

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 21 June 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 Requests Following Final Defence Witness and Evidence Lists

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 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

Peter Lewis

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

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 Rule 134(3) of the Rules of Procedure and Evidence and Regulations 24(5) and 29(1) of the Regulations of the Court ('Regulations'), issues the following 'Decision on Requests Following Final Defence Witness and Evidence Lists'.

I. Procedural history and relief sought

1. On 4 June 2018, on a deadline set by the Chamber,¹ the defence for Mr Ongwen ('Defence') filed its anticipated testimony summaries and final lists of witnesses and evidence ('LoW' and 'LoE', respectively). In the filing accompanying this information, the Defence requests leave to add experts and materials at a later time ('Defence Request').²
2. On 13 June 2018, the Office of the Prosecutor ('Prosecution') responded with various requests of its own ('Prosecution Request'), requesting the Chamber to: (i) strike five witnesses from the Defence LoW because 'the Defence has not provided concrete information about the anticipated testimony of these witnesses'; (ii) order the Defence to file summaries of anticipated testimony for four further witnesses; (ii) reject, *in limine*, the Defence request for leave to add

¹ Email from the Chamber on 24 May 2018, at 09:58 (document number forthcoming); Public Redacted Version of 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; Preliminary Directions for any LRV or Defence Evidence Presentation, 13 October 2017, ICC-02/04-01/15-1021 ('Preliminary Directions'), paras 6-7.

² Corrected version of 'Public Redacted Version of "Defence notification of List of Witnesses and Evidence in compliance with ICC-02/04-01/15-1021 and Request for Leave to Add Witnesses its List of Witnesses and Materials to its List of Evidence"', ICC-02/04-01/15-1272-Red2-Corr (with three annexes; public redacted version of filing notified 5 June 2018 and corrigendum notified 20 June 2018).

witnesses and materials to its LoW and LoE; and (iv) instruct the Defence to submit, no later than 27 June 2018, an overall witness order.³

3. On 18 June 2018, in an unopposed request,⁴ the Defence sought leave to reply on the Prosecution request related to the overall witness order.⁵

II. Analysis and conclusions

4. The Single Judge addresses each of these requests in turn.

A. Defence request to add new witnesses and further materials

5. Due to reasons it submits are outside its control, the Defence requests leave to add new witnesses and materials to its LoW and LoE. The requests concern: (i) expert reports yet to be completed; (ii) unidentified potential experts on certain topics (direction finding, sexual and gender based crimes, military structure) whose engagement is being pursued; and (iii) any materials received through outstanding requests for assistance.⁶
6. The Prosecution responds that the Defence submission is effectively only a notice of intent to file applications in the future, and should therefore be rejected *in limine*.⁷
7. The Single Judge agrees with the Prosecution, and will not pre-approve additions to the LoW or LoE prior to the Defence having the names and

³ Public Redacted Version of ‘Prosecution’s Response to the “Defence notification of List of Witnesses and Evidence in compliance with ICC-02/04-01/15-1021 and Request for Leave to Add Witnesses [to] its List of Witnesses and Materials to its List of Evidence” (ICC-02/04-01/15-1272)’, ICC-02/04-01/15-1284-Red.

⁴ Email from the Prosecution, 18 June 2018, at 15:33.

⁵ Defence Request for Leave to Reply to ‘Public Redacted Version of ‘Prosecution’s Response to the “Defence notification of List of Witnesses and Evidence in compliance with ICC-02/04-01/15-1021 and Request for Leave to Add Witnesses [to] its List of Witnesses and Materials to its List of Evidence”’ (ICC-02/04-01/15-1284-Red), ICC-02/04-01/15-1287.

⁶ Defence Request, ICC-02/04-01/15-1272-Red2-Corr, paras 11-50.

⁷ Prosecution Request, ICC-02/04-01/15-1284-Red, paras 21-23.

materials available.⁸ Accordingly, this request is dismissed *in limine*, without prejudice to a complete request being filed at a later time.

B. Prosecution requests in relation to witnesses with no anticipated testimony summaries

8. The Prosecution indicates that, out of the Defence's 72 witnesses, anticipated testimony summaries have only been provided for 63 of them. For five witnesses for whom no concrete indication of testimony has been provided, the Prosecution requests they be stricken from the LoW.⁹ For four others where the participants are in possession of at least some prior statements or reports, the Prosecution requests that the Chamber order the Defence to provide anticipated testimony summaries as soon as possible.¹⁰
9. The Single Judge expresses its concern that the Defence has not provided all its anticipated testimony summaries by the Chamber's 4 June 2018 deadline. The Defence's primary explanation for not providing the summaries seems to be that it still awaits information from these persons.¹¹ The Single Judge considers this unpersuasive. Even in the absence of a full understanding of the anticipated testimony, the Defence should still be in a position to provide a summary of what it expects to elicit from persons on its LoW.
10. However, the Single Judge considers that the Defence generally complied with its obligation to provide anticipated testimony summaries. The Single Judge considers that striking five witnesses solely for missing summaries would be

⁸ *In this regard, see* Decision on Prosecution Requests Related to Mental Health Expert Evidence, 16 November 2017, ICC-02/04-01/15-1073 (Prosecution successfully sought leave to add three experts to its LoW well after the trial commencement, but waited to do so until it had all its expert reports available.)

⁹ Prosecution Request, ICC-02/04-01/15-1284-Red, paras 13-16 (D-60, D-80, D-127, D-133 and D-139).

¹⁰ Prosecution Request, ICC-02/04-01/15-1284-Red, paras 17-20 (D-41, D-42, D-134, D-135).

¹¹ *See* Defence Request, ICC-02/04-01/15-1272-Red2-Corr, paras 11, 18-34; Annex C of the Defence Request, ICC-02/04-01/15-1272-Conf-AnxC, page 133.

disproportionate. Pursuant to Regulation 29(1) of the Regulations,¹² the Single Judge orders the Defence to provide all outstanding anticipated testimony summaries for witnesses on its LoW by the deadline indicated in the disposition. The Prosecution's requests are granted only to this extent.

C. Prosecution request related to overall witness order

11. As to the Prosecution's request for an overall witness order by 27 June 2018,¹³ the Single Judge notes the Defence request for leave to reply on this point. Regardless of whether seeking leave was necessary to react to this new Prosecution request, the Single Judge considers that no further information from the Defence is necessary. This request is rejected.
12. The Single Judge recalls that the Defence had a pre-existing obligation to provide an overall witness order when filing its LoW.¹⁴ The Defence also must provide updated versions of its witness order on the first working day of each month.¹⁵ This means that the Defence must send its latest witness order via email by no later than 2 July 2018. The Single Judge considers there to be no utility in expediting this procedure by less than one week, and rejects the Prosecution request to the extent it seeks a Defence witness order by 27 June 2018.

¹² The regulation provides: '[i]n the event of non-compliance by a participant with the provisions of any regulation, or with an order of a Chamber made thereunder, the Chamber may issue any order that is deemed necessary in the interests of justice.' The direction to produce the testimony summaries was made pursuant to, *inter alia*, Regulation 54 of the Regulations. Preliminary Directions, ICC-02/04-01/15-1021, page 3.

¹³ Prosecution Request, ICC-02/04-01/15-1284-Red, para. 24.

¹⁴ Initial Directions on the Conduct of the Proceedings, 13 July 2016, ICC-02/04-01/15-497, para. 16, *incorporated in* Preliminary Directions, ICC-02/04-01/15-1021, para. 2(vi).

¹⁵ ICC-02/04-01/15-497, para. 16.

FOR THE FOREGOING REASONS, THE SINGLE JUDGE HEREBY

DISMISSES the Defence requests to add new witnesses and materials to its LoW and LoE *in limine*;

REJECTS the Defence request for leave to reply;

GRANTS the Prosecution Request with respect to anticipated testimony summaries in part, ordering the Defence to provide all outstanding anticipated testimony summaries for witnesses on its LoW by 16:00 on Monday, 2 July 2018;¹⁶ and

REJECTS the remainder of the Prosecution Request.

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



Judge Bertram Schmitt, Single Judge

Dated 21 June 2018

At The Hague, The Netherlands

¹⁶ This information may be provided contemporaneously with the Defence's update on its outstanding witness information forms. Further Order in Relation to Defence Witness Information Forms, Email from the Chamber, 14 June 2018 at 15:07 (document number forthcoming).