,121,124,128,129,289,315,317,319,325,326,334,335,337,338,341,392,402,403,404,405, 406,407,593,645,646,658 and 661.

⁸ The first interviews conducted on 29 and 30 June 2006 were disclosed on 15 May 2015. The second interviews conducted on 5 and 6 May 2015 were disclosed on 21 September 2015, UGA-OTP-0228-4445, UGA-OTP-0228-4488, UGA-OTP-0228-4513, UGA-OTP-0228-4542, UGA-OTP-0228-4583, UGA-OTP-0228-4620, UGA-OTP-0244-0613 , UGA-OTP-0244-0618, UGA-OTP-0244-0625, UGA-OTP-0244-0636, UGA-OTP-0244-0653 , UGA-OTP-0244-0667, UGA-OTP-0244-0693, UGA-OTP-0244-0710, UGA-OTP-0244-0732 , UGA-OTP-0244-0755, UGA-OTP-0244-0776.

⁹ UGA-OTP-0228-4542 at 4545 to 4576.

May and September 2015. The Prosecution referred to this witness's evidence in its Confirmation submissions on 22 January 2016¹⁰ and summarised the critical aspects of his evidence in its Pre-Trial Brief and in the Summary of Anticipated Testimony for P-0142, initially filed on 19 July 2016,¹¹ with a final version on 6 September 2016¹². Addition of the requested transcripts from the witness's third interview will not substantially impact on the preparation of the Defence since they are only a small fraction of the totality of evidence offered by the witness and do not address any new substantive matters outside of those addressed in the previously disclosed transcripts.¹³

10. Furthermore, the witness is projected to appear as witness number 11 in the proposed order of appearance of witnesses. This pre-supposes that his appearance will be in the second batch of witnesses after the commencement of the presentation of evidence on 16 January 2017.¹⁴ The Chamber in ruling on the two previous requests by the Prosecution to add materials to its List of Evidence,¹⁵ noted that where the materials sought to be added "are not connected to the very first witnesses expected to testify in the case, which will enable to Defence to conduct any further necessary limited investigations prior to the appearance of the witnesses of relevance to these items", the addition of such materials will not prejudice the defence.¹⁶

¹⁰ Transcripts from the Confirmation hearing T-21, p. 3, lns. 20-22; p. 31, lns. 16-19; p. 34, lns. 17-19; *see also* ICC-02/04-01/15-422-Conf, p. 23, para. 47; p.32, para. 71;

¹¹ ICC-02/04-01/15-502-Conf-Anxs.

¹² ICC-02/04-01/15-532-Conf-AnxC, pp. 17, 21.

¹³ UGA-OTP-0228-4542 at 4545 to 4576.

¹⁴ The presentation of evidence is scheduled to start on 16 January 2017 for a three week block followed by a break of three weeks. *See* email of 10 October 2016 at 16h53.

¹⁵ ICC-02/04-01/15-577; ICC-02/04-01/15-585.

¹⁶ *Ibid*, para. 16.

Addition of Items on Annex B to the List of Evidence

11. The items sought to be added to the LoE in Annex B are five birth certificates and two reports which relate to Prosecution Witnesses P-0006, P-0410, P-0097, P-0396, P-0307 and P-0252. The items have significant probative value and will assist the Chamber in its truth-finding function. The determination of the ages of some of the listed witnesses, for instance through the use of birth certificates, goes to the heart of the charge of conscription and use of child soldiers.
12. Annex B provides further details on the relevance of the documents and the dates of collection of the materials.

Lack of Prejudice to the Accused

13. The addition of the items in Annex B to the List of Evidence will not cause prejudice to the Defence for the reasons set out below: Firstly, the birth certificates relate to the ages of Witnesses P-0410, P-0097, P-0396, P-0307 and P-0252 and they have made reference to their ages in their respective witness statements¹⁷. These witness statements were already disclosed to the Defence.¹⁸ Similarly, the articles relating to P-0006 detail the attack on Pajule camp and refer to the abduction of P-0006 thereby corroborating her account. P-0006's statement had been disclosed to the Defence since July 2015.¹⁹
14. Secondly, the witnesses to whom these materials relate are unlikely to testify before mid-2017, which gives the Defence sufficient time to prepare for the

¹⁷ P-0410: UGA-OTP-0267-0207 at 0209, para. 11; P-0097: UGA-OTP-0165-0035 at0036, para. 8; P-0396: UGA-OTP-0267-0246 at0248, para.12; P-0307: UGA-OTP-0266-0425 at0428, para.13; P-0252: UGA-OTP-0243-0428 at0431, para. 16.

¹⁸ They were disclosed between 17 August 2015 and 15 August 2016.

¹⁹ Disclosure Pre-Confirmation Package 2, 16 July 2015.

discrete part of their testimony to be covered by the proposed additional materials.²⁰

Other Disclosable Items

15. The Prosecution continues, on occasion, to receive individual items of evidence relevant to the case, including items upon which the Prosecution may wish to rely to prove its case. These are mainly items which were not immediately available when they were requested at the time of the Prosecution's conduct of its investigations or they were not in the immediate possession of the person from whom the document or material was requested, such as birth certificates, identify cards, school records, etc.

16. Cognisant of the fact that the deadline for the submission of its List of Evidence has expired and the commencement of trial is imminent, the Prosecution undertakes to file its application to the Chamber after a careful consideration of the relevance and probative value of the items and their utility for the truth finding function of the Chamber. Furthermore, 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 LoE. The Prosecution would however alert the Defence about its intention to seek leave for adding the items to the LoE when the respective items are disclosed, namely in the accompanying Disclosure Letter.

17. The Prosecution expects that future requests to add items to the LoE will only cover a small set of materials.

²⁰ ICC-02/04-01/15-532, Annex B: According to the Prosecution's proposed order of witness appearance, Witness P-0410 is scheduled to appear as witness number 58, P-0097 as witness number 31, P-0396 as witness number 19, P-0307 as witness number 59 and witness number P-0252 as witness number 21. None of these are expected to appear earlier than May or June 2017. *See also* ICC-02/04-01/15-600, para. 14, 19.

Relief Requested

18. The Prosecution requests leave from the Chamber to add the transcripts and the newly collected materials included in Annexes A and B to the Prosecution's LoE.
19. The Prosecution further 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.



Fatou Bensouda
Prosecutor

Dated this 23rd day of November 2016

At The Hague, The Netherlands