

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Date: 13 April 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 Request for Further Directions on the Use of
Documents During the Questioning of Witnesses**

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

The Office of the Prosecutor

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Counsel Support Section

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Detention Section

**Victims Participation and Reparations
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Others

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 Article 64(2) of the Rome Statute ('Statute'), Rule 140 of the Rules of Procedure and Evidence and Regulation 43 of the Regulations of the Court, issues the following 'Decision on Prosecution Request for Further Directions on the Use of Documents During the Questioning of Witnesses'.

I. Procedural History and Submissions

1. On 21 March 2017, the Office of the Prosecutor ('Prosecution') filed a request for further guidance on putting prior statements of a witness before the person during his or her live-testimony ('Request').¹ It submits that without such guidance, the proceedings would be conducted in a less efficient manner, risking a loss of court time.²
2. In particular, the Prosecution requests guidance on three specific issues:
 - (i) 'Witnesses should routinely be permitted to be reminded (if they cannot recall spontaneously) of what they have previously said about potentially important matters which occurred some time distant from the time of their testimony.' ('First Issue')³
 - (ii) 'When witnesses' testimony in court appears to be different, in a potentially material way, from assertions in their previous statements, parties should be permitted to remind the witness of the relevant assertions and ask the witness to explain the apparent contradiction'. ('Second Issue')⁴
 - (iii) 'Once it is established that a witness has no previous knowledge of, or connection to, a document or other evidentiary material, parties should not be permitted to continue to use that document in the course of their

¹ Prosecution request for the Trial Chamber to make supplementary Directions concerning the use of documents in the course of proceedings, ICC-02/04-01/15-778.

² Request, ICC-02/04-01/15-778, para. 1.

³ Request, ICC-02/04-01/15-778, para. 2 (i).

⁴ Request, ICC-02/04-01/15-778, para. 2 (ii).

questioning of the witness, or to ask witnesses to reconsider their answers in the light of other evidence in the case.’ (‘Third Issue’, together with the First and Second Issue, ‘Issues’)⁵

3. The Prosecution submits that the ‘procedure governing the parties’ approach for these three situations should be clearly established and followed on every occasion, save in exceptional circumstances’.⁶ Accordingly, it proposes specific amendments to the initial directions on the conduct of the proceedings (‘Directions on the Conduct of the Proceedings’)⁷ to reflect the Issues.⁸
4. On 3 April 2017, the defence for Mr Ongwen (‘Defence’) filed its response (‘Response’),⁹ requesting that the Request be denied.¹⁰ The Defence argues that the Request is a *de facto* request of reconsideration of the Directions on the Conduct of the Proceedings and that it does not fulfil the requirements for reconsideration.¹¹ It submits that the Directions on the Conduct of the Proceedings and the oral rulings given thus far during the trial already gave guidance on the Issues.¹² In case the Chamber does not find that the Request constitutes a motion for reconsideration, the Defence submits that it should be rejected because it unduly restricts the Chamber¹³ and that ‘[b]oth parties must be allowed, within reason, to inform and present testifying witnesses of significantly contrasting information to test the memory, credibility and veracity of witnesses’.¹⁴

⁵ Request, ICC-02/04-01/15-778, para. 2 (iii).

⁶ Request, ICC-02/04-01/15-778, para. 2 (iv).

⁷ Initial Directions on the Conduct of the Proceedings, 13 July 2016, ICC02/04-01/15-778.

⁸ Request, ICC-02/04-01/15-778, para. 21.

⁹ Defence Response to the Prosecution Request for Reconsideration, ICC-02/04-01/15-778, ICC-02/04-01/15-805-Conf. A public redacted version was filed on the same day.

¹⁰ Response, ICC-02/04-01/15-805-Red, para. 21.

¹¹ Response, ICC-02/04-01/15-805-Red, paras 2, 12-15.

¹² Response, ICC-02/04-01/15-805-Red, para. 12.

¹³ Response, ICC-02/04-01/15-805-Red, paras 3, 16-20.

¹⁴ Response, ICC-02/04-01/15-805-Red, para. 20.

II. Analysis

5. The Single Judge does not find that setting further guidelines on the Issues is required or would actually expedite the proceedings.
6. Over the course of the trial proceedings, the Single Judge, in his role as the Presiding Judge, has already given all necessary guidance. All three Issues have been discussed during the course of the proceedings and the Presiding Judge has provided guidance on how to address these situations.¹⁵
7. As stated on numerous occasions, the underlying rationale when putting prior statements to the witness is that, while doing so, the witness's live testimony before this Chamber should not be unduly influenced.¹⁶ As stated above, the Chamber provided guidance on how to put questions related to a prior statement to the witness on several occasions. However, it has also remarked that how such a question is phrased depends on the character of the witness, his or her suggestibility and that certain phrases or questions could therefore be allowed with one witness and not with another.¹⁷
8. Again, the Single Judge repeats that questioning a witness is not a 'mathematical operation'¹⁸ or 'natural science'¹⁹ and depends on the individual personality and capacity of the specific witness²⁰ and that, therefore, 'a formal

¹⁵ With regard to the First and Second Issues in an abstract manner: ICC-02/04-01/15-T-60-Red-ENG, page 72, lines 8-14; ICC-02/04-01/15-T-64-Conf-ENG, page 14, lines 1-5. Regarding the First Issue: ICC-02/04-01/15-T-60-Red-ENG, page 55, line 16 – page 56, line 19. Regarding the Second Issue: ICC-02/04-01/15-T-50-Red-ENG, page 43, line 5 - page 44, line 18; ICC-02/04-01/15-T-62-Red-ENG, page 54, line 1 – page 55, line 12; ICC-02/04-01/15-T-64-Red-ENG, page 54, line 18 – page 55, line 8. Regarding the Third Issue: ICC-02/04-01/15-T-46-ENG, page 14, line 23 to page 15, line 15; ICC-02/04-01/15-T-44-Red-ENG, page 62, lines 2-25.

¹⁶ ICC-02/04-01/15-T-53-Red-ENG, page 30, line 24 to page 31, line 7; ICC-02/04-01/15-T-60-Red-ENG, page 57, lines 11-15; ICC-02/04-01/15-T-64-Red-ENG, page 55, lines 3-8.

¹⁷ Allowing suggestive questions to the witnesses: ICC-02/04-01/15-T-34-CONF-ENG, page 70, line 23 to page 71, line 1; ICC-02/04-01/15-T-35-Red2-ENG, page 25, lines 4-6. Disallowing/minimising suggestive questions to the witness: ICC-02/04-01/15-T-53-Red-ENG, page 24, lines 10-17, page 31, lines 4-11.

¹⁸ ICC-02/04-01/15-T-60-Red-ENG, page 72, line 15.

¹⁹ ICC-02/04-01/15-T-53-Red-ENG, page 29, line 8.

²⁰ ICC-02/04-01/15-T-60-Red-ENG, page 35, lines 3-4.

procedure for all possible incidents, for all possible witnesses'²¹ is not desirable. Further, the Prosecution submits that the procedure set out to address the Issues should be followed, 'save in exceptional circumstances'.²² Therefore, the parties could still litigate about the existence of exceptional circumstances or if the procedure proposed by the Prosecution has actually been followed, which would make any gained expeditiousness in the questioning of the witnesses purely hypothetical. Indeed, the Prosecution itself has suggested that 'a case-by-case basis will plainly achieve the best justice'.²³ Accordingly, the Request is rejected.

FOR THE FOREGOING REASONS, THE CHAMBER HEREBY

REJECTS the Request.



Judge Bertram Schmitt, Single Judge

Dated 13 April 2017

At The Hague, The Netherlands

²¹ ICC-02/04-01/15-T-53-Red-ENG, page 32, lines 14-15.

²² Request, ICC-02/04-01/15-778, para. 2(iv).

²³ ICC-02/04-01/15-T-53-Red-ENG, page 29, lines 16-17.