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**International
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Date: **28 May 2019**

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

Prosecution's Response to "Defence Request and Observations on Trial Chamber IX's Evidentiary Regime"

Source: The Office of the Prosecutor

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

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Introduction

1. The “Defence Request and Observations on Trial Chamber IX’s Evidentiary Regime”¹ (“Defence Request”), complains about an evidentiary regime which was adopted by the Trial Chamber in the trial of Dominic Ongwen at the request of the Defence themselves. It is based on a premature assumption concerning the content of the, as yet unwritten, trial judgment in this case and an unrealistic premise concerning the Chamber’s duty to itemise and discuss individual items of evidence in that judgment. It is filed out of time without any justification being advanced. All of these matters, jointly and severally, are grounds for dismissing the Defence Request *in limine*.

Confidentiality

2. This document is filed confidentially because it responds to a filing which was itself filed confidentially. The Prosecution submits that none of the material contained in either the Defence Request or this Response is of a confidential nature and both should be reclassified as Public.

Submissions

The Defence positively requested the application of the evidentiary regime adopted by the Trial Chamber

3. At paragraph 55 (A) and (B) the Defence Request urges the Trial Chamber to provide, either now or at the latest before the Parties submit their closing briefs, reasoned rulings on the admissibility and/or relevance of all items submitted into evidence. That request is directly at odds with the evidentiary regime requested by the Defence before the start of trial and in place now for nearly three years.

¹ ICC-02/04-01/15-1519-Conf.

4. Over three years ago, on 4 May 2016, the Single Judge of the Trial Chamber expressed his intention “to issue directions ...on a variety of matters pursuant to article 64(8)(b)... [and that this] may include those in relation to:...(iv) admissibility of evidence”.² Noting the possibility, under rule 140(1) of the Rules of Procedure and Evidence (“Rules”), of the Parties agreeing on the “order and manner in which the evidence shall be submitted” the Single Judge invited submissions from the Parties on these matters.³ The deadline for making submissions was 28 October 2016.⁴

5. On 30 June 2016 and in response to the Single Judge’s invitation, the Prosecution and the Defence filed a joint submission on the conduct of proceedings (“Joint Submissions”).⁵ Under heading “k. Procedure for the formal submission of material” both Parties requested that:

“If the calling party demonstrates a clear connection between material and the substance of a witness’ testimony during the witness’ testimony, *it may request that material to be formally submitted within the meaning of article 74(2) of the Statute.*”

The application for any material that a party seeks to formally submit should be made at the time of its presentation to the witness, or at least before the end of the questioning. Any objections should be raised at that time. A party waives its right to object to the formal submission of material if they do not raise an objection at that time.”⁶

6. The Defence added an “Additional Defence” submission expressly requesting that “[t]he Party seeking to *formally submit evidence* should confirm via email the day after questioning all the documents that it sought to introduce through the witness”.⁷

² ICC-02/04-01/15-432, para 4.

³ ICC-02/04-01/15-432, para 4.

⁴ ICC-02/04-01/15-449, page 7.

⁵ ICC-02/04-01/15-486.

⁶ ICC-02/04-01/15-486, paras 50-51 (emphasis added).

⁷ ICC-02/04-01/15-486, para 51 (emphasis added).

7. In making this request the Defence and Prosecution cited to paragraph 16 of a decision in the *Bemba et al.* case which reads:

“Bearing the above in mind, the Chamber decides that *it will not make any ruling on the relevance and/or admissibility* of the 1,028 submitted items at this time beyond its previous decisions taken under Article 69(7) of the Statute. The Chamber considers these items to be submitted and discussed within the meaning of Article 74(2) of the Statute.”⁸

8. The Defence and Prosecution made a further joint request under the heading “1. Applications for the formal submission of material other than through witnesses”. They agreed that that the parties should be permitted to “submit material *without* presenting it through a witness” and that “[t]his procedure promotes efficiency in the proceedings.”⁹

9. In doing so the Parties cited to the revised directions on the conduct of the case issued by the Trial Chamber in *Gbagbo et al.* case.¹⁰ Neither Party suggested that the admissibility of material submitted under heading “k” (material connected to a witness) should be assessed differently from material submitted under heading “l” (material not connected to a witness).

10. In the *Gbagbo et al.* case, cited by both Parties, the Trial Chamber had, in January 2016, decided that the assessment of the admissibility of evidence in that case would be deferred until “the moment when the Chamber will be deliberating its judgment”.¹¹

11. There can be no doubt that, when the Defence made its requests in the Joint Submissions, it was advocating for the very regime that currently applies in the trial of Dominic Ongwen and which (like *Bemba et al.* and *Gbagbo et al.*) defers any

⁸ ICC-01/05-01/13-1285, para 16 (emphasis added).

⁹ ICC-02/04-01/15-486, para 52 (emphasis added).

¹⁰ ICC-02/11/01/15-498-AnxA.

¹¹ ICC-02/11-01/15-405, para. 12.

assessment of the admissibility of evidence until the trial judgement, unless the Trial Chamber decides otherwise.

12. On 13 July 2016, the Trial Chamber issued its Initial Directions on the Conduct of Proceedings (“Initial Directions Decision”),¹² adopting the Parties’ proposals. It clearly explained that “it would defer its assessment of the admissibility of the evidence until deliberating its judgment pursuant to Article 74(2) of the Statute”¹³ whilst at the same time emphasizing its discretion to “rule on admissibility issues upfront when appropriate”.¹⁴ At no point in the last three years has the Defence indicated that it has changed its mind about the submissions that it made to the Chamber in June 2016, or sought leave to appeal the Decision. It has never previously indicated that the evidentiary regime set out in the Initial Directions Decision should be reconsidered and modified.

13. Specifically, on 6 December 2016, at the commencement of the trial, the Presiding Judge, in accordance with rule 134(2), asked the Defence whether it had any “remaining objections or observations concerning the conduct of the proceedings”.¹⁵ Again, the Defence did not raise any objections or make reference to the evidentiary regime set out by the Trial Chamber.

14. The Defence has on occasion requested the Trial Chamber to use its discretion and rule on “admissibility issues upfront”. However, such requests were entirely consistent with the Initial Directions Decision and the evidentiary regime applied in the case.¹⁶

¹² ICC-02/04-01/15-497.

¹³ ICC-02/04-01/15-497, para. 24.

¹⁴ ICC-02/04-01/15-497, para. 26.

¹⁵ ICC-02/04-01/15-T-26-ENG, page 20, lines 17-25, page 21, lines 1-3 (emphasis added).

¹⁶ In the Initial Directions Decision the Trial Chamber emphasizing its discretion to “rule on admissibility issues upfront when appropriate”. See ICC-02/04-01/15-497, para. 26.

15. The Defence Request fails to acknowledge the procedural history that led up to the Initial Directions Decision.¹⁷ It also fails to mention its 2016 Joint Submissions or make any attempt to reconcile what it requested in those submissions with what it now requests in paragraphs 55 (A) and (B).

16. Simply put, the procedural history shows that the Trial Chamber did not impose an evidence regime which the Defence now describes as causing confusion, legal uncertainty and delay. Rather, the Trial Chamber asked the Parties to submit their views and gave the Defence (and the Prosecution) what they asked for. The Trial Chamber has therefore been inclusive, transparent and fair to both Parties from the outset. It has considered the Parties' views and has consistently applied the evidentiary regime throughout the two and a half years of trial proceedings. The Defence cannot suddenly change its mind now that the Prosecution has finished its case and a few months before the end of its own case.

17. The Defence Request should be rejected *in limine* on this basis alone.

The Defence Request is predicated on a premature assumption and an unrealistic premise

18. At paragraph 55 (C), in the alternative, the Defence Request urges the Trial Chamber to undertake that "evidential rulings" in respect of all items submitted into evidence will be "discussed" in the trial judgment, or an annex thereto. The Defence submits that the Trial Chamber's failure to provide such rulings during the trial would itself be a breach of its duty to ensure a fair trial,¹⁸ and that without such an undertaking, the Trial Chamber will not have provided "the fundamental guarantee of discussing the assessment of standard evidentiary criteria for each item in its final judgment."¹⁹

¹⁷ ICC-02/04-01/15 -486.

¹⁸ ICC-02/04-01/15-1519-Conf, para. 54.

¹⁹ ICC-02/04-01/15-1519-Conf, para. 2.

19. The Defence submission is premature. It is true that, at paragraph 24 of the Initial Directions Decision, the Trial Chamber stated that it may not “necessarily discuss” in the judgment the “relevance, probative value and potential prejudice” of *every* item submitted in the course of the trial.

20. But the Trial Chamber also stated, in the same paragraph, that it will “consider the relevance, probative value and potential prejudice of each item of evidence submitted when deliberating the judgment”. There are no grounds to assume (as the Defence appears to) that, in rendering its final judgment, in respect of any item of evidence which the Parties contend is important, the Trial Chamber will fail adequately to explain why it considers those items to be relevant, probative and non-prejudicial, or why it takes the contrary view.²⁰

21. Furthermore, the Defence assertion that such an item by item discussion is a “fundamental guarantee” is unrealistic. There are currently 4204 items of evidence, many of them hundreds of pages long, which have been formally submitted in the trial of Dominic Ongwen. There will be many more by the end of the trial. The Trial Chamber will not rely on all of them in its judgment, once all the evidence has been received and a ‘holistic’ assessment can be made. Others (the radio intercept ‘log-books’ are a good example) will belong to categories of evidence where each individual item is likely to be covered by very much the same assessment as all the other items in that category. Dominic Ongwen’s “fair trial right to present a defence”²¹ does not require that the admissibility of every such item should be individually commented upon in the judgment.

²⁰ ICC-01/05-01/13-2275-Red, para. 106.

²¹ ICC-02/04-01/15-1519-Conf, para. 3.

22. This premature assumption as to the nature of the final judgment and mischaracterisation of Dominic Ongwen's fair trial rights also justifies dismissal *in limine* in its own right.

The Defence Request is out of time

23. Contrary to the Defence Request, its submissions are not "timely".²² The Initial Directions Decision was issued almost three years ago, on 13 July 2016. The Defence Request fails to offer any explanation or provide any exceptional circumstances for it coming so late.

24. The Defence Request raises an issue regarding the conduct of the trial proceedings. Under rule 134(2), the time to raise matters pertaining to the admission or submission of evidence was "at the commencement of the trial". Rule 134(2) further provides that "such objections or observations may not be raised or made again on a subsequent occasion in the trial proceedings, without the leave of the Trial Chamber [...]". This rule was included in the statutory framework of the Court precisely in order to prevent endless procedural challenges after the commencement of trial.²³

25. The Trial Chamber recently rejected *in limine* a motion by the Defence challenging the formulation of the charges. It held that such motions must be brought in a timely manner after they arise. It reiterated that rule 134(2) requires that motions alleging defects in the confirmation decision may not, as a general rule, be brought after the commencement of trial. Any exception to this rule must be supported by "sufficient justification for the timing of [a belated] motion".²⁴

²² ICC-02/04-01/151519-Conf, para. 3.

²³ Peter Lewis, Trial Procedure, in Roy S. Lee (ed.), The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence, Transnational Publishers, Ardsley, 2001, p. 543.

²⁴ ICC-02/04-01/15-1476, para. 36.

26. The Defence Request should be rejected for the same reasons. It is out of time and the Defence has not provided sufficient justification for the lateness of its request.

27. In addition, the Defence's reliance on rule 134(3) is inapposite. The Initial Directions Decision itself is not an "issue[] that [arose] during the course of the trial."²⁵ Rather, the Initial Directions Decision was rendered in advance of the commencement of the trial pursuant to article 64(8)(b) of the Rome Statute. The fact that it is applied in ongoing trial proceedings does not change this nor does it dispense with the procedural requirement to challenge decisions in accordance with set time lines and procedures. Were the contrary to be the case, it would mean that all decisions, no matter how distant in time, could be challenged, as long as their continued implementation could be shown to impact ongoing proceedings. This would truly undermine the "legal certainty" that the Defence purports to seek.

28. This lack of timeliness would also, without more, justify dismissing the defence Request *in limine*.

Conclusion

29. For all or any of the reasons set out above, the Prosecution requests the Trial Chamber to dismiss the Defence Request *in limine*.



Fatou Bensouda, Prosecutor

Dated this 28th May 2019
At The Hague, the Netherlands

²⁵ Rule 134(3) of the Rules of Procedure and Evidence.