

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 12 March 2018

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 Request to Add Items Related to the Testimony of its
Mental Health Experts 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, 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, issues the following 'Decision on Prosecution Request to Add Items Related to the Testimony of its Mental Health Experts to its List of Evidence'.

I. Procedural history and submissions

1. On 30 May 2016, the Chamber set a deadline of 6 September 2016 ('6 September Deadline') for the Office of the Prosecutor ('Prosecution') to disclose all material 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 deadline, 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 ('List of Evidence') after the expiration of the deadline.³
2. On 16 November 2017, the Chamber granted a request by the Prosecution to add three mental health experts ('Experts') to its list of witnesses and add the Experts' reports and associated items to its List of Evidence.⁴
3. On 2 February 2018, the Chamber ordered the Prosecution to submit any further evidence by 1 March 2018 ('1 March Deadline').⁵

¹ Decision Setting the Commencement Date of the Trial, ICC-02/04-01/15-449, paras 7-8, 12.

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 Decision on Prosecution Requests Related to Mental Health Expert Evidence, 16 November 2017, ICC-02/04-01/15-1073, page 10.

⁵ Order Setting Deadline for the Prosecution to Submit Documentary Evidence, ICC-02/04-01/15-1162.

4. On 6 March 2018, the Prosecution filed a request to add items to its List of Evidence that are related to the testimony of its upcoming expert witnesses who are expected to testify about the mental health of the accused ('Request').⁶
5. The Prosecution divided the 39 items it wishes to add ('Items') into six categories: (i) a chart containing excerpts of courtroom testimony; (ii) a documentary film showing the accused speaking; (iii) an English translation of medical records prepared by the Court's detention centre; (iv) a chart providing explanatory information related to the report provided by the expert witness for the Defence; (v) video-footage of the courtroom session of 2 March 2017; and (vi) a transcript and translation of an item already on the Prosecution's List of Evidence.⁷
6. The Prosecution submits with respects to all Items, that their addition would be in the interest of justice⁸ and that the Defence would not be prejudiced by it.⁹
7. On 9 March 2018, the Defence submitted that the Request should be rejected ('Response').¹⁰ It argues, on a general basis, that it is prejudiced by the late submission of the Request.¹¹

II. Analysis

8. The Single Judge recalls that the admission of further items to the Prosecution's List of Evidence after the 6 September Deadline, in accordance with the 30 May

⁶ Prosecution's Request to Add Material Provided to its Mental Health Experts to its List of Evidence, ICC-02/04-01/15-1198.

⁷ Request, ICC-02/04-01/15-1198, para. 14.

⁸ Request, ICC-02/04-01/15-1198, paras 9-11.

⁹ Request, ICC-02/04-01/15-1198, paras 12-13.

¹⁰ Defence Response to Prosecution's Ninth Request to Add Materials Provided to its List of Evidence, ICC-02/04-01/15-1201.

¹¹ Response, ICC-02/04-01/15-1201, para. 16.

2016 decision, requires the leave of the Chamber¹² and that it will consider whether such addition unduly prejudices the rights of the Defence.¹³

9. Regarding the 1 March Deadline, the Single Judge notes that 'the testimony of the remaining Prosecution witnesses and any related materials submitted through the email submission procedure' were explicitly excluded.¹⁴ Accordingly, the 1 March Deadline does not prevent the submission of the Items through the e-mail submission procedure should their admission to the List of Evidence be allowed, as intended by the Prosecution.¹⁵
10. The Single Judge notes that the item from the first category is a chart of excerpts of courtroom testimony, which was filed in response to the Single Judge's remark on the upcoming testimony of the experts that '[t]he parties are encouraged to put questions to the experts premised on factual propositions drawn from the testimonial evidence in this case, using direct quotations as appropriate.'¹⁶ The chart was communicated to the experts as well as the parties, participants and the Chamber on 25 January 2018 via email.¹⁷
11. As correctly pointed out by the Defence,¹⁸ the Prosecution does not need to include the chart on its List of Evidence in order to be able to put the excerpts to the witnesses. The excerpts are part of other witnesses' testimony and, as such, already in evidence. However, as the experts have reviewed and may testify on the contents of this specific chart, it is more than a purely demonstrative aid

¹² 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.

¹³ 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.

¹⁴ Order Setting Deadline for the Prosecution to Submit Documentary Evidence, ICC-02/04-01/15-1162, para. 2.

¹⁵ Request, ICC-02/04-01/15-1198, para. 1

¹⁶ Decision on Prosecution Requests Related to Mental Health Expert Evidence, 16 November 2017, ICC-02/04-01/15-1073.

¹⁷ Email from the Senior Trial Attorney to the participants and Chamber on 25 January 2018, at 20:14.

¹⁸ Response, ICC-02/04-01/15-1201, para. 19.

prepared by the Prosecution.¹⁹ While not strictly necessary, the Single Judge is of the view that putting the item on the List of Evidence will avoid confusion. The Defence cannot be prejudiced by this addition since the Prosecution is allowed to put the content of the document to the experts in any case. Accordingly, the Single Judge grants the addition of this item to the List of Evidence.

12. In respect of the item in the second category, a documentary film showing Mr Ongwen speaking, the Defence submits that while it has had the opportunity to watch the film²⁰ it was not provided to the Defence experts. Further, the Defence argues that it is prejudiced because the Prosecution has not indicated when it first watched it and has not formally disclosed the film to the Defence yet.²¹ Additionally, it submits that prejudice is caused due to the fact that the film is not available to the Defence and its experts for review,²² the film may not reflect the true nature and context, and it was filmed for 'reasons not known' to the parties.²³
13. The Single Judge notes that the Prosecution informed the parties, participants and the Chamber via e-mail on 9 March 2018, that the whole film and the excerpt showing the accused speaking were formally disclosed and that the Defence received a copy of the film on 8 March 2018.²⁴ Accordingly, the Defence's arguments in this regard are moot.
14. Regarding the issue related to the availability of the film to the anticipated expert witnesses of the Defence, the Single Judge fails to see how this could cause prejudice to the Defence. At this point in time, the Defence is not even

¹⁹ Compare with Annex I to the Registration into the Record of the Case of a Document presented during the Trial Hearing held on 1 November 2017 (ICC-02/04-01/15-HNE-1), 16 November 2017, ICC-02/04-01/15-1075-AnxI.

²⁰ Response, ICC-02/04-01/15-1201, para. 20.

²¹ Response, ICC-02/04-01/15-1201, para. 20 a).

²² Response, ICC-02/04-01/15-1201, para. 20 b).

²³ Response, ICC-02/04-01/15-1201, para. 20 c).

²⁴ E-mail to Trial Chamber IX Communications on 9 March 2018, at 14:22.

obliged to submit its final list of witnesses.²⁵ Accordingly, the film can still be made available to the experts sufficiently before their anticipated testimony. In respect of the arguments concerning the ‘true nature and context’ as well as any considerations to the motivation for making the film, the Single Judge recalls that these factors concern the assessment of evidence and are to be taken into account at a later point in time.

15. Regarding the timing of the disclosure the Single Judge agrees that it is relatively soon before the testimony of the Experts. However, this does not mean that the Defence does not have sufficient time to include the excerpt (or the whole film, if it wishes) into its line of questioning for cross-examination for the Experts. Accordingly, the Single Judge finds that including this in the List of Evidence does not unduly prejudice the Defence and consequently allows its addition.
16. In respect of the English translation of the medical records prepared by the Court’s detention centre and the chart providing explanatory information related to the report provided by the expert witness of the Defence (category iii) and iv) of the Request) the Single Judge notes that the items were disclosed by the Defence itself. Accordingly, the Defence is fully aware of their contents. Further, all Experts mention that they relied upon these materials in the production of their reports.²⁶ The Defence therefore was aware that the items were connected to the expert reports and the upcoming testimonies of the Experts and can adequately prepare and take them into account for its cross-examination, if it wishes to do so. Consequently, the Single Judge does not consider that addition of these items would unduly prejudice the Defence and accordingly grants the Request in respect of these items.

²⁵ This list is to be provided on 31 May 2018; 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 and page 26.

²⁶ UGA-OTP-0280-0674, at UGA-OTP-0280-0676; UGA-OTP-0280-0786 at UGA-OTP-0280-0790; and UGA-OTP-0280-0732 at UGA-OTP-0280-0755.

17. Regarding the video footage of the courtroom session on 2 March 2017 (item in category (v)) the Single Judge notes that it was disclosed to the Defence on 28 July 2017.²⁷ Again, the expert reports refer to this video footage as one of the sources for the report.²⁸ The item – and the related translations – are therefore connected to the upcoming testimony of the Experts and the Defence can still take them into account for its cross-examination, should it wish to do so. Needless to say, the Defence is also aware of the contents of the video, having been present during its recording. Accordingly, the Single Judge does not consider that addition of these items would unduly prejudice the Defence and grants the Request in respect of these items.
18. In respect to the items in the last category identified by the Prosecution – a transcript and translation of an audio recording already on the List of Evidence – the Single Judge recalls paragraph 30 of its Initial Directions of the Conduct of the Proceedings²⁹ and accordingly grants the Request in this regard.

²⁷ Response, ICC-02/04-01/15-1201, para. 17.

²⁸ UGA-OTP-0280-0674, at UGA-OTP-0280-0676; UGA-OTP-0280-0786 at UGA-OTP-0280-0791; and UGA-OTP-0280-0732 at UGA-OTP-0280-0755.

²⁹ Initial Directions on the Conduct of the Proceedings, 13 July 2016, ICC-02/04-01/15-497, para. 30 ('In principle, recognising the formal submission of audio-visual material automatically includes recognising the formal submission of any associated transcripts or translations which were duly disclosed. This would be the case irrespective of whether these transcripts/translations were on the list of evidence or formally submitted, though it is clearly preferable to do both so there is no confusion as to their status').

FOR THE FOREGOING REASONS, THE SINGLE JUDGE HEREBY

GRANTS the Request; and

ORDERS the Prosecution to provide an updated List of Evidence forthwith.

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



Judge Bertram Schmitt, Single Judge

Dated 12 March 2018

At The Hague, The Netherlands