

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-02/04-01/15
Date: 24 August 2017

TRIAL CHAMBER IX

Before: Judge Bertram Schmitt, Single Judge

SITUATION IN UGANDA

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

Public

Decision on Prosecution's Request to Add 14 Items to its List of Evidence

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

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Detention Section

**Victims Participation and Reparations
Section**

Others

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(2) and 67 of the Rome Statute ('Statute'), issues the following 'Decision on Prosecution Request to Add 14 Items to its List of Evidence'.

A. Procedural History

1. On 30 May 2016, the Chamber issued a decision setting 6 September 2016 as the deadline ('6 September Deadline') for the Office of the Prosecutor ('Prosecution') to submit, *inter alia*, its final list of evidence and disclose all incriminating evidence.¹ The Prosecution duly submitted its list of evidence ('List of Evidence') on the indicated day.²
2. On 24 July 2017, the Prosecution filed a request to add 14 items to the List of Evidence ('Request').³
3. On 3 August 2017, the defence for Mr Ongwen ('Defence') submitted its response to the Request ('Response').⁴

B. Submissions and Analysis

i) Requests to add items related to Witness P-250

4. In its Request, the Prosecution seeks leave to add to the List of Evidence the three English/Acholi transcripts of an interview with Witness P-250 ('P-250 Transcripts')⁵ and a victim participation application made by Witness P-250

¹ Decision Setting the Commencement Date of the Trial, 30 May 2016, ICC-02/04-01/15-449.

² Prosecution's submission of the list of evidence, the list of witnesses and summaries of anticipated testimony, 6 September 2016, ICC-02/04-01/15-532, with three confidential annexes, A to C.

³ Prosecution's Request to Add 14 Items to its List of Evidence, 24 July 2017, ICC-02/04-01/15-927-Conf.

⁴ Defence Response to the Prosecution's Request to Add 14 Items to its List of Evidence, 3 August 2017, ICC-02/04-01/15-932-Conf. A public redacted version was filed on the same day, ICC-02/04-01/15-932-Red.

⁵ UGA-OTP-0278-0376, UGA-OTP-0278-0385, UGA-OTP-0278-0427.

(‘Victim Application’).⁶ The P-250 Transcripts were produced during the Prosecution’s second interview with the witness on 2 July 2017, which was conducted in order to explore a contradiction between a statement in his first interview⁷ and his Victim Application. The Prosecution submits that ‘the clarification of the contradiction and P-250’s further information provided during the second interview are of importance to his anticipated evidence’, while the addition of these items does not cause any undue prejudice to Mr Ongwen.⁸

5. The Defence does not oppose the addition of the Victim Application. However, it opposes the addition of the P-250 Transcripts alleging that ‘the Prosecution failed to use proper due diligence with P-250’.⁹ It explains that the second interview should have taken place much earlier when the Prosecution met with P-250 in August 2016, which was already approximately eight months after the Prosecution reviewed the Victim Application.¹⁰
6. As previously explained 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 Regulation of the Court.¹¹ Rather, the Chamber must determine *in concreto* whether reliance on the additional 14 items causes an undue prejudice to 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 and the

⁶ UGA-OTP-0278-0468.

⁷ UGA-OTP-0243-1311, UGA-OTP-0243-1328, UGA-OTP-0243-1353, UGA-OTP-0243-1376, UGA-OTP-0243-1383, UGA-OTP-0243-1400, UGA-OTP-0243-1414, UGA-OTP-0243-1432, UGA-OTP-0243-1438, UGA-OTP-0243-1446, UGA-OTP-0243-1464, UGA-OTP-0243-1484, UGA-OTP-0243-1509.

⁸ Request, ICC-02/04-01/15-927-Conf, paras 10, 12.

⁹ Response, ICC-02/04-01/15-932-Red, para. 16.

¹⁰ Response, ICC-02/04-01/15-932-Red, para. 19.

¹¹ 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.

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.¹²

7. Considering that the request to add the Victim Application is unopposed and the Defence admits that there is no prejudice encountered, the Single Judge grants the request for leave to add the Victim Application.
8. In respect of P-250 Transcripts, the Single Judge observes that: (i) the witness is currently scheduled to appear as the 56th witness in the trial¹³ and will not be called until early 2018;¹⁴ (ii) the insertion in the List of Evidence of the P-250 Transcripts is only of limited purpose, mainly to question the witness about the contradiction in his Victim Application; (iii) according to the Defence itself, 'the issues which the Prosecution attempts to rectify' with P-250 Transcripts are 'simplistic issues'¹⁵ and (iv) rejecting the Request to add these transcripts to the List of Evidence serves little purpose, as doing so would not necessarily preclude the parties from exploring the contradiction in question when P-250 testifies.
9. Considering the above, the Single Judge is of the view that the addition of the P-250 Transcripts does not infringe fair and expeditious conduct of the proceedings. The Defence has sufficient time to prepare and is not unduly prejudiced by their addition, considering the nature and information contained in these items. Accordingly, the Single Judge grants the request to add the P-250 Transcripts.

¹² Decision on the 'Prosecution's Request to Add Transcripts and Seven Additional Documents to its List of Evidence', 2 December 2016, ICC-02/04-01/15-619, para. 10.

¹³ See Updated List of Prosecution Witnesses, 30 November 2016, ICC-02/04-01/15-613-Conf-AnxB.

¹⁴ Request, ICC-02/04-01/15-927-Conf, para. 4.

¹⁵ Response, ICC-02/04-01/15-932-Red, para. 20.

ii) Request to add items related to Witness P-372

10. In its Request, the Prosecution also seeks leave to add to its List of Evidence ten English/Acholi transcripts of an interview with Witness P-372 ('P-372 Transcripts'),¹⁶ conducted on April 2016. The Prosecution submits that Witness P-372 'provides key evidence in relation to the charged attacks on Pajule and Odek, in which he participated' and that the addition of P-372 Transcripts 'does not cause any undue prejudice' to Mr Ongwen.¹⁷
11. The Defence opposes the addition of the P-372 Transcripts, arguing that 'the Prosecution has failed to conduct its affairs with this witness with proper due diligence, and has placed the Defence at a disadvantage in its examinations of previous witnesses', by not disclosing English-only transcripts to the Defence by the 6 September deadline, or at a time earlier than the completion of the Acholi/English transcripts.¹⁸
12. The Single Judge recalls that the Single Judge allowed the Prosecution to provide Acholi translations falling under Rule 76(3) to the Defence by no later than three months prior to the testimony of the witness concerned, irrespective of the 6 September Deadline.¹⁹ The Defence is right in pointing out that this does not include the original English version and that the Prosecution should have provided draft transcripts of P-372's interview at a time earlier than the completed transcripts if it was in a position to do so.
13. However, it also must be noted that the Prosecution disclosed a 23 page English summary of P-372's interview²⁰ by the 6 September deadline. While the

¹⁶ UGA-OTP-0277-0849, UGA-OTP-0277-0866, UGA-OTP-0277-0899, UGA-OTP-0277-0933, UGA-OTP-0277-0960, UGA-OTP-0277-0991, UGA-OTP-0277-1020, UGA-OTP-0277-1041, UGA-OTP-0277-1060, UGA-OTP-0277-1091.

¹⁷ Request, ICC-02/04-01/15-927-Conf, paras 11, 12.

¹⁸ Response, ICC-02/04-01/15-932-Conf, para. 27.

¹⁹ Decision on Disclosure Issues Arising out of First Status Conference, 7 June 2016, ICC-02/04-01/15-457.

²⁰ UGA-OTP-0270-0122.

interview summary note does not contain the statements of P-372 word-for-word, it contains a sufficiently detailed summary of the statements to enable the Defence to fully understand the key issues which are meant to be dealt with during the examination of Witness P-372. As such, the late disclosure of P-372 Transcripts caused no undue prejudice to the Defence, considering also that (i) the witness is currently scheduled to appear as the 64th witness in the trial²¹ and will not be called until early 2018;²² and (ii) the Defence provides no specific substantiation for its claim that the absence of P-372's English-only transcripts have materially affected their ability to 'test the information from the witness against the recollection of other witnesses'.²³

14. Therefore, despite the late disclosure, the Single Judge is of the view that the fair and expeditious conduct of the proceedings is not infringed by permitting the Prosecution to add these items. The Defence still has sufficient time to prepare and is not unduly prejudiced by their addition. Accordingly, the Single Judge grants the request for leave to add the P-372 Transcripts.

²¹ See Updated List of Prosecution Witnesses, 30 November 2016, ICC-02/04-01/15-613-Conf-AnxB.

²² Request, ICC-02/04-01/15-927-Conf, para. 4.

²³ Response, ICC-02/04-01/15-932- Red, para. 26.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

GRANTS the Request; and

DIRECTS the Prosecution to file an updated List of Evidence.

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


Judge Bertram Schmitt, Presiding Judge

Dated 24 August 2017

At The Hague, The Netherlands