

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

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

Decision on Prosecution Request to Add Two Witnesses

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

The Office of the Prosecutor

Fatou Bensouda
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Counsel for the Defence

Krispus Ayena Odongo

Legal Representatives of Victims

Joseph Akwenyu Manoba
Francisco Cox
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

Herman von Hebel

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Others

Trial Chamber IX ('Chamber') of the International Criminal Court ('Court'), in the case of *The Prosecutor v. Dominic Ongwen*, having regard to Articles 64(2) of the Rome Statute ('Statute') and Rule 68(2)(b) of the Rules of Procedures and Evidence ('Rules'), issues the following 'Decision on Prosecution Request to Add Two Witnesses'.

I. Procedural History and Submissions

1. On 30 May 2016, the Chamber issued its 'Decision Setting the Commencement Date of the Trial', in which it, *inter alia*, ordered the Office of the Prosecutor ('Prosecution') to submit its final list of Prosecution witnesses by 6 September 2016.¹ The Prosecution duly complied.²
2. From 27 January 2017 until 1 February 2017, Prosecution witness P-59 ('P-59') provided his testimony.³
3. On 7 February 2017, the Prosecution filed a request to add two witnesses ('Additional Witnesses') to its list of witnesses and introduce their prior recorded testimonies pursuant to Rule 68(2)(b) of the Rules ('Request').⁴
4. The Prosecution submits that the two testimonies are relevant and probative since they explain the authorship of a sketch used during the testimony of P-59 and will 'permit the Chamber to better weigh P-0059's testimony at the end of the trial'.⁵ It further argues that the two testimonies are eligible to be

¹ ICC-02/04-01/15-449, paras 6-8 and page 7.

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 and Annex B to the Prosecution's submission of the list of evidence, the list of witnesses and summaries of anticipated testimony, ICC-02/04-01/15-532-Conf-AnxB.

³ Transcripts from 27, 30 and 31 January 2017 and 1 February 2017, ICC-02/04-01/15-T-36-Red-ENG, ICC-02/04-01/15-T-37-Red-ENG, ICC-02/04-01/15-T-38-Red-ENG and ICC-02/04-01/15-T-39-Red-ENG.

⁴ Prosecution request to add two witnesses to its list of witnesses and two items to its list of evidence, ICC-02/04-01/15-699, with two confidential annexes ICC-02/04-01/15-699-Conf-AnxA and ICC-02/04-01/15-699-Conf-AnxB.

⁵ Request ICC-02/04-01/15-699, para. 9.

introduced under Rule 68(2)(b) of the Rules, since the evidence in question goes to proof of matters other than the acts and conduct of the accused.⁶

5. Both Legal Representatives for the victims indicated that they do not oppose the Request.⁷
6. On 10 February 2017, the defence for Mr Ongwen ('Defence') filed its response, requesting that the Request be rejected ('Response').⁸ It submits that 'enough information has been paced on the record' for the Chamber to assess the witness's credibility.⁹

II. Analysis

7. As a preliminary matter, the Chamber notes that the Defence did not – as indicated¹⁰ – file a public redacted version of the Response. It is therefore instructed to do so forthwith.
8. The Chamber notes that the Prosecution wishes to use the evidence provided by the Additional Witnesses in order to clarify the authorship of a sketch¹¹ shown to Witness P-59 during his testimony.¹² Witness P-59 initially indicated that he was the author of the sketch.¹³ The Prosecution instead contends that the sketch was authored by the Prosecution and given to the witness to comment upon.
9. In an e-mail to the Chamber and the other party and participants, sent while P-59 was still testifying, the Prosecution indicated that it would question the

⁶ Request ICC-02/04-01/15-699, para. 11.

⁷ E-mails to Trial Chamber IX Communications on 08 February 2017, at 14:06 and on 09 February 2017, at 19:31.

⁸ Defence Response to the Prosecution's Request to Add Two Witnesses to its List of Witnesses and Submission of Statements Pursuant to Rule 68(2)(b), ICC-02/04-01/15-705-Conf.

⁹ Response, ICC-02/04-01/15-705-Conf, para. 13.

¹⁰ Response, ICC-02/04-01/15-705-Conf, para. 2.

¹¹ UGA-OTP-0258-0721.

¹² Request, ICC-02/04-01/15-699, para. 2.

¹³ Transcript of 31 January 2017, ICC-02/04-01/15-T-38-Red-ENG, page 32, lines 14 to 21.

witness on the authorship of the sketch and, should P-59 accept that he was shown the sketch by the Prosecution, it did not intend to request the introduction of additional evidence.¹⁴

10. The Chamber also notes that P-59 subsequently testified, upon questioning by the Prosecution and the Defence, that '[t]his sketch was brought to me already sketched and it was this – and it was the Prosecutor who brought to me this sketch'¹⁵ and admitted that he was wrong before.¹⁶
11. Accordingly, the Chamber considers that there is no need to allow the addition of the Additional Witnesses. In its Request, the Prosecution concedes that the sole purpose of their testimonies is to clarify the authorship of the sketch. The Prosecution itself notes that Witness P-59 indeed clarified the matter during his testimony.¹⁷ Further, in its Response, the Defence does not challenge the authorship of the document, but raises questions about his overall credibility and reliability in light of his testimony regarding the sketch.¹⁸
12. As to the Presiding Judge's comment that the Chamber would rather receive any evidence from the Additional Witnesses in writing,¹⁹ this remark was made before the Prosecution re-examined P-59 and was predicated on the outcome of the additional questioning. Given the Defence's objection to the Request and P-59's testimony during his re-examination, the Chamber considers that no further evidence on this point is warranted. Accordingly, the Chamber rejects the Request.

¹⁴ E-mail to Trial Chamber IX Communication, 31 January 2017, at 17:52.

¹⁵ Transcript of 1 February 2017, ICC-02/04-01/15-T-39-Conf-ENG, page 55, line 25 to page 56, line 1.

¹⁶ Transcript of 1 February 2017, ICC-02/04-01/15-T-39-Conf-ENG, page 56, lines 1 to 3.

¹⁷ Request, ICC-02/04-01/15-699, para. 6.

¹⁸ See, e.g., Response, ICC-02/04-01/15-705-Conf, para. 14.

¹⁹ Transcript of 1 February 2017, ICC-02/04-01/15-T-39-Conf-ENG, page 54, lines 6 to 14.

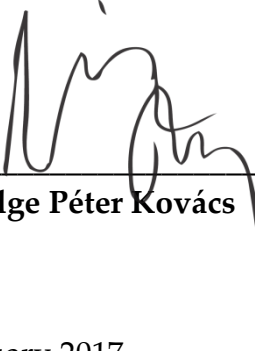
FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

ORDERS the Defence to file a public redacted version of its Response forthwith; and

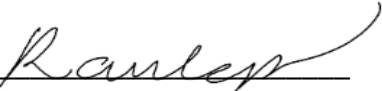
REJECTS the Request.



Judge Bertram Schmitt, Presiding Judge



Judge Péter Kovács



Judge Raul C. Pangalangan

Dated 15 February 2017

At The Hague, The Netherlands