

**Cour
Pénale
Internationale**

**International
Criminal
Court**



Original: **English**

No.: **ICC-02/04-01/15**
Date: **31 January 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

**Public
With Confidential Annex A**

Prosecution's Request for Disclosure of Material Provided to D-0133

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
Ms Beth Lyons

Legal Representatives of Victims

Mr Joseph Akwenyu 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**

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

States Representatives

Amicus Curiae

REGISTRY

Registrar

Mr Peter Lewis

Counsel Support Section

Victims and Witnesses Section

Mr Nigel Verrill

Detention Section

**Victims Participation and Reparations
Section**

Other

Introduction

1. The Prosecution requests the Trial Chamber to order the Defence to disclose the material provided to Expert Witness D-0133 “to aid in the preparation of [his expert] report”.¹ Disclosure of this material is necessary to assess the expert’s credibility, the reliability of his opinion, and thus for the determination of the truth. It will enable the Prosecution to examine D-0133 on an informed basis, test the methodology and the probative value of the report, and therefore promote the fair and expeditious conduct of the proceedings.

2. This Request is made pursuant to article 64(2) of the Rome Statute (“Statute”) and rule 140(2)(b) of the Rules of Procedure and Evidence (“RPE”). The Prosecution also relies on articles 64(3)(c), 69(3) and 69(4) of the Statute and rules 79(2), 79(4) and 84 of the RPE.

Confidentiality

3. Annex A to this filing is classified as confidential, because it includes *inter partes* communication between the Prosecution and the Defence.

Background

4. Witness D-0133 is an expert witness, called by the Defence. He is currently scheduled to testify around 25 February 2019. His expert report is UGA-D26-0015-1022. It was compiled on 28 July 2018 and signed on 21 September 2018.

¹ UGA-D26-0015-1032 at 1034.

5. The Terms of Reference issued by the Defence to D-0133 include the following statement: “To aid in preparation of the report, the defence shall provide selected material of evidence and potential evidence.”²

6. On 23 January 2019, the Prosecution, referring to the above statement in the Terms of Reference, requested from the Defence the following information: (a) Whether the Defence did in fact provide any material to Expert Witness D-0133 and (b) If yes, what material was provided.³

7. On 25 January 2019, the Defence asked the Prosecution to clarify the legal basis for its request.⁴ The Prosecution responded on the same day, identifying several provisions from the Court’s legal framework as the legal basis and citing to the Trial Chamber’s previous jurisprudence.⁵

8. On 29 January 2019, the Defence responded to the Prosecution, effectively rejecting the 23 January 2019 request.⁶

9. Having exhausted *inter partes* consultations, the Prosecution seizes the Trial Chamber for relief.⁷

Submissions

10. The Defence’s email response of 29 January 2019 makes it clear that the Defence provided Expert Witness D-0133 with selected material to aid in the

² UGA-D26-0015-1032 at 1034.

³ Email from the Prosecution to the Defence of 23 January 2019 at 16:38 hrs - Annex A.

⁴ Email from the Defence to the Prosecution of 25 January 2019 at 12:09 hrs - Annex A.

⁵ Email from the Prosecution to the Defence of 25 January 2019 at 17:57 hrs - Annex A.

⁶ Email from the Defence to the Prosecution of 29 January 2019 at 18:05 hrs - Annex A.

⁷ ICC-02/04-01/15-T-25-ENG, p. 3, ln. 22-25: “First, the parties and participants are expected to cooperate with each other in this case wherever possible; for example, when requesting disclosure, the Chamber expects the parties to first engage *inter partes* consultations before seizing the Chamber for relief.”

preparation of his expert report,⁸ as anticipated in the Terms of Reference. Expert Witness D-0133 in his Report makes no mention of having received any material from the Defence,⁹ nor has that material been identified to the Prosecution by the Defence directly. The Prosecution thus has no idea what material was provided.

11. In Decision 709, this Trial Chamber ruled “that ‘sources used in support of any expert witness statement must be clearly indicated and easily accessible to the other party upon request’ as this is necessary for the proper evaluation of the expert evidence and the ability to test or challenge the probative value of such evidence”.¹⁰ The Chamber also held that “for the purpose of disclosure, there is no meaningful difference between an expert ‘using’ a source and ‘relying upon’ that source”.¹¹

12. The Prosecution submits that where the calling party selects material and provides it to an expert witness in order to aid him or her in the preparation of their expert opinion, this material must be disclosed to the opposing party and the Chamber. The fact that it is selected and supplied by the calling party is what distinguishes such material from other sources an expert may have come to consider on his or her own but ultimately decided not to use in forming his or her opinion.

13. Access to the material selected and provided to D-0133 by the Defence is necessary to test and explore, for example, whether the selection may have in any way steered the expert’s opinion and whether the expert used the material but failed to identify it as a source. Similarly, the fact that an expert chooses *not* to use any of the material provided by the calling party may be relevant and thus the subject of

⁸ The Response, *inter alia*, reads: “The Defence is not in the position to speculate *whether or not material provided to D-0133* was reviewed, relied upon,...” [emphasis added]. See Annex A.

⁹ UGA-D-26-0015-1022.

¹⁰ ICC-02/04-01/15-709, para. 12. The Trial Chamber also referred to jurisprudence of other international criminal tribunals, see ft. 25 of the cited decision.

¹¹ ICC-02/04-01/15-709, para. 13.

examination. The Parties and the Chamber must be able to explore these questions in order to assess the credibility of the expert and the reliability of his evidence.

14. The Prosecution submits that expert witnesses should give their opinion in full transparency. This includes disclosure of the guidance provided to experts in their Terms of Reference and must logically extend to other material provided to the expert witness by the instructing party. The lack of such transparency would seriously affect the Parties' and the Chamber's ability to test or challenge the basis and/or the methodology on which the experts reach their conclusions, and would therefore affect the assessment of the probative value of expert reports.¹²

15. The Defence appears to suggest that disclosure of the material selected and provided to D-0133 is not necessary, because the Prosecution can simply ask the expert, when he testifies, what material the Defence provided him.¹³ This argument however fails to appreciate that witness examination is not a substitute for disclosure. To the contrary, disclosure is the prerequisite for conducting an informed examination of an expert witness. As held by this Trial Chamber previously, "the Prosecution has a justifiable interest in exploring [an issue] on an informed basis," ruling against the Defence's contention that no prior disclosure was necessary given the possibility of exploring the topic during the testimony.¹⁴

16. Disclosure of the material selected and provided by the Defence to D-0133 will expedite and streamline his examination. It will enable the Prosecution to prepare and consider the relevant issues related to the material beforehand and adjust its questioning accordingly. If the Prosecution is made to conduct the examination "in the dark", it will inevitably be longer and less focused.

¹² See e.g. ICTY, Trial Chamber, *Prosecutor vs. Gotovina et al*, Decision on disclosure of expert material, 27 August 2009, para. 10.

¹³ Email from the Defence to the Prosecution of 29 January 2019 at 18:05 hrs - Annex A.

¹⁴ ICC-02/04-01/15-1388, paras. 13 and 14.

17. Finally, disclosure before the expert testifies will prevent potential delays that may occur if the Prosecution and the Chamber only learn about the material during examination and need time to consider its content and implications before continuing with the examination. This scenario is most likely to arise if the material is voluminous.

Conclusion

18. For the reasons set out above, the Prosecution requests the Trial Chamber to order the Defence to disclose what material it provided to Expert Witness D-0133 to aid in the preparation of his report.



Fatou Bensouda, Prosecutor

Dated this 31st January 2019
At The Hague, the Netherlands